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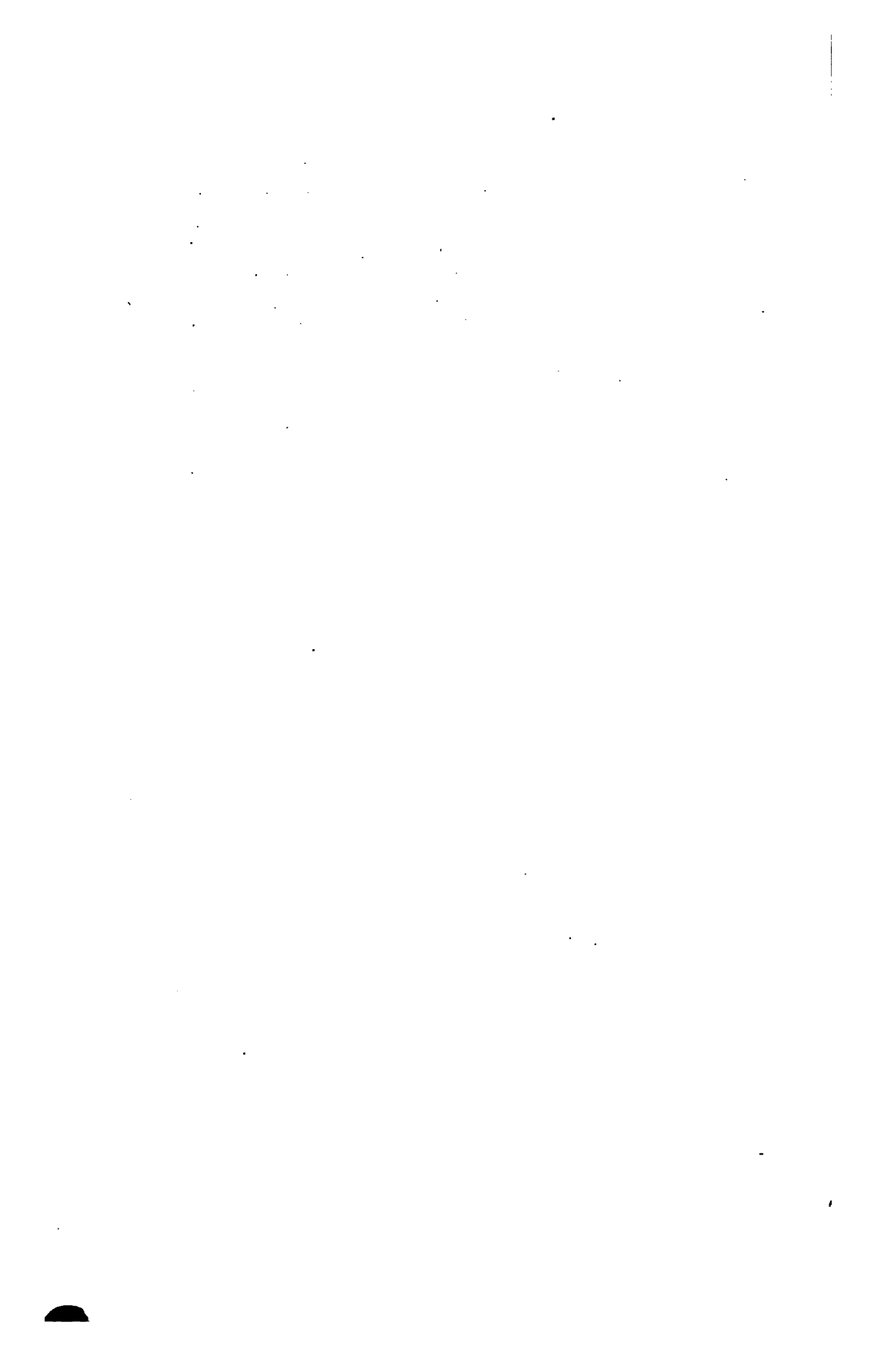
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RAILROAD REPORTS

CHICAGO CITY RY. CO. *v.* TUOHY.

(*Supreme Court of Illinois, April 16, 1902.*)

[63 N. E. Rep. 997.]

Accident on Street Railroad Track—Injury to Boy—Negligence—Question for Jury.

Plaintiff's evidence tended to show that, when he, a six year old boy, was run over by defendant's electric street car, he was standing on defendant's track, about 20 feet from a street crossing, with his back towards the approaching car, and talking to a boy standing on the sidewalk; that the car was running about 16 miles an hour; that no bell was sounded for the crossing, and that, when the boy on the sidewalk saw it, he warned plaintiff, who attempted to get off the track, but too late, the car being only 15 feet away; that plaintiff was standing in full view of the motorman; and that, when the car stopped after running over him, it had passed him 75 feet. Defendant's evidence tended to contradict plaintiff's on all material points, and there was evidence of previous contradictory statements by plaintiff's principal witnesses: *held*, that the evidence was sufficient to justify the submission of the case to the jury.

Same—Same—Same—Evidence.

The fact that a street car runs an unusual distance before it is stopped after running over a person, is some evidence of improper management thereof.

Credibility of Witnesses.

Where, in an action against a street railway company for injuries, defendant introduced evidence, based upon notes taken in an interview with plaintiff's witnesses immediately after the accident, and on a subsequent interview between such witnesses and defendant's attorneys, which was taken down by a stenographer, tending to contradict the testimony of the witnesses at the trial, whether the witnesses were in fact contradicted was for the jury.

Capacity of Child.

In an action against a street railway company for injury to a child of tender years, it appeared that he had been going for several months to a school two blocks from his house, to reach which he had to cross defendant's tracks, which ran by the school; but it did not affirmatively appear that he went to school alone, and his mother testified that she never allowed him to go alone to visit his playmates, only a block and a half away: *held*, that the evidence was insufficient to show that the child was of sufficient intelligence or capacity to exercise any care for his own safety, especially in view of the presumption that defendant obeyed the law and exercised greater care at the crossings frequented by school children than at the ordinary crossing, where the child was injured.

Contributory Negligence of Children.*

A child under seven years of age is incapable of such conduct as will constitute contributory negligence.

Care Required in Using Street.†

Where an instruction, in an action against a street railway company

*See notes, 19 Am. & Eng. R. Cas., N. S., 357; 20 Am. & Eng. R. Cas., N. S., 322; 19 Am. & Eng. R. Cas., N. S., 99; *Fezler v. Willmar & S. F. Ry. Co.* (Minn.), 24 Am. & Eng. R. Cas., N. S., 174; *Illinois Cent. R. Co. v. Wilson* (Ky.), 21 Am. & Eng. R. Cas., N. S., 644.

†See notes, 16 Am. & Eng. R. Cas., N. S., 615; 13 Am. & Eng. R. Cas., N. S., 729; 20 Am. & Eng. R. Cas., N. S., 299. Also, see Sample

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for injury to a pedestrian, that defendant, in using the highway, was bound to use "every reasonable effort to avoid injury to others," was qualified by other instructions that defendant was not bound to use the highest degree of care, but only ordinary care under the circumstances of the case, any possible error in the first instruction was cured by the others.

Employees as Witnesses—Instructions.

In an action against a street railway company for injuries, the court instructed that in considering the credibility of witnesses, and in determining the worth of their testimony, the jury might consider the fact that a witness was in defendant's employ, and also his connection, if any, with the accident complained of. Other instructions stated that defendant's employees were competent witnesses, and that their testimony could not be arbitrarily rejected because they were such employees, and that, if the jury believed that any witness was interested in the result of the suit, they might consider such interest, together with all the other circumstances which would aid them in determining the credit to be given such witness: *held*, that any possible defect in the first instruction was cured by the others.

Evidence—Admissions of Children.

In an action against a street railway company for injury to a six year old boy, which was tried four year after the accident, plaintiff testified that he did not remember how he was hurt, whereupon defendant introduced evidence of previous statements made by him to his playmates as to the manner in which he was injured: *held*, that there was no error in instructing that the admissions of a child of plaintiff's age when his admissions were made should be received more cautiously, than those of an adult, and should be weighed with reference to his age and understanding.

Negligence of Parents.†

The negligence of the parent of a child six years old in allowing him to go across street car tracks with a boy eleven years old was not imputable to the child, so as to support the defense of contributory negligence to his action for injuries received through the negligence of the railway company.

Appeal from appellate court, First district.

Action by John Tuohy, by his next friend, against the Chicago City Railway Company. From a judgment of the appellate court (95 Ill. App. 314) affirming a judgment in favor of plaintiff, defendant appeals. Affirmed.

This is an action on the case, begun on February 24, 1896, by the appellee against the appellant company, to recover damages for a personal injury. The trial in the circuit court resulted in verdict and judgment in favor of appellee. This judgment has been affirmed by the appellate court. The present appeal is prosecuted from such judgment of affirmance. The appellee, a boy between five and six years of age, was on April 17, 1895, struck by one of the electric cars of the appellant company on Thirty-Fifth street, in the city of Chicago, near the corner of Wood street. The car ran over the appellee, and crushed his leg in such a way that it had to be amputated at a point about one-third below the knee.

v. Consolidated Light & Ry. Co. (W. Va.), 1 R. R. R. 380, 24 Am. & Eng. R. Cas., N. S., 380; *Levin v. Second Ave. Trac. Co.* (Pa.), 23 Am. & Eng. R. Cas., N. S., 318.

†See notes, 10 Am. & Eng. R. Cas., N. S., 880; 13 Am. & Eng. R. Cas., N. S., 712.

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Thirty-Fifth street runs east and west, and Wood street runs north and south. When the injury occurred, the car which struck the appellee was coming from the west and going east on Thirty-Fifth street. The evidence tends to show that the injury occurred about 20 feet east of the crossing or intersection of Wood street with Thirty-Fifth street. The next street west of Wood street, running north and south, which crosses Thirty-Fifth street, is Honore street; and the next street west of Honore street, running north and south, which crosses Thirty-Fifth street, is Lincoln street. The next street east of Wood street, running north and south, and which crosses Thirty-Fifth street, is Hermitage avenue.

Wm. J. Hynes, Samuel S. Page, and Watson J. Ferry (Mason B. Starring, of counsel), for appellant.

Altgeld, Darrow & Thompson and P. A. Hines, for appellee.

MAGRUDER, J. (after stating the facts). 1. At the close of the evidence of appellee (the plaintiff below), the appellant (defendant below) asked the court to give the jury a written instruction to return a verdict of not guilty. This instruction was refused, and exception was taken to such refusal. At the close of all the testimony in the case, the defendant below again presented to the court a written instruction directing the jury to return a verdict of not guilty, and asked the court to give such instruction. The court refused to do so, and exception was taken to such refusal. The question is thus raised whether or not the evidence justified the court in submitting the case to the jury. Where the evidence before the jury, with all the inferences proper to be drawn therefrom, tends to prove the cause of action set out in the declaration, the court should not peremptorily direct the jury to return a verdict of not guilty. *Bridge Co. v. Teehan*, 190 Ill. 374, 60 N. E. 533.

The cars of the appellant upon Thirty-Fifth street were propelled by electricity by means of electric wires strung overhead, and were known as "trolley cars." There were two tracks laid in Thirty-Fifth street; the cars going east running upon the south track, and the cars going west running upon the north track. The car which inflicted the injury had stopped at Lincoln street, two blocks west of Wood street, to take on a passenger, but after that did not stop until it passed beyond Wood street to the point where the appellee was injured. Just before the accident the appellee was standing in company with another boy, 11 years old, named Thomas Bonner, near the intersection of Wood street and Thirty-Fifth street, on the south side of Thirty-Fifth street, and near the corner made by the intersection therewith of Wood street. The sidewalk was about 14 feet wide between the curb and the building line of the houses fronting upon the street. The space between the curb at the edge of the sidewalk and the south rail of the appellant's south track was about 12 feet.

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At that time appellee lived with his father and mother on Thirty-Fourth court, near the corner of an alley west of Wood street, and not much farther than a block or a block and a half from where the accident occurred. The boy Thomas Bonner lived with his father on Wood street, about a block and a half from where the appellee lived. Frank Bonner, the father of Thomas Bonner, was a lamplighter in the employ of Michael, J. Tuohy, appellee's father. The accident occurred about 5 o'clock in the afternoon. There was a lamp-post about 82 feet east from the southeast corner of Wood and Thirty-Fifth streets. Frank Bonner had sent his son, the boy Thomas Bonner, to the house of appellee's father, to get a filler of oil for the purpose of filling some of the street lamps. Upon going to the house of appellee's father to get the oil, appellee asked permission to accompany Thomas Bonner, and his mother permitted him to do so. They went south, and crossed the tracks, and stood near the corner of Wood and Thirty-Fifth streets, on the south side of Thirty-Fifth street, while Frank Bonner, the father, was lighting the lamp, distant 82 feet from the corner, or thereabouts. Frank Bonner had requested the boys to stand at the corner until he finished lighting the lamp. There is testimony in the record tending to prove that the car which caused the injury was traveling at an unusually high rate of speed; that is to say, from 14 to 16 miles an hour, according to the testimony of some of the witnesses. There is also evidence tending to show that no bell was rung or gong sounded upon the approach of the car to the street crossing.

It is incumbent upon those in control of a street car to exercise a greater degree of care or watchfulness at street intersections than at other places along the route. Booth, St. Ry. Law, § 306; Railroad Co. v. McCallum, 169 Ill. 240, 48 N. E. 424; Railway Co. v. Robinson, 127 Ill. 9, 18 N. E. 772, 4 L. R. A. 126, 11 Am. St. Rep. 87. Drivers, gripmen, and motormen of street cars are obliged at all times to exercise reasonable care in the conduct of their cars; but the requirement of reasonable care imposes upon them a more exacting attention when they approach street crossings in a crowded city, where vehicles and pedestrians may always be expected in front of them. "The failure under such circumstances to ring the bell, sound the gong, or give other proper warning, * * * is undoubtedly evidence of negligence to be submitted to a jury under all the circumstances," whether there is an ordinance requiring such precautions or not. The increase of danger to the public at such crossing demands a corresponding increase of vigilance and energy on the part of such drivers, gripmen, and motormen. They ought to notice whether or not the track is clear when they approach such public crossings, and sound the gong as warning. 2 Thomp. Neg. §§ 1399-1401.

Counsel for appellant insist that the appellee was not at the

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crossing. While this may be strictly and technically a correct statement of the facts, yet the evidence tends to show that the appellee was struck only about 20 feet east of the crossing, and so near thereto as to have required a slackening of the speed of the car. The evidence tends to show that the boys had been instructed by the father of one of them to stand at the corner until he had finished lighting his lamp, and, while they may have moved a short distance east of the corner, they were near enough thereto to demand of the appellant the exercise of the care required in propelling its cars across a street crossing.

Even, however, if the party injured was not sufficiently near the crossing to justify the application of the increased vigilance required of a street car company in approaching a crossing, yet there is evidence tending to show that the speed of the train was unreasonable and dangerous. Street cars propelled by electricity cannot be lawfully run at a rate of speed which is incompatible with the lawful and customary use of the highway by others. Here the appellee had as much right to be upon the street as the appellant. 2 Thomp. Neg. § 1395. A street railway company has no property interest in the street, and therefore no right to run its cars at a rate of speed which will interfere with the customary use of the street by others of the public with safety. Such cars can be more readily and quickly stopped than the train of an ordinary railroad. Where the motorman or gripman runs his car at such a rate of speed that he is prevented from keeping control of it, so as to stop it within a reasonable distance upon an appearance of danger to others, the rate of speed at which he propels the car is to be deemed unreasonable or dangerous. It has been held that, where an electric car was running at the rate of 10 or 11 miles an hour over a crossing in a much-frequented street, without giving any signal, there was such evidence of negligence as justified a submission of the case to a jury. 2 Thomp. Neg. §§ 1395-1397.

The evidence in the case tends to show that, when Frank Bonner had finished lighting the lamp and came down from the ladder, the appellee, with his face towards the track, stepped down from the curbing at the edge of the sidewalk to the street, and then turned around, and while backing towards the northwest, and towards the south track, he talked with the other boy, standing upon the sidewalk or curb with his oil can. While he was thus backing towards the track, the train was coming at an unusually high rate of speed. The boy Thomas Bonner says that the appellee had reached the south rail of the track, and had his foot over it, when he (the witness) discovered that the train was about to strike the appellee. Thomas Bonner then says that he hallooed to appellee to look out, and went forward to pull him away from the car; that the car was within 15 feet of the appellee before witness saw the car; that he did not see

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the car until it had advanced about 5 feet beyond the crossing. He also says that when he called to appellee to look out, and advanced towards him, appellee tried to cross the rail and come back, but was struck before he succeeded in doing so. The evidence also tends to show that when the car stopped it had probably passed the boy by about 75 feet. It is a question of fact for the jury whether the gripman or motorman on such a car keeps such a lookout as the circumstances demand, or gives such warning of approach as is necessary when he discovers that a child is upon the car track or approaching it, and the circumstances that the car has run an unusual distance before it stops is some evidence of improper management. *Roberts v. Railway Co.* (Wash.) 63 Pac. 506, 54 L. R. A. 190. When a young child is discovered approaching the car track with the apparent intention of crossing in front of a moving car, or is discovered on the track, it is certainly the duty of the gripman or motorman to exercise a high degree of diligence in order to prevent injury to the child. 2 *Thomp. Neg.* § 1424; *Railway Co. v. Mechler*, 87 Tex. 628, 30 S. W. 899. A verdict in favor of the plaintiff will not be disturbed where it appears that a street car approaches a street crossing at a very fast rate of speed, without any alarm, while a boy is standing on the track in full view of the motorman, or standing in the center of the track, with his back towards the car. 2 *Thomp. Neg.* § 1425. In the case of *Rack v. Railway Co.*, 173 Ill. 289, 50 N. E. 668, 44 L. R. A. 127, it appeared that the boy there injured was standing in the roadway, and not, as here, approaching the car, with his back towards it. It also appeared in the *Rack Case* that the gong was rung while the train was passing over the crossing. In that case there was no testimony tending to contradict the gripman in reference to the circumstances there referred to. In the case at bar, however, there was not only evidence tending to show that the appellee was approaching the car, and that, too, with his back turned towards it, but there was also evidence tending to show that no bell was rung, or other warning given to the appellee of the approach of the car. In these respects the *Rack Case* is distinguishable from the case at bar.

After Frank Bonner had lighted the lamp and descended by means of his ladder, he stood upon the sidewalk, talking with a man named Gillen. He and his son Frank Bonner and Gillen were witnesses of the accident, and testified to what they saw, in behalf of the appellee. The only witness on behalf of the appellant who saw the accident was the motorman, whose deposition was taken in a distant state, and read upon the trial. Appellant sought upon the trial to discredit the testimony of the appellee's witnesses by introducing evidence tending to show that such witnesses had made different statements in regard to the facts from those testified to upon the trial. It appears that a day or two after the accident the

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appellant sent parties to appellee's witnesses to interview them, and at a subsequent day procured the attendance of these witnesses at the office of appellant's attorney, and took down their statements. Upon the latter occasion it would appear that such statements were taken down, so far as they were taken down at all, by a stenographer. But upon the occasion immediately following the accident no stenographer was present, but two representatives of the company were present; one of them asking questions in the presence of the other. The questioner made notes of the answers, and when he returned to his office he dictated these notes to a shorthand reporter, and he and his companion then signed the reporter's notes. The statements thus alleged to have been made by the plaintiff's witnesses were proven, and sought to be proven, upon the trial, as contradictory of their testimony. Whether or not the witnesses were contradicted in this way was a matter for the jury to determine. The jury were the judges of the credibility of the witnesses.

It is true that the witnesses introduced by the appellant contradicted the witnesses introduced by appellee. The evidence of appellant tended to show that the car was not proceeding at an unusual rate of speed, and that the gong was sounded and due warning given, and that the appellee attempted to run across the track as the train was approaching, with his face towards the track. Whether the witnesses of appellant were more worthy of credit than those of appellee was a matter for the jury to decide. So far as we are concerned, the judgments of the circuit and appellate courts are conclusive upon the questions of fact. If the jury believed that the car which injured appellee was proceeding across Wood street at its intersection with Thirty-Fifth street at an unreasonable and dangerous rate of speed, and without giving any signal or warning to those crossing the street at that point, and if the jury further believed that, under all the circumstances, the motorman saw, or ought to have seen, the appellee approaching the track, and, if he had kept a proper lookout, could have avoided striking him, then the verdict of the jury was correct. All that we decide upon this branch of the case is that there was testimony enough tending to show negligence on the part of the appellant company to justify the submission of the matter to the jury.

2. Appellant complains that the trial court erred in the giving and refusal of certain instructions. The second instruction given for the appellee is complained of by the appellant, and is as follows: "The court further instructs the jury that, if they believe from the evidence that the plaintiff at the time of the accident was a child between the age of five and six years, then he cannot, because of his tender years, be guilty of, or be charged with, carelessness or negligence in respect to the accident in this case, so as to relieve at all any want of due care on the part of the railroad com-

pany, so that, if the jury further believe from the evidence that the accident causing the injury to plaintiff was due to the want of due and ordinary care by the defendant railroad, then you must find a verdict for the plaintiff, and no want of care by the plaintiff will save the defendant from liability for the accident." Instruction numbered 24 given by the court for appellant told the jury that the burden was upon the plaintiff (appellee here) "to prove that he was exercising due care for his own safety at the time of the alleged injury." Instruction numbered 46 given for the appellant, as modified by the court, told the jury that the plaintiff could not recover at all unless he established by a preponderance of all the evidence "either that the plaintiff was too young to be charged with carelessness under these instructions, or else that the plaintiff did not in any way contribute to the injury by any want of ordinary care, prudence, vigilance, and caution for his own safety, or to avoid the accident, on the occasion in question." By instruction numbered 47, as modified and given for the appellant, the court told the jury that the plaintiff must prove by a preponderance of all the evidence in the case that he "at the time in question was too young to be charged with carelessness, under these instructions, or that he was in the exercise of due care, caution, prudence, and vigilance for his own safety." The instructions upon this subject thus given for the appellee and for the appellant were, to a certain extent, contradictory of each other. Instruction numbered 2 given for the appellee told the jury, in substance, that the appellant could not be charged with negligence, because of his tender years, while the instructions given for the appellant told the jury that the appellee was chargeable with ordinary care for his own safety. This contradiction, however, could have done appellant no harm, if the second instruction given for appellee was correct or harmless. The other instructions were in appellant's favor.

It is a general rule of law, that children of tender years are not deemed, in law, imputable with contributory negligence. This rule is based upon the fact that they are not capable of care. But at what age children are to be deemed *sui juris*, so as to be capable of contributory negligence, and at what age they are to be deemed *non sui juris*, so as to be incapable of contributory negligence, is a question of much difficulty, and about which the authorities are strangely in conflict. If a child is of such tender years that he is conclusively presumed incapable of judgment and discretion, and of owing duty to another, contributory negligence on his part cannot be set up to defeat recovery. At what age is a child to be considered of such tender years that this conclusive presumption arises? In the case at bar the proof shows that the accident occurred on April 17, 1895, and that the appellee became six years of age on the 2d day of June following, so that he lacked six weeks of being six years of age when he was injured. In *Railway*

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Co. v. Wilcox, 138 Ill. 370, 27 N. E. 899, 21 L. R. A. 76, where the child injured was only six years of age, the court gave to the jury an instruction that negligence could not be imputed to him, on account of his age. In that case we said (page 382, 138 Ill., page 902, 27 N. E., 21 L. R. A. 76): "The application of the doctrine of contributory negligence to the conduct of young children is a difficult one, and very naturally had led to a considerable difference of opinion. The two opposing views most commonly met with are, first, that up to a certain age, the precise limit of which is not, and perhaps cannot be, well defined, a child is incapable of such conduct as will constitute contributory negligence, and that the court may so declare, as a matter of law. The rule thus contended for is sometimes said to be analogous to the rule of the common law which exempts children under seven years of age from criminal responsibility. It has accordingly been held that children of eighteen months, of two years, of two years and ten months, of four years, under five years, of five years, of six years, under seven years, and even seven years of age, are incapable of such negligence. Bish. Noncont. Law, § 586, and authorities cited. This rule seems to have been recognized in this state, with more or less distinctness, in the following cases." Seven cases decided by this court are then referred to. In *Railway Co. v. Wilcox*, supra, the court proceeds further to say: "The other view is that young children are bound to use such care, and such care only, as is usually exercised by children of the same age and degree of intelligence, and that it is always, therefore, a question of fact, to be determined by the jury, whether in a given case the child is in the exercise of proper care; his tender years, his intelligence, or the want of it, and all the circumstances by which he was surrounded, being taken into account. Under this rule, as is claimed, it can never be laid down as a matter of law that any child, however young, is incapable of contributory negligence; it being always a question of fact for the jury. The following cases are referred to as giving some support to this rule." The court then refers to four cases decided by this court. In *Railway Co. v. Wilcox*, supra, it was not determined which of the two rules above mentioned should be adopted; but the court held, for certain reasons there set forth, that the instruction given, even if it embodied an incorrect proposition of law, could not have materially prejudiced the party complaining of it, and therefore the judgment in favor of Wilcox was not disturbed. It was there said (page 385, 138 Ill., page 903, 27 N. E., 21 L. R. A. 76): "Whether the instruction, then, was or was not correct, in holding that, on account of the plaintiff's tender age, negligence could not be attributed to him, it manifestly did no harm, as the jury could not have found otherwise than they did on that question if the instruction had not been given, or if the contributory

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negligence of the plaintiff had been submitted to them as a question of fact."

We are of the opinion, upon further consideration, that, where the testimony shows that a child is only six years old, or less, he is incapable of such conduct as will constitute contributory negligence. In other words, a child of the age of only six years, or under, is exempt from responsibility in the matter of contributory negligence, and so far as the exercise of due care for his own safety is concerned. In *Railroad Co. v. Gregory*, 58 Ill. 226, the child injured was not quite five years old, and it was held that negligence could not be imputed to a child of such tender years. In *City of Chicago v. Hesing*, 83 Ill. 204, 25 Am. Rep. 378, the child was less than four years old, and it was there held that he was too young to observe any care for his personal safety. In *Railroad Co. v. Becker*, 84 Ill. 483, the child was between six and seven years of age, and it was there said that a general rule as to negligence "cannot be applied to a case where the person injured is an infant of such tender age that the requisite capacity to exercise proper care and discretion is wanting. While the deceased was, no doubt, possessed of ordinary intelligence, and was as capable of using as much caution for his safety as other boys of his age, yet it is not to be expected of a boy between six and seven years of age that the same caution and care will be used for personal safety as will be exercised by a person of mature age, and the law will not impute negligence to an infant of such tender years. * * * We are therefore of opinion * * * that the deceased could not be required to use as much care and caution as one older in years, and hence negligence was not to be imputed to him." In *Gavin v. City of Chicago*, 97 Ill. 66, 37 Am. Rep. 99, the plaintiff was only four years old, and we there said: "Of course, he was too young to exercise any care for his personal safety." In *Railway Co. v. Grable*, 88 Ill. 441, we said: "The intestate at the time of her death was only twenty-eight months old, and, of course, she was too young to exercise any care for her personal safety." In *Railroad Co. v. Welsh*, 118 Ill. 572, 9 N. E. 197, the plaintiff injured was at the time of the happening of the accident seven years and three months old, and we there said: "It is obvious, plaintiff was too young, at the time she was injured, to observe any care for her personal safety." In *Railway Co. v. Ryan*, 131 Ill. 474, 23 N. E. 385, where the child injured was not quite seventeen months old, we said: "The child was so young that it was incapable of exercising care, and cannot be charged with negligence."

In view of the authorities in our own state which are quoted as above, we are certainly justified in holding that a child under six years of age is *prima facie* incapable of exercising care for his own safety, so that negligence cannot be imputed to him, and in such case it devolves upon the party defending against liability for injuring him to prove that

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he has sufficient capacity and intelligence to exercise care for his own safety. The case of *Railroad Co. v. Becker*, 76 Ill. 25, is referred to as holding a contrary doctrine, but in that very case, which came before us a second time and is reported as *Railroad Co. v. Becker*, 84 Ill. 483, we said that a boy between six and seven years of age was of such tender age that the law would not impute negligence to him. The case of *Railroad Co. v. Murray*, 62 Ill. 326, is also referred to in support of the contention of appellant, but in that case the child injured was 7½ years old. In *Kerr v. Forgue*, 54 Ill. 482, 5 Am. Rep. 146, the child injured was about 12 years old. In *Railway Co. v. Eininger*, 114 Ill. 79, 29 N. E. 196, there was no evidence as to the age of the child injured, it being there expressly said: "There was no evidence as to the age or capacity or discretion of the plaintiff introduced, more than that witnesses spoke of him as a little boy."

The doctrine, that negligence cannot be imputed to a child six years old and under is supported by other than Illinois authorities. In *Walbridge v. Railway Co.*, 190 Pa. 274, 42 Atl. 689, the child injured was only six years of age, and in that case the supreme court of Pennsylvania say: "Our consideration of the testimony has led us to the conclusion that the case could not have been thus withdrawn from the jury. There was sufficient evidence to carry the case to them on the question of defendant company's negligence, and that was the only question of fact in the case, aside from the amount of damages that should be awarded in case it was determined that the injury was the result of defendant's negligence. The question of contributory negligence was not in the case, because the plaintiff was only six years of age at the time he was injured." In the latter case the company against whom the suit was brought was the Schuylkill Electric Railway Company, and the court further say: "It might be fairly inferred from the testimony that the car was running at an unusual and excessive rate of speed, that no gong was sounded or other warning given, and that the car could have been stopped in ample time to prevent the accident if proper caution had been taken. Such inferences from proved facts were for the jury, and not for the court, and the case was rightly submitted to them." In *Mackey v. City of Vicksburg*, 64 Miss. 779, 2 South. 178, the action was brought by an infant of six years to recover damages for an injury, and the court there say: "It cannot be inferred, as matter of law, that the plaintiff, an infant of six years, could be guilty of contributory negligence. * * * There is certainly no presumption of law that an infant of his age is capable of even the slight degree of care and prudence the absence of which in an adult would be the grossest negligence." In *Central Trust Co. v. Wabash, St. L. & P. Ry. Co.* (C. C.) 31 Fed. 246, which was a claim in behalf of a boy about six years old, whose foot had been crushed in such a way as to necessitate

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amputation, the court say: "The boy being only six years old, no negligence can be imputed to him. Therefore the issue of contributory negligence is not in the case." In *Gunn v. Railroad Co.*, 42 W. Va. 676, 26 S. E. 546, 36 L. R. A. 575, two little boys (Henry C. Mayes, not quite five years old, and Luelza Mayes, about six years old) were killed by a train on the Ohio River Railroad, and a suit was brought by the administrator of Henry C. Mayes against the railroad company to recover damages for his death; and it was there said: "If Henry C. Mayes had been an adult, no recovery could be had for his death, as he met his sad and early death on the railroad track, and the defense of contributory negligence would defeat recovery; but a child of the tender years of this child is not chargeable with contributory negligence, for want of judgment, discretion, and presence of mind to know and avoid danger." *Dicken v. Coal Co.*, 41 W. Va. 518, 23 S. E. 582; *Railway Co. v. Schuster*, 113 Pa. 415, 6 Atl. 269, 57 Am. Rep. 471; *Summers v. Brewing Co.*, 143 Pa. 115, 22 Atl. 707, 24 Am. St. Rep. 518; 1 *Thomp. Neg.* § 310, and cases cited in note 95.

In the present case, however, there was no evidence tending to show that the appellee was a boy of sufficient intelligence or capacity to exercise any care for his own safety. The proof shows that he lived only a block and a half from the house of his little friend, Thomas Bonner, 11 years old, and the son of his father's employee, Frank Bonner. His mother swears that she never allowed him to go alone to the house of Frank Bonner, only a block and a half distant. Appellant relies upon the fact that he was allowed to go to school at a public school at the corner of Lincoln and Thirty-Fifth streets. His mother says that he had been in the habit of going to that school for more than a month, and in order to reach the school it was necessary for him to cross the tracks. It appears, however, that the school was only a short distance from his home,—not more than about two blocks distant. His mother says, when asked: "This school you speak of was how many blocks from your house? Ans. I should think it was a block and a half." The proof does not show conclusively that the boy went to school alone. He had a sister older than himself. Whether she accompanied him to and from school does not appear, but it does appear that he was not allowed to go alone to the house of Thomas Bonner, and it is a natural inference that he was not permitted to go to and from school alone. It appears from the evidence that the cars of the appellant ran by the school house in question, where the appellee attended school, and which was at the corner of Lincoln and Thirty-Fifth streets. The law demands "greater care and vigilance in running an electric car over a public street crossing which is much frequented by children going to and returning from school, at a time when they may reasonably be expected to be using the crossing, than is

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demand at other places." 2 Thomp. Neg. § 1424; *Wallace v. Railway Co.*, 26 Or. 174, 37 Pac. 477, 25 L. R. A. 663. The presumption is that, in passing the school in question, the cars of the appellant obeyed the law, which demands greater care in view of the crossing of the street at that point by children going to school. It does not follow, therefore, that in going to this school every day, which was so short a distance from his home, the boy was running the same dangerous risk as he would run in crossing the track at any other point. He was protected by the fact that other children passed to and fro with him over the tracks in going to and from school. Appellant lays stress upon the case of *Railway Co. v. Eininger*, supra, where it appeared that the boy who was injured was permitted by his parents to attend school. But there it is stated that the school was "at a considerable distance from home," while here the school was only a block and a half or two blocks from the home of the appellee. Moreover, the boy in the *Eininger* Case was upon the private right of way of a steam railroad company, and was charged by the company with attempting wrongfully to climb upon the train. It not appearing what the age of the boy *Eininger* was, so far as is shown to the contrary he may have been much older than six years. Hence that case has no application. We are of the opinion that there was no error in giving the second instruction, and hold, in analogy to the rule of the common law, which exempts children under seven years of age from criminal responsibility, that up to the age of seven years "a child is incapable of such conduct as will constitute contributory negligence, and that the court may so declare as a matter of law." *Railway Co. v. Wilcox*, supra. The rule has its basis in the well-known immaturity of a child of such tender years. But even if the second instruction given for the appellee was incorrect, it may be said here, as it was said in the case of *Railway Co. v. Wilcox*, supra, that the instruction did no harm, as the jury could not have found otherwise than they did if the instruction had not been given. There is no evidence to show that appellee did not exercise such care and caution as might be expected of a boy of his age, or that he was guilty of any negligence such as could be charged to a boy of his age. Even *Thomas Bonner*, who was 11 years old, did not know of the approach of the train, or hear it coming, until it had passed five feet beyond the crossing; and there is nothing to show that the appellee saw the train, or that it was in any way brought to his attention, before it struck him. Therefore we agree with the appellate court when they say in their opinion deciding this case "that it does not affirmatively appear from the evidence that appellee was not in the exercise of such care as is usually exercised by, and might be expected from, children of the same age and degree of intelligence; and the jury would not have been warranted in so finding, had the question been

expressly submitted to them. The instruction complained of was not, at least, harmful in that respect."

3. Appellant complains of the third instruction given by the court for appellee, which is as follows: "The court further instructs the jury that a street railroad company, while using the highway, must have due regard for the safety of others, and use every reasonable effort to avoid injury to others." It is insisted that by this instruction the jury were informed that, in using the highway, appellant was bound to do all that human skill, care, vigilance, and foresight reasonably could do. We do not think that the instruction is capable of any such construction. The instruction merely required the appellant to use ordinary care to avoid injury to others. The word "every" does not mean that the company should use all possible effort to avoid injury to others. The use of the word "reasonable" makes such a construction unnatural. Although the language used in the instruction may not have been wisely selected, yet any apparent defect in it was cured and remedied by other instructions which were given. By the fourteenth instruction given for the appellant, the court instructed the jury "that the motorman in question, on the occasion in question, was not bound to use the highest degree of care and caution possible to avoid injuring children or other persons upon the street or approaching or crossing the tracks where the defendant was running its cars; but he was, in law, only required to use ordinary and reasonable care, under all the circumstances, to avoid such injury." Other instructions given for appellant told the jury that the motorman was only obliged to exercise reasonable and ordinary diligence and care to avoid injury to the plaintiff. Inasmuch as any obscurity in the expressions used in the instruction complained of was thus explained and cured, the instruction cannot be regarded as sufficiently erroneous to make the giving of it a ground for a reversal of the judgment.

4. Complaint is also made of the sixth instruction given on behalf of appellee, which reads as follows: "The jury are instructed that in considering the credibility of witnesses, and in determining the worth of their testimony, they can take into consideration the fact that a witness is in the employ of defendant railroad company, and also his connection, if any, with the accident causing the injury complained of; taking the same in connection with all the other evidence in this case." The charge made against this instruction is that it singles out the employees of defendant who are witnesses, and directs the special attention of the jury to their testimony. The instructions given on both sides are to be considered all together, and as one charge. The sixth instruction given for appellee must be read in connection with instruction numbered 34, given for appellant, which is as follows: "The court instructs you that by law the employees of the defendant company are competent witnesses in the case, and you have

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no right to arbitrarily reject any of their testimony merely because they are such employees, but it is your duty to receive, consider, and weigh the same in connection with all the other testimony and circumstances and evidence in the case." Again, instruction numbered 27, given for appellant, reads as follows: "If you believe from the evidence that any witness who has testified in this case is interested in the result of this suit, as a party or otherwise, then, in determining the credit to be given to such witness, the jury may take into consideration such interest as the evidence shows such witness has, together with all the other facts and circumstances disclosed by the evidence, if any, which will aid the jury in arriving at and determining the credit to which the testimony of such witness is entitled." If any defect existed in appellee's sixth instruction, it was cured by the instructions so given for the appellant. In *Railroad Co. v. Estep*, 162 Ill. 130, 44 N. E. 404, the following instruction was held to state a correct proposition of law, to wit: "The jury are instructed that, while the law permits a plaintiff in a case to testify on his own behalf, nevertheless the jury have a right, in weighing his evidence, and determining how much credence is to be given to it, to take into consideration that he is the plaintiff, and his interest in the result of the suit." See, also, *Railroad Co. v. Nash*, 166 Ill. 528, 46 N. E. 1082; *Railway Co. v. Mager*, 185 Ill. 336, 56 N. E. 1058.

5. This case was tried in 1899,—four years after the accident happened, and after the appellee had reached the age of ten years. The appellee was placed upon the stand, and, when asked how he was hurt, stated that he did not remember. Appellant placed upon the stand a number of boys to prove that the appellee made certain statements to them as to how he received the injury, in answer to questions by them as to the cause of his having lost his leg. In other words, it was sought to prove admissions made by the appellee contrary to his statement that he could not remember how he was hurt. Many of the admissions thus proven as having been made by him were merely to the effect that he was playing in the street, and went across the car tracks, and saw no car, and in that way his leg was cut off. In view of this class of admissions proven by the appellant, the appellee asked, and the court gave to the jury, an instruction stating to them "that the admissions of a child of the tender age of plaintiff at the time of the admissions, if any are proved, should be received more cautiously, on account of his age, than the admissions of an adult, and the jury should weigh them with reference to his age and understanding; in other words, that, even while admissions of an adult are received with great care and caution, those of an infant of the age of plaintiff at the time of the admissions must be received with still greater care and caution, on account of his tender years and understanding at the time of the admissions." We see no objec-

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tion to this instruction. An admission, if it is legally an admission, must be made by some one legally capable of making the same. The fact about which the child was questioned by these boys occurred when he was less than six years of age, and his rights certainly ought not to be taken away by childish prattle indulged in by him when trying to explain the cause of the injury received by him.

6. Some other objections are made as to the refusal of instructions asked by appellant, and as to the admission and exclusion of evidence. But these objections are not of sufficient importance to deserve discussion. Sixty-one instructions were asked by appellant, most of which were given, and those which were given covered almost every phase of the case as presented by the evidence. Appellant's attorneys asked the mother of appellee some questions as to what instructions she gave to the appellee in regard to crossing the tracks; but the exclusion of this evidence worked no harm to the appellant, as many of the questions asked were immaterial, and were not proper cross-examination. The child was not responsible for the acts of the mother, and under the doctrine laid down in *Railway Co. v. Wilcox*, supra, the negligence of the parent of a child of tender years, who is injured by the negligence of another, cannot be imputed to the child, so as to support the defense of contributory negligence to his suit for damages.

We discover no error in the record which would justify a reversal of the judgment. Accordingly the judgment of the appellate court is affirmed. Judgment affirmed.

MENDENHALL v. PHILADELPHIA, W. & B. R. Co.

(*Supreme Court of Pennsylvania, May 5, 1902.*)

[51 Atl. Rep. 1028.]

Railroad Crossing Accident—Contributory Negligence.*

However negligent plaintiff may have been in crossing in front of a moving train, he having got safely across, and his horse then being frightened by escape of steam from a heating apparatus of the railroad company near the crossing, and having backed in front of the train, his negligence is not contributory.

Appeal from court of common pleas, Chester county.

Action by Joseph Mendenhall against the Philadelphia, Wilmington & Baltimore Railroad Company. Judgment for plaintiff. Defendant appeals. Affirmed.

John J. Pinkerton, for appellant.

R. T. Cornwell, John J. Gheen, and Gibbons Gray Cornwell, for appellee.

*See *Burnett v. Eastern & A. R. Co.*, 10 Am. & Eng. R. Cas., N. S., 469, and note, 471; *Chicago, etc., R. Co. v. Ptacek*, 10 Am. & Eng. R. Cas., N. S., 481, and note, 484; *State v. Cumberland & P. R. Co.*, 10 Am. & Eng. R. Cas., N. S., 511, and note, 518; *New York, S. & W. R. Co. v. Moore* (C. C. A.), 21 Am. & Eng. R. Cas., N. S., 462.

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MITCHELL, J. Appellant complains that this was a perfectly clear case of contributory negligence on the part of the plaintiff, which should not have been submitted to the jury. And this would be undeniable on appellant's view of the facts, and its evidence in support of them. According to this, the plaintiff, if he stopped to look and listen at all, did so, on his own admission, at a point where the coming train must have been in plain sight, and then attempted to cross in the face of manifest danger. If this were the whole case, the court would have been bound to declare plaintiff negligent as a matter of law, and to direct a verdict for defendant. But the case on plaintiff's evidence was wholly different. He testified that he had crossed the tracks, but that his horse was frightened by the escape of steam, and backed into danger again. In this view, however negligent he may have been in crossing in front of a moving train, he had in fact crossed safely, and his negligence, not having contributed to his injury, was immaterial. The accident, according to him, resulted from a new and wholly unconnected source of danger,—the escaping steam. These two accounts of the occurrence were radically different and involved different rules of law. As there was positive evidence in support of each, even if plaintiff's own testimony was ambiguous or inconsistent, it was nevertheless part of the whole case, which necessarily was for the jury. The steam complained of was not the usual and unavoidable escape from a locomotive, but from a heating apparatus for passenger cars situated at or near the crossing. The morning was damp and foggy, and there was testimony that the steam hung about the point of escape to a greater degree than was usual. Whether it was negligently done or not was therefore for the jury, and the rules of law as to what would be negligence on the part of defendant, and also of plaintiff if he drove into manifest danger, were very fully and accurately stated to the jury in the charge. If the verdict was against the weight of the evidence, the remedy was with the trial court.

Judgment affirmed.

ALLEN *et al.* v. KANSAS CITY, M. & B. R. Co.

(*Supreme Court of Mississippi, May 19, 1902.*)

[32 So. Rep. 3.]

Railroads—Personal Injuries—Peremptory Instruction.

A 15 year old girl, while riding in a buggy with a man of mature years, was killed in a railroad collision. The track was several feet higher than the road which crossed it. The evidence showed that there were only a few places from which the train could have been seen. The man driving testified that he was looking out and listening all the time; that he was going at a trot, but about 75 feet before he got to the track he crossed a little bridge, and stopped to look and listen, but did not see or hear the train until within 2 or 3 feet of the track; that the railroad employees did not ring or whistle. Defendant's testimony was

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that the employees complied with all the statutory regulations, and, after seeing the buggy, did everything possible to prevent the accident: *held* error to give a peremptory instruction for defendant.

Appeal from circuit court, Marshall county; Z. M. Stephens, Judge.

Action by Maggie Allen and another against the Kansas City, Memphis & Birmingham Railroad Company. Judgment for defendant, and plaintiffs appeal. Reversed.

Lela Allen left Holly Springs, Miss., in a buggy with Mr. M. W. Boswell, who was driving the buggy. They were going north. The public road they were traveling crossed the railroad of the defendant company at an angle of about 45 degrees. The railroad track there is on a fill, and is several feet higher than the dirt road. As they were crossing the railroad the buggy was struck by a train, and Lela Allen was thrown out of the buggy, and received such injuries that she died in a few hours afterwards. This is a suit brought by Maggie Allen and her brother (they being the only brother and sister of Lela Allen, and both their father and mother being dead) against the Kansas City, Memphis & Birmingham Railroad Company, to recover damages for the killing of their sister, Lela Allen. The defendant pleaded the general issue, and that Lela Allen was guilty of contributory negligence. The evidence showed that there were only a few places where the trains on the railroad could be seen from the public road by one going north across the track. M. W. Boswell testified for plaintiffs that he was driving the buggy, and that he was looking and listening all the time; that he was going in a trot, but about 75 feet before he got to the track he crossed a little bridge, and he stopped to look and listen, and did not see or hear the train until he was within 2 or 3 feet of the track; that the employees on the train did not whistle for the crossing or ring the bell. The testimony for appellee was to the effect that the employees complied strictly with all statutory regulations, and, after the buggy was seen approaching the track, they used every effort to prevent the accident. The court gave a peremptory instruction to find for defendant. From a verdict and judgment in accordance therewith, plaintiffs appeal.

W. A. Belk and Brame & Brame, for appellants.

R. T. Fant and J. W. Buchanan, for appellee.

TERRAL, J. The appellants sued appellee for causing the death of their sister, Lela Allen, and a verdict was rendered against them by the peremptory order of the court. Upon the record, we think it quite plain that the case should have been submitted to the jury. There was evidence before the jury tending to show that the railroad company was negligent in causing the death of Lela Allen, and from which negligence might have been found by the jury; and whether Lela Allen was guilty of contributory negligence, so as to bar appellants'

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recovery, was also a question that should have been submitted to the jury, under proper instructions. Lela Allen was in her fifteenth year at her death, and, when caused, she was in the buggy of Mr. Boswell, a man of mature years, who was driving the buggy along the public road across the railroad track, and who had entire control of it; and it cannot be safely said that any negligence on her part contributing to such injury, if any such negligence there was, was so manifest that it should have been declared by the court, rather than found by the jury, to whom such questions usually belong. We think the peremptory instruction was erroneous.

Reversed and remanded.

ST. LOUIS SOUTHWESTERN RY. CO. OF TEXAS v. McADAMS.

(*Court of Civil Appeals of Texas, May 7, 1902.*)

[68 S. W. Rep. 319.]

Fires*—Railroads—Pleading—Issues—Refusal of Instruction.

Where, in an action for damages from a fire, claimed to have been caused by sparks from defendant railroad's locomotive, the answer merely charged contributory negligence in piling posts on or near the right of way, it was not error to refuse to instruct on contributory negligence in allowing accumulation of grass, chips, etc., near the posts.

Appeal from Collin county court; J. H. Faulkner, Judge.

Action by A. G. McAdams against the St. Louis Southwestern Railway Company of Texas. From a judgment for plaintiff, defendant appeals. Affirmed.

E. B. Perkins and Culver & Hay, for appellant.

R. T. Shelton, for appellee.

KEY, J. No reversible error has been pointed out in this case. While the testimony tending to show that the fire which caused the injury complained of originated from sparks which escaped from an engine on appellant's road is circumstantial in its nature, we are not prepared to hold that it is insufficient to support the verdict. The charge of the court is not subject to the criticisms urged against it; nor was error committed in refusing the instructions requested by appellant.

The question of contributory negligence, resulting from the plaintiff's failure to exercise proper care to keep grass, chips, trash, etc., from accumulating at or near where his posts were

*See extensive note appended to *Brennan Lumber Co. v. Great Northern Ry. Co.* (Minn.), 15 Am. & Eng. R. Cas., N. S., 478. Also, see *Cleveland, C., C. & St. L. Co. v. Stephens* (Ill.), 11 Am. & Eng. R. Cas., N. S., 268, and note at end of case; *Richmond et al. v. McNeill* (Ore.), 10 Am. & Eng. R. Cas., N. S., 691, and note at end of case, collecting authorities; *St. Louis & S. N. R. Co. v. Ludlum* (Kan.), 23 Am. & Eng. R. Cas., N. S., 851; *Wabash R. Co. v. Miller* (Ind.), 23 Am. & Eng. R. Cas., N. S., 843; *Atchison, T. & S. F. Ry. Co. v. Ireton* (Kan.), 23 Am. & Eng. R. Cas., N. S., 843; *Shields v. Norfolk & C. R. Co.*, 22 Am. & Eng. R. Cas., N. S., 635.

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piled, was not an issue in the case, because not presented by the pleadings. The defendant in its answer charged the plaintiff with contributory negligence in piling the posts on or near the defendant's right of way, and, this being the only plea of contributory negligence, that issue was thus limited, and did not include the plaintiff's failure to exercise proper care to prevent the accumulation of grass, chips, trash, etc., at or near where the posts were piled; and hence no error was committed in refusing the requested instruction on that subject.

Judgment affirmed.

CHICAGO & E. R. CO. v. LESH *et al.*

(*Supreme Court of Indiana, April 29, 1902.*)

[63 N. E. Rep. 794.]

Railroads—Fires—Communication—Intervening Agency*—Ordinary Wind.

A complaint alleging that fire from defendant's locomotive ignited combustible material which it had negligently allowed to accumulate on its right of way, and that an ordinary wind was blowing, and defendant negligently permitted the fire to spread to plaintiff's buildings on adjoining premises, was not demurrable; an ordinary wind not being a new and independent intervening agency.

Appeal from circuit court, Miami county; C. W. Watkins, Judge.

Action by Joseph A. Lesh and others against the Chicago & Erie Railroad Company. From a judgment for plaintiffs, defendant appeals. Transferred from the appellate court, under section 1337u, Burns' Rev. St. 1901 (Acts 1901, p. 590). Affirmed.

W. O. Johnson and M. Wingfield, for appellant.

A. H. Plummer, N. N. Antrim, and Reasoner & O'Hara, for appellees.

MONKS, J. This action was brought by appellees against appellant to recover the value of buildings and other property destroyed by fire on account of the alleged negligence of appellant. A trial resulted in a general verdict in favor of appellees. Answers to interrogatories were also returned by the jury under section 555, Burns' Rev. St. 1901 (section 546, Horner's Rev. St. 1901). Over a motion by appellant for a judgment in its favor on the interrogatories notwithstanding the general verdict, and a motion for a new trial, judgment was rendered in favor of appellees. The assignment of errors calls in question the action of the court in overruling appellant's demurrer to the amended complaint, the motion for a judgment on the interrogatories notwithstanding the general verdict, and a motion for a new trial.

*On subject of wind as an intervening agency, see *Brennan Lumber Co. v. Great Northern Ry. Co.*, 15 Am. & Eng. R. Cas., N. S., 477, and note at end of case. See also, 5 Rap. & Mack's Dig. 882, §§ 97-98.

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It appears from the complaint that fire from appellant's locomotive fell upon and ignited combustible material which appellant had negligently and knowingly permitted to accumulate and remain on its right of way for a period of two months at a time of great drouth; that the fire spread to appellant's depot building; that on said day there was an ordinary wind blowing, and appellant negligently permitted sparks and coals from said fire so started upon its right of way to escape and spread therefrom, and be carried by said wind to and communicated with appellees' said buildings and other property located upon their premises, which were adjacent to said right of way, and to burn and completely destroy the same. Appellant insists that under the decision of this court in *Pennsylvania Co. v. Whitlock*, 99 Ind. 16, 50 Am. Rep. 71, the wind was a new and independent intervening agency, and for this reason the amended complaint was insufficient. The decision in the last-named case that ordinary wind was a new and independent intervening agency was expressly overruled in *Railroad Co. v. Williams*, 131 Ind. 30, 34, 30 N. E. 696, and was clearly disapproved by what was said in *Railway Co. v. Nitsche*, 126 Ind. 229, 234-238, 26 N. E. 51, 9 L. R. A. 750, 22 Am. St. Rep. 582. See, also, *Railway Co. v. Ross*, 24 Ind. App. 222, 227, 56 N. E. 451; *Railroad Co. v. Luddington*, 10 Ind. App. 636, 637, 38 N. E. 342; note c, *Gilson v. Canal Co. (Vt.)* 36 Am. St. Rep. 824 (s. c. 26 Atl. 70). The court did not err in overruling the demurrer to the amended complaint.

The other questions argued by appellant have been decided adversely to its contentions in *Pittsburgh, C., C. & St. L. Ry. Co. v. Indiana Horseshoe Co.*, 154 Ind. 322, 56 N. E. 766; *Railroad Co. v. Williams*, 131 Ind. 30, 30 N. E. 696.

Judgment affirmed.

BURLINGTON & M. R. R. CO. IN NEBRASKA v. BURCH.

(*Court of Appeals of Colorado, May 12, 1902.*)

[60 Pac. Rep. 6.]

Origin of Fire—Evidence.*

In an action against a railroad, evidence that the fire which caused the damage occurred immediately after the passage of a train, that the fire started at the track, and that before the train passed no fire was there, was sufficient to warrant the submission to the jury of the question whether the fire was caused by the train.

Same—Same.

Such evidence was sufficient to sustain a finding that the fire was caused by the train.

Misnomer of Defendant.

The Chicago, Burlington & Quincy Railroad Company owned and operated the line of road along which a passing train started a fire, causing damage to the owner of the adjacent land. Suit was brought

*See *San Antonio & A. P. Ry. Co. v. Adams (Tex.)*, 1 R. R. R. 878, 24 Am. & Eng. R. Cas., N. S., 878, and foot-note.

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against the Burlington & Missouri River Railroad in Nebraska, the designation under which, for convenience, the Q. road operated its lines west of the Missouri river, but which was not the name of any corporation or legal entity. The summons was served on an agent of the Q. road, and it appeared and defended the suit on its merits in the justice's court, and took an appeal to the county court: *held*, that the error as to its name had been waived, and that a judgment against the Burlington & Missouri River Railroad in Nebraska was binding on the Q. Road.

Evidence—Harmless Error.

In an action against a railroad for damages to hay by a fire set by a passing train, the plaintiff was allowed to testify that there were small trees between the haystack and the railroad. The plaintiff claimed nothing on account of the trees: *held*, that the admission of such evidence was harmless error.

Appeal from Boulder county court.

Action by W. W. Burch against the Burlington & Missouri River Railroad Company in Nebraska. From a judgment for plaintiff, defendant appeals. *Affirmed*.

Wolcott & Vaile and William W. Field, for appellant.

H. M. Minor, for appellee.

THOMSON, J. The appellee brought suit before a justice of the peace against the appellant to recover damages for injury to property occasioned by fire charged to have been set out by the defendant. Judgment went against the latter, and it appealed to the county court, where judgment was again given against it, and from this it appeals to this court.

It was proven that the fire from which the plaintiff suffered occurred immediately after the passage of a freight train over the track of a railroad running through his farm, that the fire started at the track, and that prior to the passage of the train no fire was there. The evidence was sufficient to warrant a submission to the jury of the question whether the fire was chargeable to the passing train, and to sustain a finding that it was. *Railway Co. v. De Busk*, 12 Colo. 294, 20 Pac. 752, 3 L. R. A. 350, 13 Am. St. Rep. 221; *Cressy & Fowler Lumber Co. v. Denver & R. G. R. Co.* (Colo. App.) 68 Pac. 670.

When the plaintiff rested, the defendant asked an instruction directing the jury to return a verdict for the defendant. As appears from the argument, the ground of the motion was that no proof had been made showing that the railroad was operated by the defendant. The request was denied. Witnesses were then examined for the defendant by whom it was proved that the owner and operator of the road was the Chicago, Burlington & Quincy Railroad Company. In relation to the ownership and operation of the road, and kindred matters, we give the language of the witnesses themselves, as found in the transcript of the record. The following occurs in the examination of E. Hanson, one of the defendant's witnesses: "Q. What is your business? A. Claim agent for the Chicago, Burlington & Quincy. Q. Are you or have you been in the employ or pay of the Burlington & Missouri River Railroad Company in Nebraska? A. No, sir; I have never drawn

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any salary from the Burlington & Missouri River Railroad Company in Nebraska. Q. Do you know whether or not the Burlington & Missouri River Railroad Company owns any property in the state of Colorado? A. I do. Q. You may state whether or not during the month of February of the present year the Burlington & Missouri River Railroad Company in Nebraska owned or operated any property in the state of Colorado? A. It did not. Q. You may state who, if an individual, or what corporation or company, owns and operates the railroad known as the Burlington & Missouri River Railroad in Nebraska, or that portion which runs across Boulder county, Colorado? A. The Chicago, Burlington & Quincy Railroad Company operates the line of road running through Longmont and Hygiene and into Lyons, in this county, formerly known as the Denver, Utah & Pacific road. Q. What was the significance, if you know, of the name the Burlington & Missouri River Railroad Company in Nebraska? A. It is for the convenience of keeping the accounts separate from the accounts of the road east of the Missouri river. Q. And that portion of the line east of the Missouri river and the portion west of the Missouri river, designated as the Burlington & Missouri River Railroad in Nebraska, are parts of what railroad system? A. Of the Chicago, Burlington & Quincy Railroad Company. Q. How long, if you know, has the Chicago, Burlington & Quincy Railroad Company owned and operated these two portions of the system that you have spoken of? A. To my knowledge, since 1891 up to the present time. Q. Mr. Hanson, did you or were you instrumental in appealing this case from the justice court to this court? A. I was." Another witness for the defendant (J. W. Williams) was examined as follows: "Q. What is your business? A. An agent for the Chicago, Burlington & Quincy. Q. Where are you located? A. At Longmont. Q. What was your business during the month of February, 1898? A. I was located at Longmont, Colorado, and occupied as agent for the Chicago, Burlington & Quincy Railroad Company. Q. Were you during the month of February, 1898, agent or employed by the Burlington & Missouri River Railroad Company in Nebraska? A. I was not. Q. How long have you been employed by the Chicago, Burlington & Quincy Railroad Company? A. About twelve years. Q. Were you at any time since the 26th day of February, 1898, served with a summons in the case of W. W. Burch v. The Burlington & Missouri River Railroad Company in Nebraska? A. Yes, sir. Q. Do you remember when? A. I think along about the 1st of May, if I am not mistaken. Q. Were you employed by the Burlington & Missouri River Railroad Company in Nebraska in any capacity? A. No, sir. Q. Have you been since? A. No, sir. Q. Are you familiar with the line of railroad owned by the Chicago, Burlington & Quincy Railroad Company in Boulder county, Colorado? A. Yes, sir. Q. You may state

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to the jury the termini of that railroad in this county? A. The Chicago, Burlington & Quincy operates that line of road known as the Burlington & Missouri River Railroad in Nebraska. It runs from Denver to Lyons, through Longmont and Hygiene. * * *

Q. What did you do when you had the summons served on you? A. I took it and sent it into the superintendent's office at McCook, Nebraska. * * *

Q. If you represent the Chicago, Burlington & Quincy Railroad, and had nothing to do with the Burlington & Missouri River Railroad Company in Nebraska, why did you pay any attention to it? A. For this reason: I was satisfied it had reference to our road. I took the summons, and had it sent in to the superintendent. Q. Is not it a fact that that road of which you are agent of is known as the Burlington & Missouri River Railroad in Nebraska? A. Yes, sir. Q. And that on their printed matter they have that name,—the name of the Burlington & Missouri River Railroad in Nebraska? A. They have that printed matter, a large share of it, at the top of which is, 'The Burlington & Missouri River Railroad in Nebraska,' and, in parenthesis under it, 'Chicago, Burlington & Quincy Railroad Company, Owners.' "

The Chicago, Burlington & Quincy Railroad Company being at the time of the fire the owner and operator of the railroad on the line of which the fire originated, whatever responsibility for the fire and its results there may be attaches solely to that corporation; and because it was from its train, and from no other train, that the fire proceeded, and it, and not another, is liable for the loss, it is insisted that the judgment against the Burlington & Missouri River Railroad in Nebraska cannot stand. If the defendant were a corporation distinct from the Chicago, Burlington & Quincy Railroad Company, we might be compelled to agree with counsel. See *Railroad Co. v. Loveland* (Colo. App.) 64 Pac. 381. But the fact is not so. It appears abundantly from the evidence produced for the defendant that the Burlington & Missouri River Railroad Company in Nebraska is not the legal name of any corporation, but that, for its own convenience, the Chicago, Burlington & Quincy Railroad Company has designated that portion of its line west of the Missouri river as the Burlington & Missouri River Railroad Company in Nebraska. The purpose of this suit was to obtain a judgment against the owner of the line of railroad from which the fire proceeded, but the owner was misnamed. Instead of being sued by its proper corporate appellation, it was called by a name derived from a designation which it applied to a particular portion of its line. The summons in the case was served on the agent of the Chicago, Burlington & Quincy Railroad Company, and in response to its notification that company appeared and conducted the defense. As a legal entity, the Burlington & Missouri River Railroad Company in Nebraska had no existence, summons could not be served on it, it had no agents,

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it could not employ counsel, and it could not make a defense. But the summons brought a party into court by which defense was made, and evidently that party was the Chicago, Burlington & Quincy Railroad Company, upon whose agent summons was served. The simple fact, which the record clearly discloses, is that the Chicago, Burlington & Quincy Railroad Company was sued by an erroneous name. It was competent to that company to submit to a suit against it by that name. It could have taken advantage of the error upon its appearance in response to the summons, but it offered no objection, and participated in a trial of the case upon its merits. It therefore waived the error in its name. Its failure to show the misnomer at the proper time concludes it, and, if the plaintiff moved properly, the judgment is as effective against it as if it had been correctly named. *Insurance Co. v. French*, 18 How. 404, 15 L. Ed. 451; *Pond v. Ennis*, 69 Ill. 341.

Error is assigned upon the admission and exclusion of evidence. It is not shown in argument how the defendant was injured by the rulings. In some instances they seem to have been proper enough. In others, the evidence rejected was afterwards received, and it is upon that very evidence that this opinion largely rests. Two examples will serve to show the nature of the rulings of which complaint is made: The plaintiff was asked by his counsel whether or not in the inclosure where the hay was stacked, and on the ground where it was cut, there were small trees growing. The answer was that there were small trees between the stack and the railroad. It was objected by the defendant that the question was immaterial, incompetent, and irrelevant. The question does not seem to us to be very important. It probably belongs to a class of questions not infrequently asked witnesses for the purpose of obtaining an acquaintance with the situation or circumstances related to the occurrence out of which the litigation arose. Such acquaintance may lead to a clearer understanding of the principal facts, or it may not; but how it can be harmful, is not explained to us. The plaintiff claimed nothing on account of the trees. There was no evidence that any of them were injured, and, except as descriptive of the ground through which the fire passed on its way to the stack, nothing was said about them. We hardly think the court erred in allowing the question. John A. Webber was a witness for the defendant. He testified that he was an agent for the company whose track passed through the plaintiff's farm. He was then asked, "What company is that?" The plaintiff objected to the question as not being cross-examination, and the objection was sustained. The question was proper, and the answer should have been received. But the defendant was allowed by other witnesses to prove what company that was, and the evidence was uncontradicted, so that it had the full benefit of the fact it desired to establish, and was therefore unharmed by the particular ruling.

Complaint is made of an instruction to the effect that if the

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defendant appeared and defended the suit, and appealed from the judgment of the justice to the county court, it was estopped to deny its corporate existence. That instruction states the law. *Decorating Co. v. Ham*, 3 Colo. App. 559, 34 Pac. 484. As the defendant was the Chicago, Burlington & Quincy Railroad Company, sued by a wrong name, it was its corporate existence to which the instruction referred. We see no necessity for the instruction, but neither do we see how the defendant could be injured by it. The instructions offered by the defendant which the court declined to give advanced propositions directly opposite to views expressed to us in this opinion, and were properly refused. Some of the instructions for the plaintiff were too favorable to the defendant, but that they were so furnishes the defendant with no ground of complaint.

The judgment will be affirmed. Affirmed.

CINCINNATI, H. & D. R. CO. v. THIEBAUD.

(*Circuit Court of Appeals, Sixth Circuit, November 7, 1900.*)

[114 Fed. Rep. 918.]

Appeal—Presumptions—Facts Not Shown by Record.

It is not necessary in all cases that a bill of exceptions should expressly declare that it contains all the evidence or the whole case in order to repel the presumption that other facts may have been proven or other evidence given. It is enough if, from the frame of the bill, it is clearly implied that what is therein stated constitutes the whole of what took place on the trial.

Master and Servant—Injury to Servant—Employer's Liability Act of Indiana.

In the employer's liability act of Indiana (Laws 1893, pp. 294, 295), which provides that corporations shall be liable for damages for personal injury suffered by an employee through the negligence of co-employees, in certain cases, in the absence of contributory negligence, "and the person so injured obeying or conforming to the order of some superior, at the time of such injury, having authority to direct," the provision quoted, under the construction placed thereon by the supreme court of the state, does not require that the person injured should be acting at the time under any special direction of a superior, but is equivalent to a requirement that he shall be acting in the line of his duty as an employee; and a railroad engineer injured without negligence on his part while in charge of his engine, at a time and place when and where he had a right to be with his train, through the negligence of those in charge of another engine, must be presumed to have been at the time discharging the regular duties of his employment, and the case is within the statute.

Same—Constitutionality of Act.*

The Indiana employer's liability act is not in contravention of the

*As to the constitutionality of such statutes, see *Coley v. North Carolina R. Co.* (N. Car.), 23 Am. & Eng. R. Cas., N. S., 885, and foot-note; *Powell v. Sherwood* (Mo.), 22 Am. & Eng. R. Cas., N. S., 53; *Pennsylvania Co. v. Ebaugh* (Ind.), 14 Am. & Eng. R. Cas., N. S., 701; *Pittsburgh, C. & St. L. Ry. Co. v. Hosea* (Ind.), 14 Am. & Eng. R. Cas., N. S., 692; *Pittsburgh, C., C. & St. L. Ry. Co. v. Montgomery* (Ind.), 9 Am. & Eng. R. Cas., N. S., 792.

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fourteenth amendment to the federal constitution, as denying to corporations the equal protection of the laws by discriminating between them and individual employers.

Jurisdiction of Federal Court—Action by Administrator for Wrongful Death—Citizenship of Parties.

The statute of Indiana (Burns' Rev. St. 1894, § 285) gives an administrator a right of action for the wrongful death of his intestate if the deceased, had he lived, might have maintained an action for an injury for the same act or omission, and provides that the damages recovered shall inure to "the exclusive benefit of the widow and children, if any, or next of kin, to be distributed in the same manner as personal property of the deceased": *held*, that an administrator in such an action sues as trustee, and not as a merely formal party, without interest, being vested by the statute with the legal title to the cause of action, and charged in his official capacity with the care and distribution of the amount recovered, and that his citizenship, and not that of the beneficiaries, must be considered in determining whether a federal court has jurisdiction of the action.

Administrator—Validity of Appointment—Domicile of Decedent.

Under the statute of Indiana (Burns' Rev. St. 1894, § 2381), which provides that an administrator shall be appointed in the county—"First, where, at his death, the intestate was an inhabitant; second, where, not being an inhabitant, he leaves assets," a petition for letters of administration which was not controverted, and which alleged that the decedent left an estate in the county, was sufficient to authorize the appointment whether the deceased at the time of his death was a resident of the state or not.

Wrongful Death—Action for Damages—Right of Foreign Administrator to Sue in Ohio.

Under Rev. St. Ohio, § 6133, which authorizes an executor or administrator duly appointed in another state to maintain an action in the courts of Ohio in his official capacity, "in like manner and under like restrictions as a nonresident may be permitted to sue," and section 6134a, which provides that a right of action for wrongful death accruing under the laws of another state may be enforced in Ohio "in all cases where such other state, * * * allows the enforcement in its courts of the statute of this state of like character," an administrator appointed in Indiana, where his decedent was killed, and who is given by the Indiana statute a right of action for the death in his official capacity, may maintain an action thereon in Ohio.

In Error to the Circuit Court of the United States for the Western Division of the Southern District of Ohio.

This is a suit brought by Thiebaud, the defendant in error, as administrator of Sweetman, against the Cincinnati, Hamilton & Dayton Railroad Company, to recover damages arising from the death of the deceased, occasioned by the negligence of the company. The right of the administrator to bring such an action is founded upon a statute of Indiana, where the accident and death occurred, which provides that: "When the death of one is caused by the wrongful act or omission of another, the personal representative of the former may maintain an action therefor against the latter, if the former might have maintained an action, had he lived, against the latter for an injury for the same act or omission. The action must be commenced within two years. The damages can not exceed ten thousand dollars, and must inure to the exclusive benefit of the widow and children, if any, or next of kin, to be distributed in the same manner as personal property of the

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deceased." Burns' Rev. St. 1894, § 285. Sweetman was a locomotive engineer in the employment of the railroad company, and was killed in a collision with a freight engine on the defendant's railroad in Fayette county, Ind., between Longwood switch and Saulter's switch, on September 18, 1896, under the following circumstances: The deceased on that day was running an engine drawing the pay car of the defendant going eastwardly from Indianapolis, Ind., to Hamilton, Ohio. The defendant's freight train No. 95, also going eastwardly between those points, had been stalled near Longwood switch. The conductor of the freight train thereupon ordered part of the cars placed on the Longwood switch or side track, and proceeded with the balance of the train to Saulter's switch or side track, four and a half miles distant east, intending to come back to Longwood switch for the part of the train he left there. From Saulter's switch to Connersville is eight-tenths of a mile, and at said last-mentioned point a telegraph operator was stationed. Having placed said freight cars on the switch at Saulter's switch, the conductor and engineer of No. 95 started west with the locomotive and crew to get the cars which had been left at Longwood switch, and came into said collision with the deceased's locomotive east of Longwood switch. The conductor and engineer of freight train No. 95 had not left and did not leave a flagman or signals at Longwood switch, and did not go to Connersville to receive orders before proceeding westwardly to Longwood switch on the main track; and in failing to leave a flagman or place signals at Longwood switch, or in not going to Connersville to receive orders before proceeding westwardly on said main track, were, it is conceded, negligent, and said negligence was the cause of the accident. The bill of exceptions states that it was proven on the trial, and not disputed, that the deceased was guilty of no negligence, and had the right to be with his train at the place where and at the time when he was killed, and also that the railroad at that place consisted of a single track. The deceased left a widow and children, to whom the damages recovered would, under the Indiana statute above recited, inure. By the employer's liability act of Indiana in force when the accident happened it was enacted: "That every railroad or other corporation, except municipal, operating in this state shall be liable for damages for personal injury suffered by an employee while in its service, the employee so injured being in the exercise of due care and diligence, in the following cases: * * * (3) Where such injury resulted from the act or omission of any person done or made in obedience to any rule, regulation or by-law of such corporation, or in obedience to the particular instructions given by any person delegated with the authority of the corporation in that behalf. (4) Where such injury was caused by the negligence of any person in the service of such corporation who

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has charge of any signal, telegraph office, switch yard, shop, roundhouse, locomotive engine or train upon a railway, or where such injury was caused by the negligence of any person, coemployee or fellow servant engaged in the same common service in any of the several departments of the service of any corporation, the said person, coemployee or fellow servant, at the time acting in the place, and performing the duty of the corporation in that behalf, and the person so injured, obeying or conforming to the order of some superior at the time of such injury, having authority to direct." Laws 1893, pp. 294, 295. The plaintiff's appointment as administrator was made in Indiana by the court having probate jurisdiction there. The validity of the appointment is denied by the plaintiff in error in this court, and the rejection of an offer of proof made of certain matters in the court below mentioned in the opinion which follows is relied on to support an assignment of error. On the trial of the case the court, upon the foregoing facts appearing or being conceded, instructed the jury that the verdict should be for the plaintiff, leaving the amount of the damages to be settled by them. To this instruction counsel for the railroad company excepted. The jury returned a verdict for \$3,000 in favor of the plaintiff, whereon judgment was duly entered, and the case is brought here on writ of error.

Lawrence Maxwell, Jr., for plaintiff in error.

Harlan Cleveland and Charles M. Cist, for defendant in error.

Before LURTON, DAY, and SEVERENS, Circuit Judges.

SEVERENS, Circuit Judge, having made the foregoing statement of the case, delivered the opinion of the court.

In support of the assignments of error, it is contended by counsel in behalf of the railroad company:

1. That the case is not within the scope of the Indiana statute fixing the liability of employees. The contention is that it applies only to persons who are "obeying or conforming to the order of some superior, at the time of such injury, having authority to direct"; and it is said (which appears to be the fact) that there was no proof that the deceased was acting at the time under any special direction, or otherwise than in the discharge of the general duty of his employment. It is insisted for the defendant in error that the bill of exceptions does not purport to contain all the evidence, and that we may presume that proof was made of such facts as would show that the deceased was under such direction. But, although the bill of exceptions does not, in terms, state that it contains the whole case which the evidence tended to make out, yet it purports to state the facts which did appear by the evidence and the admissions of counsel, and it does this in such a way as to indicate that the whole case, so far as the parties deemed it material to the exceptions taken, is presented. "It

is not in all cases necessary that the bill should expressly declare that it contains all the evidence, or the whole case, in order to repel the presumption that other facts may have been proven or other evidence given. It is enough if, from the frame of the bill, it is clearly implied that that which is stated constitutes the whole of what took place upon the trial. *Ironwood Store Co. v. Harrison*, 75 Mich. 197, 42 N. W. 808; *Everett v. Clements*, 9 Ark. 480; *Leggett v. Grimmer*, 36 Ark. 500; *Robinson v. Hartridge*, 13 Fla. 505. We therefore think that the question under discussion must be considered upon the assumption of the fact that the deceased was not, at the time of the accident, in the execution, of any special order or direction.

Counsel for the plaintiff in error contends that the clause in subdivision 4, requiring that the person injured shall have been acting in obedience to the order of some superior, is to be construed in immediate connection with each of the two preceding clauses which describes the classes of persons who commit the injury, and reference is made to two cases decided by the supreme court of Indiana involving the construction of the third and fourth subdivisions of section 1 of the act (Laws 1893, pp. 294, 295). *Railway Co. v. Little*, 149 Ind. 167, 48 N. E. 862; *Railroad Co. v. Montgomery*, 152 Ind. 1, 49 N. E. 582, 71 Am. St. Rep. 301. The classification made by the learned judge who delivered the opinion in the case of *Railway Co. v. Little* of the cases taken out of the operation of the fellow-servant rule by subdivisions 3 and 4 of section 1 of the act seems to require a construction different from that contended for. But the only question pertinent here actually involved and decided in that case was whether a brakeman was included in the classes of persons by whose negligence the injury is committed. It was held that he was not. In the *Montgomery Case*, however, it was distinctly held that the concluding clause was to be read in connection with each of the two clauses describing the persons by whose fault the injury happened. We are required to follow the construction of the act given by the supreme court of that state. But under the obligation of the same rule we are also required by the decision in the last-mentioned case to hold, as was there held, that the requirement that the injured person should be acting in conformity to the order of some superior is equivalent to a requirement that he should be acting in the line of his duty as an employee. Having regard to the well-known order of business of railroad companies, of which the court must take judicial notice, it could not be otherwise than that a subordinate, such as a locomotive engineer, when acting in the line of his duty as such, would be acting under the order of some superior. It is stated in the bill of exceptions that the deceased was guilty of no negligence and that he had the right to be with his train at the time and place when and where the accident occurred. This can have no other reason-

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able meaning than that he was discharging the regular duties of his employment. The negligence of the conductor and engineer of the other train being conceded, it would seem that a case was made out fulfilling the conditions of the Indiana statute, and, as the accident and death happened in that state, that is the law applicable to the case. *Railroad Co. v. Ihlenberg*, 43 U. S. App. 726, 21 C. C. A. 546, 75 Fed. 873; *Dennick v. Railroad Co.*, 103 U. S. 11, 26 L. Ed. 439, 1 Am. & Eng. R. Cas. 309.

2. It was contended that this statute is in contravention of the fourteenth amendment to the federal constitution, which declares that "no state shall deny to any person within its jurisdiction the equal protection of the law," in that it discriminates between corporations and all other persons. But during the pendency of this case on writ of error this point has been distinctly ruled the other way by the supreme court in *Tullis v. Railroad Co.*, 175 U. S. 348, 20 Sup. Ct. 136, 44 L. Ed. 192,—a case arising under the same statute.

3. It is insisted that the circuit court of the United States in Ohio did not have jurisdiction, because, as the petition alleges, the suit is brought for the benefit of the widow and children of the deceased, who are alleged to have suffered damages by his death; and the point is that, as Thiebaud, the administrator, who brings this suit as a citizen of Indiana, is a nominal party only, having no interest in the recovery, the citizenship of the beneficiaries, who are citizens of Ohio, is to govern in determining the question of jurisdiction, and that by that test, the railroad company being also a citizen of Ohio, it does not exist. It has been held in numerous cases that where the plaintiff in the suit has no interest, legal or equitable, in the recovery, but is put forward as a formal party in conformity to some statutory appointment made for the purpose, the citizenship of the real party will furnish the test of jurisdiction so far as that party to the case is concerned. *McNutt v. Bland*, 2 How. 9, 11 L. Ed. 159; *Huff v. Hutchinson*, 14 How. 586, 14 L. Ed. 553; *Maryland v. Baldwin*, 112 U. S. 490, 5 Sup. Ct. 278, 28 L. Ed. 822; *Indiana v. Glover*, 155 U. S. 513, 15 Sup. Ct. 186, 39 L. Ed. 243; *Stewart v. Railroad Co.*, 168 U. S. 445, 18 Sup. Ct. 105, 42 L. Ed. 537. The case of *Blacklock v. Small*, 127 U. S. 96, 8 Sup. Ct. 1006, 32 L. Ed. 70, is also cited in the brief of counsel for the plaintiff in error. In this class of cases the nominal plaintiff has no title or interest in the subject of the suit, immediate or remote. He cannot control the litigation, and has no authority to meddle with it. On the other hand, it is well settled that where the plaintiff sues in the character of a trustee, being vested with the title to the subject of the litigation, even though it is destined to ultimately pass in due course to designated beneficiaries, it is his citizenship which is recognized in settling the question of jurisdiction. It is he who has the control of the action, and, so long as he faithfully dis-

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charges the duties of his trust, he is the only party to represent the interest he prosecutes. *Coal Co. v. Blatchford*, 11 Wall. 172, 20 L. Ed. 179; *Knapp v. Railroad Co.*, 20 Wall. 117, 22 L. Ed. 328; *Morris v. Landauer*, 6 U. S. App. 510, 4 C. C. A. 168, 54 Fed. 23; *Popp v. Railroad Co. (C. C.)* 96 Fed. 465. These citations of cases on either side are by no means exhaustive of the decisions on this subject, but they are sufficient to explain the principle of the distinction. We will refer to one or two comparatively recent decisions, which are supposed to be not in harmony with the rules above stated. In *Blacklock v. Small*, 127 U. S. 96, 8 Sup. Ct. 1096, 32 L. Ed. 70, the case involved a somewhat different question. The plaintiffs were two of three beneficiaries, and brought suit against the obligor in a bond assigned to their trustee, against the trustee himself and the other beneficiary, to set aside the payment of the bond, which had been made in treasury notes of the Confederate States, of no value. The trustee was charged with a breach of trust in accepting such payment. The beneficiary who was made defendant by her answer ranged herself with the plaintiffs, and prayed the same relief. It was held that she should be classed with the plaintiffs, and, as she was a citizen of the same state as the obligor in the bond, the court had no jurisdiction. The trustee was not suing. The beneficiaries were themselves the actors seeking direct relief, and it was therefore their citizenship which was to be considered in determining the jurisdiction of the controversy as between the parties before the court. In the case of *Stewart v. Railroad Co.*, 168 U. S. 449, 18 Sup. Ct. 105, 42 L. Ed. 537, much relied on for the plaintiff in error, the deceased was killed by the negligence of the railroad company in the state of Maryland. The statute of that state required that the action should be brought in the name of the state. The action was brought in the District of Columbia, in the name of an administrator appointed there, the law of the District requiring that such an action should be so brought. The supreme court of the United States held that the action being transitory, and under the law of both jurisdictions, the plaintiff in whose name the suit was required to be brought being a merely nominal one, the action might be maintained. It will be noticed that the statute of the district required the action to be brought "in the name of the personal representative." The short explanation of the case is that, as both statutes required the action to be brought in the name of a formal party, the action was regarded as that of the beneficiaries, and the employment of the name of the administrator was simply conforming to the law of the forum in respect to the mode of procedure. The statutes in the several states providing a remedy for the benefit of the family or next of kin of the deceased who dies from the wrongful act of another differ in the mode by which it is accomplished, and this difference

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greatly affects the subject we are considering. In some a remedy is given directly to the beneficiaries. Such is the law of Tennessee, which was involved in the case of *Railway Co. v. Hooper*, 35 C. C. A. 24, 92 Fed. 820, which came to this court from that state. There either the administrator or the beneficiaries may sue. In others the right of action is devolved upon his personal representative. It is true that the recovery is not turned over to creditors, but that is a matter which relates merely to the administration of the fund, and the legislature which creates the law is perfectly competent to direct in this, as it does with reference to the proper assets of deceased persons, who shall be the beneficiaries; and when this is done by vesting the right of action in the personal representative he takes it for administration in the general meaning of the word as much as when he takes other property to collect and distribute to those designated by law. It is included in the duties of his appointment, and he is responsible for the fund. The Indiana statute provides that the administrator may maintain an action if the deceased, had he lived, might have maintained an action for the same cause. The damages, when collected, are distributed to the family or next of kin. It is obvious that the beneficiaries cannot bring the action. They have only the right to ultimately receive the proceeds when the administrator shall have executed his trust. And this is the interpretation which the supreme court of Indiana puts upon this statute. *Packet Co. v. Pikey*, 142 Ind. 304, 40 N. E. 527. It was held in that case that the administrator held the fund when collected as the trustee of an express trust for the benefit of the persons named. In *Yelton v. Railroad Co.*, 134 Ind. 414, 33 N. E. 629, 21 L. R. A. 158, the sole beneficiary had attempted to compromise the liability of the defendant while a suit by the administrator was pending. It was held that she (the widow in that case) had not the power to do this; and the court said:

"While actions under this section of the statute are prosecuted for the benefit of, and the damages inure to the exclusive benefit of, the widow and children of the deceased, yet it contemplates the collection of the damages by the administrator, and the turning of the same over to the widow and children on final settlement."

The statute as thus interpreted creates a trust, and names the trustee. We are unable to distinguish the case in this respect from those in which it has been repeatedly held by the federal courts that the trustee is the legal representative of the beneficiaries, and that his citizenship is the only one to be considered in determining the jurisdiction in respect to that side of the controversy.

4. The authority and jurisdiction of the probate court in Indiana, from which the administrator derived his appointment, is disputed, it being contended that Sweetman was not an inhabitant of Indiana, and left no assets there. And it is

further insisted in this connection that the court below erred in excluding evidence tending to show these facts. We will deal with this last objection first. It is sufficient to say that this question is not presented by the record. It appears that, on a question being put to a witness in regard to the situs of certain personal effects of the deceased by counsel for the railroad company, objection was made that the appointment of the administrator could not be thus collaterally attacked. The counsel who put the question thereupon expressly disclaimed the purpose of attacking the appointment made by the court of probate, and stated his purpose to be to show that the claim for which the suit was brought was the whole of the estate, and that his purpose in doing this was to prove that the circuit court in which the case was being tried was without jurisdiction. There is nothing whatever in the record to show that the defendant below raised any question of the validity of the appointment so far as it related to existence of assets in Indiana. Then, as to the point that Sweetman was not an inhabitant of Indiana, the question raised relates to the effect of the record of the proceedings in the court of probate. The statute of Indiana (Burns' Rev. St. 1894, § 2381) relating to the granting of letters of administration provides that "such letters shall be granted in the county; first, where, at his death, the intestate was an inhabitant; second, where, not being an inhabitant, he leaves assets." The record of the court of probate shows that a verified petition praying for the appointment of Thiebaud as administrator was filed in that court, showing that the deceased died in Fayette county, Ind., leaving a personal estate of the probable value of \$100, and that his widow and next of kin were not residents of that state. It further states that the petition was granted; that Thiebaud was appointed administrator; that he filed a proper bond as such, which was approved; that he took the oath of office, and that letters of administration were issued to him. Conceding that it inferentially appears from this and other recitals in the record that the court of probate assumed that Sweetman was an inhabitant of Fayette county, Ind., at the time of his death, and conceding also that he was not, but was an inhabitant of Ohio, still the petition, which was verified, and not disputed, showed that he left assets in the county, and that was sufficient whether he was an inhabitant of the county and state or not. If the court was in error in assuming one of the conditions to an appointment to exist, still, if other conditions existed, which, independently of the first, authorized the appointment, they would constitute a sufficient basis for the order. But there is not in the record anything which shows with positiveness that the letters were granted upon the assumption that Sweetman was such inhabitant of Indiana. All that we find upon that subject on which to base an inference that the court based the appointment upon the ground

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that the deceased was an inhabitant of Indiana is that he is described in the probate record as "Chris Sweetman, late of Fayette county." We perceive no sufficient reason for doubting that the appointment was valid. The question whether it was competent for the defendant in the court below to have proven that the conditions were such that the court of probate had no authority at all to appoint an administrator is, as we have said, not presented for our decision, and we therefore express no opinion upon it.

5. It is further contended that Thiebaud, having been appointed administrator in Indiana only, cannot maintain this action in Ohio. This would undoubtedly have been so at the common law. Story, Conf. Laws, 513; Johnson v. Powers, 139 U. S. 156, 11 Sup. Ct. 525, 35 L. Ed. 112. But the Revised Statutes of Ohio contain the following provisions:

Sec. 6133. An executor or administrator duly appointed in any state or county may commence and prosecute any action or proceeding in any court in this state in his capacity of executor or administrator, in like manner and under like restriction as a nonresident may be permitted to sue."

"Sec. 6134a. Whenever death has been or may be caused by a wrongful act, neglect or default in another state, territory or foreign country, for which a right to maintain an action and recover damages in respect thereof is given by a statute of such other state, territory or foreign country, such right of action may be enforced in this state in all cases where such other state, territory or foreign country allows the enforcement in its courts of the statute of this state of a like character," etc.

The state of Indiana gives such right of action as is mentioned in section 6134a of the Ohio Statutes, as is shown by the cases of Burns v. Railroad Co., 113 Ind. 169, 15 N. E. 230, and Railroad Co. v. McMullen, 117 Ind. 439, 20 N. E. 287, 10 Am. St. Rep. 67. This removes all objection which may have existed upon the ground of the public policy of Ohio. Section 6133 of the Ohio Statutes in very broad terms concedes to foreign administrators the right to prosecute "any action or proceeding" in the courts of the state in like manner "as any nonresident may be permitted to sue." The ground upon which it is proposed to restrict this privilege is that the intention was to accord it only to such action or proceeding as the administrator institutes for recovering the assets of the deceased. But, as we have already stated, under the Indiana statutes the plaintiff sues as administrator under a right of action vested in him as such. It seems to us that the statute of Ohio extends to all cases where the administrator is the actor, and sues for that which, in his official capacity, he is entitled to recover. It does not discriminate between the matters which, by the foreign law, may be intrusted to him by virtue of his office, provided the exercise of the privilege is not inconsistent with the interests of the

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public in the state of Ohio. The only restriction mentioned by the statute is that which is imposed upon any nonresident. We think there is no valid reason for excluding such an action as this upon the fact that the fund, after it comes to the hand of the administrator, is distributed to other persons than those to whom by another statute of Indiana the assets of the deceased are distributable. The case of *Transfer Co. v. Wilson's Adm'r*, 16 U. S. App. 236, 8 C. C. A. 21, 59 Fed. 91, decided by this court, and cited for the plaintiff, is not opposed to this conclusion. It was there held that a foreign administrator could not sue in the courts of Kentucky to recover damages for a death occasioned by the fault of another under a statute of that state which authorized such administrator to "prosecute actions for the recovery of debts due to such decedents." The restriction was expressly made in the very terms of the grant of the privilege without which the foreign administrator could not sue in Kentucky. In no sense could such damages be called debts due the decedent. The dissimilarity between the Kentucky and Ohio statutes is obvious.

For the reasons stated, we are convinced that none of the assignments of error are maintainable, and that the judgment should be affirmed.

MEXICAN CENT. RY. CO. v. KNOX.

(*Circuit Court of Appeals, Fifth Circuit, February 25, 1902.*)

[114 Fed. Rep. 73.]

Master and Servant—Laws of Mexico—Fellow Servants in Railroad Service.*

Under the laws of the republic of Mexico, an employee of a railroad company does not assume the risk of injury through the negligence of a co-employee, but the company is liable for such an injury in the absence of contributory negligence.

In Error to the Circuit Court of the United States for the Western District of Texas.

Mr. Davis, for plaintiff in error.

Millard Patterson and C. N. Buckler, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. An examination of the record, in connection with the very able and elaborate briefs of counsel, satisfies us that the pleadings and evidence in the case warranted the trial judge in charging the jury to the effect that, under the laws in force in the republic of Mexico at the time the defendant in error received his injuries, railway corporations were liable for all faults or accidents occurring through tardiness, negligence, imprudence, or want of capacity of their em-

*See 5 Rap. & Mack's Dig. 644 et seq.

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ployees, and this although the injury resulting was to another employee of the company, himself without fault; or, in other words, in the Republic of Mexico the employee of a railway corporation does not assume, as one of the risks of his employment, the negligence of a co-employee.

This disposes of the first assignment of error. The remaining assignments of error complain in different ways of the failure of the trial court, in view of plaintiff's contributory negligence, to instruct the jury to find a verdict for the defendant; and, in regard to these assignments, all that it is necessary to say is that, while the evidence is neither very complicated nor conflicting, yet it is not clear that from it all reasonable men would draw the same conclusions in respect to whether the plaintiff below, through his own fault and negligence, contributed to his own injury.

The case seems to have been submitted on a very fair and impartial charge, to which no objection is made, and in which the jury were distinctly and specifically instructed that if they "found from the testimony that the plaintiff himself was guilty of negligence in the respects mentioned by defendant's counsel (which were recited, or in any other respect, and this negligence or want of due and proper care for himself contributed to his injuries, then he could not recover."

The judgment of the circuit court is affirmed.

TEXAS & P. RY. CO. v. ALLEN *et al.*

(Circuit Court of Appeals, Fifth Circuit, February 25, 1902.)

[114 Fed. Rep. 177.]

Master and Servant—Defective Railroad Car—Duty of Inspection.*

An instruction defining the inspection required to be made by a railroad company to exonerate it from liability for an injury to a brakeman resulting from a defective handhold on a freight car considered and approved.

In Error to the Circuit Court of the United States for the Northern District of Texas.

Mr. Thompson and T. J. Freeman, for plaintiff in error.
R. L. Carlock, for defendants in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. This is a suit brought by the widow and father and mother of one A. T. Allen, deceased, to recover damages from the Texas & Pacific Railway Company by reason of the negligence of said company, resulting in the death of said A. T. Allen, the same being caused by the said Allen falling from the side of a freight car while in the performance

*See *Thompson v. Great Northern Ry. Co.* (Minn.), 19 Am. & Eng. R. Cas., N. S., 421, and note, 427 et seq.; 20 Am. & Eng. Enc. Law (2d Ed.) 88 et seq.; 5 Rap. & Mack's Dig. 104 et seq.

of his duties as a brakeman. The grounds of negligence relied upon are (1) in not having the proper kind of fastenings for the handhold on the car,—that is, in having used in the fastenings what is known as “lag” or “wood” screws instead of iron bolts with a nut on the end; (2) in not properly inspecting the car to see that the handholds were kept in reasonably safe condition. The bill of exceptions shows that evidence was offered tending to show that the deceased, Allen, fell from a car while the train was moving because a handhold was not securely fastened; and further tending to show that the lag screws with which the handhold was fastened were either not properly screwed in the wood, or that the wood of the car was decayed, thereby rendering the handhold insecure. There was also evidence tending to show that within a short time prior to the death of Allen the car had been inspected in the yards of the company at Baird and at Thurber Junction, division terminals, and also evidence tending to show the nature and character of the inspection made.

The trial judge charged the jury fully upon all the law applicable to the case, and to such charge no objection was made. After the jury had retired and for some time had considered their verdict, they returned into the court, and through their foreman requested the court to further define the term “inspection,” as that term was used in the court’s charge with reference to the duty of the defendant railway company towards the deceased, and thereupon the court made the following additional charge:

“Inspection, gentlemen, as used in the court’s charge, is an inquiry, by actual observation, into the state, efficiency, safety, and quality of the thing inspected. Inspection of the appliances and instrumentalities in use by a railway company should not rest alone upon the vision, because there are many defects, the existence of which could be ascertained by reasonable and ordinary tests which involve the exercise of senses other than the sense of vision. I should say the railway company would be liable for those defects in its appliances and instrumentalities which, in the course of inspection, could be perceived; that is, capable of coming under the cognizance of any one or more of the senses of man in the exercise of ordinary care. Inspection not only involves looking at cars and appliances, but as well all those tests which would ordinarily be used to ascertain the condition of cars and appliances that a reasonably prudent man would use in the exercise of such an undertaking.”

When this instruction was given, the defendant railway company duly excepted, and before the jury retired requested the court to specially charge the jury as follows:

“The court instructs the jury that the duty of a railroad company toward a servant in its employ is to exercise ordinary care to furnish such appliances as are reasonably safe for the use for which they are intended, and, within the meaning

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of the law, such appliances are considered as reasonably safe that are in the general, usual, and ordinary course adopted by those in the same business; and therefore if you find from the evidence that the handhold, which is alleged to have been pulled out from the car and caused the accident, was of such a character and fastened onto the car in the manner as was in general use and according to the course usually adopted by others in the same business, and that the defendant railway company, by the exercise of ordinary care, could not have discovered any defect in same, then, in such event, the defendant would not be liable to plaintiffs. The court instructs the jury that the plaintiffs cannot presume that the defendant railway company was guilty of negligence from the mere fact that the accident happened, but it is incumbent upon the plaintiffs to show that the accident happened by reason of the negligence of defendant by a preponderance of the evidence, and if a preponderance of the evidence does not establish this fact they will find for the defendant."

These special instructions were refused, and to such refusal exception was duly entered. The special charge given to the jury defining "inspection" is claimed to be erroneous, not because it is incorrect as a matter of law, but because it withdrew from the jury the question of whether the defendant company had exercised a reasonable care in the matter of inspecting the handholds of the car from which the deceased, Allen, fell.

After an attentive consideration of the brief and arguments of the learned counsel for plaintiff in error, we are unable to see wherein and how the instruction and definition given in any wise withdrew any fact from the jury or invaded the province of the jury in determining the facts in the case. The matters contained in the special instructions requested and refused seem to be in the main correct as matters of law, but we find that the judge in his general charge covered the same ground, and, so far as we are able to see, as favorably to the railway company as in the special instructions asked.

The judgment of the circuit court is affirmed.

COGDELL v. SOUTHERN RY. CO.

(*Supreme Court of North Carolina, Dec. 20, 1901.*)

[40 S. E. Rep. 202.]

Assumption of Risk as a Defense under Employers' Liability Act.*

Priv. Law 1897, ch. 56 (Act Feb. 23, 1897), providing that any employee of a railroad company suffering injury in the course of his employment by reason of any defects in the machinery, ways, or appliances of the company shall be entitled to maintain an action against the company, deprives all railroad companies of the defense of assumption of risk,

*See *Coley v. North Carolina R. Co.* (N. Car.), 21 Am. & Eng. R. Cas., N. S., 891, and foot-note.

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whether resting in contract, express or implied, and whether treated directly or under the fellow servant doctrine.

Contributory Negligence—Undertaking Performance of Dangerous Work.*

The servant is not guilty of contributory negligence in undertaking the performance of a dangerous work unless he performs it in a negligent manner, or unless the act itself is obviously so dangerous that in its careful performance the inherent probabilities of injury are greater than those of safety.

Negligence—Sufficiency of Evidence.

In an action by a servant for personal injuries, where there was more than a mere scintilla of evidence tending to prove the defendant's negligence, the case could not be taken from the jury.

Contributory Negligence—Instructions.

In an action for personal injuries the court properly refused to charge as to contributory negligence on an issue whether defendant was negligent, especially where it gave such charge as a separate issue.

Instructions—Weight of Evidence.

An instruction that if the jury found, from the testimony of defendant's witnesses, and from that of a particular witness for plaintiff, that certain facts were so, they should report a certain finding was properly modified so as to require them to find such fact from all the testimony; the instruction as requested tending to give undue credit to the witnesses referred to.

Witnesses—Credibility.

The credibility of a witness is a matter peculiarly within the province of the jury, and depends not only on his desire to tell the truth, but also on his insensible bias, his intelligence, his means of knowledge, and powers of observation.

Cook, J., dissenting.

Appeal from superior court, Cumberland county; Moore, Judge.

Action for personal injuries by C. T. Cogdell against the Southern Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

This is an action for damages for personal injuries to the plaintiff caused by the alleged negligence of the defendant. The material allegations of the complaint are as follows: "(2) That the plaintiff was, at the date hereinafter mentioned, and for some time previous thereto, an employee of the said defendant corporation in the capacity of a fireman on one of the said defendant's engines, then operating at Winston-Salem, N. C. (3) That on the 11th day of November, 1899, as it was his duty and daily custom as such employee, the plaintiff was working and performing his duties as fireman upon said engine. (4) That while so working as fireman upon said engine it was his duty to shake the clinkers or cinders out of the grate, to clean the fires, from time to time, as became necessary. (5) That on the said date, while cleaning fires as aforesaid, plaintiff was thrown down violently against the boiler, falling with great force, by reason of the defective condition of the grate handle or shaker bar rigging, which defective condition caused the lever to slip off while plaintiff,

*See *Chattanooga Electric Ry. Co. v. Lawson* (Tenn.), 12 Am. & Eng. R. Cas., N. S., 669, and note, 672 et seq.

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with his full weight and strength, was cleaning fires as aforesaid. (6) That at the time aforesaid the said defendant was, with gross carelessness and negligence, willfully operating said engine in its defective condition, to the great danger of plaintiff. (7) That in consequence of said defective condition of said machinery, which could and ought to have been kept in good condition, the plaintiff, when thrown down violently as aforesaid, was very painfully and dangerously and permanently injured." There was evidence tending to sustain the plaintiff's contention. The defendant asked that the following issues be submitted to the jury: "(1) Was the plaintiff injured by the negligence of the defendant in the manner alleged in the complaint? (2) Did the plaintiff, by his own negligence, contribute to the injury complained of? (3) Did the plaintiff assume the risk of any defect in the shaker bar or grate handle? (4) What damages, if any, has the plaintiff sustained?" The court submitted the first, second, and fourth issues as requested, but refused to submit the third issue, and the defendant excepted. The issues submitted were found in favor of the plaintiff.

F. H. Busbee, for appellant.

N. A. Sinclair, for appellee.

DOUGLAS, J. (after stating the facts). In view of the act of February 23, 1897 (Priv. Laws, c. 56), the court properly refused to submit the third issue tendered by defendant. This point has been so fully considered in the cases of *Coley v. Railroad Co.*, 40 S. E. 195, and *Thomas v. Railroad Co.*, 40 S. E. 201 (both at this term), that further discussion seems unnecessary. It may now be considered settled that the said act deprives all railroad companies operating in this state of the defense of assumption of risk, whether resting in contract, express or implied, and whether treated directly or under the doctrine of fellow servant. It is further settled that the plaintiff is not guilty of contributory negligence in undertaking the performance of a dangerous work unless he performs it in a negligent manner, or unless the act itself is obviously so dangerous that, in its careful performance, the inherent probabilities of injury are greater than those of safety. *Hinshaw v. Railroad Co.*, 118 N. C. 1047, 24 S. E. 426, 3 Am. & Eng. R. Cas., N. S., 558; *Coley v. Railroad Co.*, and *Thomas v. Railroad Co.*, *supra*.

We see no error in the charge. As there was more than a scintilla of evidence tending to prove the negligence of the defendant, the case could not have been taken from the jury. *Anniston Nat. Bank v. School Committee of Durham*, 121 N. C. 107, 28 S. E. 134; *Cable v. Railway Co.*, 122 N. C. 892, 29 S. E. 377; *Moore v. Railway Co.*, 128 N. C. 455, 39 S. E. 57. The court properly refused to charge as to contributory negligence on the first issue, especially as he substantially

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embodied that part of the prayer in his instructions upon the second issue.

The defendant requested the court to charge: "If the jury believe from the testimony of defendant's witnesses as to the condition of the grate bar, or the testimony of plaintiff's witness Clark, that the grate bar was worn 'the least bit in the world,' this would not be sufficient evidence of a defective appliance to go to the jury, and they should find the first issue 'No.'" The court refused to give the instruction as requested, but gave it in the following modified form: "If the jury find from the testimony that the condition of the grate bar was good, and not worn, or that the grate bar was worn only 'the least bit in the world,' this would not be sufficient evidence of a defective appliance to go to the jury, and they should find the first issue 'No.'" Defendant excepted to the modification. His honor was correct in modifying the prayer, because its effect would have been, or might have been, to give undue credit to the defendant's witnesses as well as the witness Clark, whose testimony was by no means favorable to the plaintiff. *Jackson v. Commissioners*, 76 N. C. 282; *Anderson v. Steamboat Co.*, 64 N. C. 399; *Weisenfeld v. McLean*, 96 N. C. 248, 2 S. E. 56. We are inclined to think that it would have been error if the instruction had been given as asked, as it tended to discredit the plaintiff, who had testified in his own behalf: but, in any event, the defendant had no right to demand that his honor should single out by name any one witness from among others who had testified to the same matter.

Among other prayers, some of which were given, the defendant asked for the following instruction: "A railroad is not an insurer of the safety of its employees, nor is it required to have every appliance in perfect condition at all times. If its machinery is reasonably suitable for the purpose for which it is designed, if used with ordinary care, the railroad cannot be found negligent because the corners of a grate bar are worn 'the least bit in the world,' provided that this would not cause the accident, if due care should be observed by the fireman using it." The court gave this instruction as requested, and charged the jury upon the second issue, among other things, as follows: "If you find from the evidence that the grate bar was in a dangerous condition on account of two of its corners having worn until they were round, that the plaintiff knew of its defective and dangerous condition, and that with knowledge of such defective and dangerous condition he voluntarily remained in the service of defendant, and continued to use such grate bar, he assumed the risk incident to the use of such defective grate bar, and you should answer the second issue 'Yes.' If you find from the evidence that the plaintiff did not use that degree of care and caution in attaching the handle to the grate bar which a prudent man would have used in so attaching it, and that such want of care

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caused or contributed to the injury of which the plaintiff complains, then, whether the grate bar was worn or not, you should answer the second issue 'Yes.' These instructions, with others, went fully as far as the defendant had a right to demand, and, in fact, if the point were before us, we might seriously question its correctness, as being too favorable to the defendant as to the assumption of risk under the act of 1897. This case is peculiarly one whose determination comes within the province of the jury, as the testimony was conflicting upon material points. Even if the facts were undisputed, it would be extremely difficult for a court to say as matter of law what degree of wear would render a piece of machinery, not in common use, so far dangerous as to imply negligence on the part of the defendant, or to deter a man of ordinary prudence from undertaking to use it. Considering the testimony and the charge, the jury might well have found for the defendant if they had given to its witnesses the same degree of credibility that they appear to have given to the plaintiff. But they have found otherwise, and we cannot say that they are wrong. The credibility of a witness is a matter peculiarly for the jury, and depends not only upon his desire to tell the truth, but also, and sometimes even to a greater extent, upon his insensible bias, his intelligence, his means of knowledge and powers of observation.

The judgment is affirmed.

COOK, J., dissents.

CITIZENS' ST. R. CO. v. REED.

(Appellate Court of Indiana, Division No. 2, April 9, 1902.)

[63 N. E. Rep. 770.]

Injury to Employee Riding on Front Platform of Street Car—Proximity of Trolley Poles and Absence of Gates—Contributory Negligence.

The complaint, in an action against an electric street railway company, alleged that it had double tracks, with poles between, which, where the accident occurred, were only three inches from the cars, and that the track was there very rough; that it was the duty of the company to, and on most of its cars it did, have gates at the sides of the front platform to protect the employees thereon, and such gates were required by its rules; that deceased was an employee of the company, and when riding on the cars it was his duty to ride on the front platform; that in the line of his duty he boarded a car at night and passed through to the front platform; that the car had no gate, and he was thrown against one of such poles and killed; that he did not know that there was no gate at the side of such platform, and was free from fault or negligence contributing to the accident: *held*, that the complaint does not show contributory negligence on the part of the deceased.

Same—Same—Assumption of Risk.*

The complaint did not show that the decedent had assumed the risk created by the absence of a safety gate.

*As to whether knowledge of defect is necessary to assumption of risk, see 20 Am. & Eng. Enc. Law (2d Ed.) 122 et seq.; 5 Rap. & Mack's Dig. 149 et seq.

Citizens' St. R. Co. v. Reed

Appeal from superior court, Marion county; John L. McMaster, Judge.

Action by Nancy E. Reed, as administratrix of the estate of John Reed, against the Citizens' Street Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

F. Winter, S. O. Pickens, and W. H. Latta, for appellant.

ROBY, J. The appellant assigns three errors. The first and second attack the sufficiency of the amended complaint. The third error assigned is that the court erred in overruling the appellant's motion for judgment in its favor on the special findings of fact contained in the answers to the interrogatories by the jury notwithstanding the general verdict. The verdict was returned June 9, 1900. "On June 25th, appellee filed a motion for judgment. On July 3d, her motion was sustained, and judgment rendered in her favor, against appellant, for thirty-five hundred dollars. On July 9th, appellant filed its motion for judgment in its favor upon the special findings of fact contained in the answers to the interrogatories by the jury notwithstanding the general verdict of the jury." This motion was overruled, and an exception reserved.

A motion, in practice, is defined as an application to a court, by one of the parties in the cause, in order to obtain some rule or order. Bouv. Dict. tit. "Motion." A motion for judgment may be made at any time before judgment. *Jacquay v. Hartzell*, 1 Ind. App. 500-504, 27 N. E. 1105. A motion that the court render judgment, when judgment has already been rendered, is bad upon its face. The ruling upon a motion thus made cannot constitute reversible error. To hold otherwise would be to introduce discord and uncertainty into judicial records and proceedings, without advantage or excuse. A motion for a new trial may, by the terms of the statute, be made at any time during the term. The effect of granting a new trial is to vacate judgment. The question here presented is not the same. Appellant's third assignment of error is not therefore well taken.

Appellee sued as administratrix of the estate of John Reed, deceased, for the benefit of his widow and next of kin. She averred that on April 8, 1895, prior thereto and ever since, the appellant was operating a street railroad in Indianapolis; that its cars were operated by electric power; that it had double tracks on Washington street, with poles between them to hold up the wires; that the space between cars passing over said tracks and said poles was only three inches at the point where decedent was killed; that at said place its tracks were very rough; that decedent was in appellant's employ as road officer; his duty it was, while riding upon appellant's cars, to ride upon the front end, with the motorman, unless his presence was otherwise required; that appellant's cars

were provided with safety gates at each side of the front end of the car; that such gates were necessary to protect a person standing on the front end of said cars from injury; that they ran so near the poles as to make it very dangerous, and it therefore became necessary that such gates be maintained, and that the rules of appellant required that no open-ended cars be used; that on said day appellant, in violation of its rules, used a car without any safety gate or other protection on the side next to said poles; that decedent had occasion to ride upon said car and to carry a headlight to appellant's barn; that he got upon said car, passed to its front and upon the platform, and, owing to the fact that there was no safety gate upon said platform next to said poles, fell off, was caught between the car and one of said poles and crushed to death; that at the time it was dark; that decedent had no opportunity of knowing, and did not know, that said platform had no safety gate; that the absence of such gate made the car dangerous and unsafe, as appellant well knew; that such gate was necessary to make the front platform a safe working place for appellant's employees; that, had such gate been provided, decedent would not have been injured; that such car was old, worn, and out of repair; that said accident happened wholly by reason of appellant's negligence, and without fault or negligence on the part of decedent or appellee contributing thereto. Taking the complaint as it stands, the decedent's death must be attributed to a combination of causes, i. e., a rough track, the proximity of the poles to the car, and the absence of safety gates. These conditions, combined with the decedent's action in passing through the car and upon the platform as he did, resulted in his death. His knowledge of the rough track and the position of the poles is not denied, and is therefore conceded. The use of the word "negligent" in connection with these two conditions adds nothing to the complaint. The third condition, i. e., the absence of safety gates, is said to have been unknown to the decedent. Failing to provide such gates is charged to have been a violation of the appellant's rules, and a negligent act. If the absence of the gates, concurring with the other conditions, caused decedent to fall off the car, as charged, such negligent omission may be a proximate cause of the injury. *Railway Co. v. McIntosh*, 140 Ind. 261, 274, 278, 38 N. E. 476; *Board v. Sisson*, 2 Ind. App. 311, 28 N. E. 374; *Windeler v. Association* (Ind. App.) 60 N. E. 954.

It is contended that the act of decedent in carrying a "headlight" through the car and out on the platform, without which the accident could not have occurred, was an act of negligence on his part, and therefore a bar to recovery. The general averment that he was free from fault or negligence contributing to the accident makes the complaint good, unless the facts specifically set out overcome it. *Railroad Co. v. Wagner*, 17 Ind. App. 22, 45 N. E. 76, 1121; *Railroad Co. v.*

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Walker, 113 Ind. 196, 15 N. E. 234, 3 Am. St. Rep. 638. It cannot be determined from the averments in that behalf that carrying the headlight was per se a negligent act, nor that it was done in a negligent manner. The averment that decedent did not know that there was no safety gate is of a fact. The further averment that he had no opportunity to know of such condition is not an unsupported conclusion. It is shown that he had occasion to carry a headlight to appellant's barn; that he got upon the car and passed to its front platform; that it was dark at the time; that the appellant's rules required that no open-ended cars be used. The conclusion, if it be so regarded, that he had no opportunity to know that there was no safety gate on this particular car may have been justified by the degree of darkness, by the character of the duty being performed, and the attention necessarily given to it. The complaint does not state specific facts overcoming the general averment that decedent was free from fault, nor does it show that the risk created by the absence of a safety gate was open and obvious to, and therefore assumed by, him. The evidence is not in the record. As matter of pleading, it is shown that decedent met his death by reason of appellant's negligence.

Judgment affirmed.

JENSEN v. OMAHA & ST. L. R. CO.

(*Supreme Court of Iowa, January 28, 1902.*)

[88 N. W. Rep. 952.]

Employees' Liability—Car Cleaner as Fellow Servant of Hostler.

Under Code, § 2071, making railway companies liable to employees for injuries from the negligence of fellow servants where such negligence is in any manner connected with the use and operation of the railway on which they happen, a car cleaner working in a standing car on a side track is entitled to recover for injuries inflicted by the negligence of a hostler in charge of an engine in failing to notice that a switch was open, and running his engine against the standing car, the cleaner being exposed to the hazards incident to the use and operation of the road, and the movement of the engine constituting such use and operation.

Same—Same—Hostler Taking Yard Master to Dinner on Engine Acting within Scope of Employment—Termination of Departure from Ordinary Service.*

Where a hostler took charge of an engine to take it to the roundhouse, but before doing so ran out some distance from the main track to take the yard master to his dinner, he was not, after his return, and while proceeding to the roundhouse, outside the scope of his employment, so that the railway company was not liable for injuries inflicted by his negligence on a fellow servant.

Issues.

Where a petition alleged that plaintiff was injured by a motionless car, in which he was working, being "run into with great force, negli-

*As to master's liability for acts of servant as depending upon whether they were committed within scope of employment, see 14 Am. & Eng. Enc. Law 807 et seq.; 1 Am. & Eng. Enc. Law (2d Ed.) 1151 et seq.; 1 Rap. & Mack's Dig. 62 et seq.

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gently and without warning, by a locomotive belonging to and under control of defendant," evidence that the accident was occasioned by an open switch was admissible.

Negligence in Operating Engine on Switch Track.

Where the person operating an engine on switch tracks did not look to see the condition of a switch ahead, but asked another person on the engine if the switch was all right, and, on that person looking around as if he heard, "took it for granted" that the switch was properly set, the jury were justified in finding the operator of the engine negligent.

Appeal from district court, Pottawattamie county; Walter I. Smith, Judge.

Action at law to recover damages on account of personal injuries alleged to have been occasioned by the defendant's negligence. Verdict and judgment for plaintiff, and defendant appeals. Affirmed.

J. G. Trimble and Pusey & McGee, for appellant.

Finley Burke, Ambrose Burke, and C. B. Aitchison, for appellee.

WEAVER, J. Plaintiff was in the service of the defendant as a coach cleaner. At the time of the accident he was engaged in the line of his duty in a baggage car standing on what is known as the "coach track" in defendant's yard at Council Bluffs. While so employed, an engine, being operated by defendant's hostler, and running six or eight miles an hour, came in collision with the baggage car, throwing plaintiff against the rim of the car stove, and causing the alleged injuries of which he complains. The appellant contends: (a) That appellee's duties as a coach cleaner do not bring him within the benefit of Code, § 2071, giving right of action against his employer for the negligence of a fellow servant; (b) that, even if it be conceded that in performance of some portion of his duties he would come within the benefits of the statute, he was not so employed at the time the alleged injuries were received; (c) that the act of the engineer or hostler in moving the engine at the time of the collision was outside of the scope of his employment, and the company is therefore not liable for his negligence, if any, in so doing; and (d) that the trial court erred in admitting evidence of the open switch through which the engine passed in upon the coach track to the point of collision.

1. The statute above referred to provides for the liability of a railroad company to its employees for injuries received by them in consequence of the neglect of the company's agents, or by any mismanagement of the engineers or other employees thereof, whenever such negligence is "in any manner connected with the use and operation of the railway on or about which" they shall, at the time of the alleged injury, be employed. This provision has been construed as embracing within its protection all that class of employees whose employment "exposes them to the peculiar dangers and perils

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attendant upon the use and operation of railroads." *Keatley v. Railway Co.*, 94 Iowa, 685, 63 N. W. 560; *Akeson v. Railway Co.*, 106 Iowa, 54, 75 N. W. 676; *Reddington v. Railway Co.*, 108 Iowa, 99, 78 N. W. 800. And, while the rule itself is not difficult of statement or comprehension, the boundary line between the "class" which is and the "class" which is not so peculiarly "exposed" to the hazards of railway operation is by no means so clear as to be always free from doubt. Language has been employed which, standing alone, and literally construed, might seem to imply that no employee, unless he be a trainman, and no injury except such as is received in the movement of trains, are contemplated by the statute. This interpretation we have in numerous cases held to be entirely too narrow. Among others found to be entitled to recover have been the section hand, the section foreman, the shop hand, the clinker man, the detective, the gravel shoveler, and the snow shoveler; none of whom had any connection with the train service proper. These cases have been recently collated and discussed by the court, and required no extended citation. See *Akeson v. Railway Co.*, 106 Iowa, 54, 75 N. W. 676; *Larson v. Railway Co.*, 91 Iowa, 81, 58 N. W. 1076; *Butler v. Railroad Co.*, 87 Iowa, 206, 54 N. W. 208. The kind of labor in which the employee is engaged is not the test of his right of recovery so much as the fact whether, in the performance of that labor, he is, for the time being, exposed to the peculiar hazards which arise from or are connected with the use and operation of the road. *Pyne v. Railroad Co.*, 54 Iowa, 225, 6 N. W. 281, 37 Am. Rep. 198. It has also been held that the movement of a lone engine by a hostler over the side tracks or about the yards or in the cinder pit is a "use and operation of the road" within the meaning of the law. *Butler v. Railroad Co.*, supra; *Larson v. Railway Co.*, supra. If that holding be correct,—and we see no reason to doubt it,—then the plaintiff in this case, being in his proper place in the baggage car in defendant's yards, where, as shown by the evidence, switch engines and other engines were frequently run back and forth switching and turning cars, making up trains, and sometimes moving the cars in which the cleaners were at the time employed, was clearly exposed to perils peculiarly incident to railroad use and operation. Counsel have given considerable attention to the question whether the work of cleaning was ordinarily performed while the coaches were being switched about the yard, but we do not regard this fact of controlling importance. If the work was done exclusively while the coaches were at rest, the dangers to which plaintiff was exposed by the use and operation of the yard as a part of the railroad were not thereby eliminated. Those dangers are notorious, and inseparable from the operation of engines and cars over a net work of tracks. Prominent among such obvious perils we may mention the negligent placing of the coaches too near the

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switch to "clear" an adjacent track, the misplacing of a switch, the running of another car or engine in upon the coach track at a negligently high rate of speed, and the failure of an engineer to interpret a signal or obey an order. All these contingencies are peculiar to the use and operation of the railroad, and, plaintiff's employment being such as to necessarily expose him to hazards so arising, he is clearly of the class contemplated by the statute. This conclusion is directly in line with *Pierce v. Railway Co.*, 73 Iowa, 140, 34 N. W. 783, where the plaintiff, a mechanic, was engaged in removing a screen from the outside of a coach standing on a side track, and, being injured by the negligent moving of the train, he was permitted to recover. There is nothing, therefore, in this branch of the case, to justify a reversal of the judgment below.

2. We turn now to the further proposition of appellant that the hostler's conduct in moving the engine was outside of the scope of his employment. Whether, if this were correct, it would, under the present status of the law of railway master and servant in this state, be available as a defense to appellee's claim, we need not determine, for we think the facts do not sustain the objection raised. The basis of the objection is as follows: The evidence tends to show that the hostler assumed charge of the engine for the purpose of taking it to the roundhouse, as was his duty, but before doing so, acting upon the order or request of the yard master, he ran out some distance on the main track, taking that official home to his dinner. Returning from this trip to the point of departure, he passed with his engine in upon the roundhouse track, and, stopping, closed the switch behind him. Starting, then, for the roundhouse at a somewhat rapid pace, he failed to observe that the switch leading from the roundhouse track to the coach track was open, and thus unexpectedly was thrown in upon the latter, and against the coach in which the appellee was at work. If, in taking the yard master to his dinner, the hostler was so out of the line of duty as to relieve appellant from responsibility for his negligence while so improperly engaged (which we need not decide), it is sufficient here to say that such departure from his ordinary service had ceased. The trip had been made and completed, and he had, in accordance with his admitted duty, entered upon the appropriate track to reach the roundhouse, where he was to store and care for the engine. This was plainly within the scope of his employment, and his prior trip for the accommodation of the yard master is wholly immaterial.

3. The assignment of error upon the admission of testimony concerning the open switch is not well taken. The allegation of negligence stated in the petition is "that said baggage car was run into with great force negligently, and without notice or warning, by a locomotive belonging to said defendant, and under its charge and control," thereby injur-

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ing the plaintiff; and "that by reason of the force with which said car was run into by reason of the negligence of the company and its employees plaintiff had one of his ribs broken," etc. An amendment to the petition set out the name of the hostler in charge of the engine, but adds nothing to the charge of negligence. This charge, as will be seen, is of a very general and quite indefinite nature, and in the absence of any order of court requiring more specific allegations, appears to be broad enough to admit proof of negligence in respect to the switch, as well as in the handling of the engine. Moreover, if plaintiff be held to rely alone upon the negligence of the hostler, the fact of the open switch was so intimately connected with the collision complained of that no clear statement of the accident could have been given by the witnesses without revealing it.

4. It is also urged that there is no showing of negligence on part of a hostler in failing to notice the open switch. The testimony of that person shows that he did not look to ascertain for himself the condition of the switch, but contented himself with asking another person. He says: "A man by the name of Larish was with me on the engine, and I asked him if the switch was all right at the coach track. The steam was blowing and making a noise, and Larish looked around just as if he heard me, and I took it for granted that the switch was all right." The jury needed no other evidence to justify its verdict in this respect. The negligence is manifest. Other points made by the appellant are dependent upon those we have above discussed, and do not require further consideration.

The judgment of the district court is affirmed.

GALVESTON, H. & S. A. RY. CO. v. ABBEY.

(*Court of Civil Appeals of Texas, April 23, 1902.*)

[68 S. W. Rep. 293.]

Injury to Employee—Defective Engine Step—Negligence—Pleading.

Where a railway engineer was injured by the step of the engine turning and dropping off when he stepped on it, and alleged in his petition that through the company's negligence such step became loose, defective, and insecurely fastened, so as to make it dangerous to use for the purpose for which it was placed on the engine, and that defendant had negligently failed to inspect the step, an exception to the petition on the ground that it did not allege how and in what manner defendant had permitted the step to become loose and defective should not be sustained.

Same—Same—Damages.

In an action against a railway company for injury to an engineer resulting from the fall of an engine step when he stepped on it, an instruction that if the jury found for the plaintiff they should allow him such sum as they believe from the evidence will compensate him for the injury sustained, enumerating the elements of damage to be taken into consideration, is not erroneous.

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Same—Excessive Verdict.*

Where a railway engineer, 35 years of age, earning \$175 per month, was thrown under the wheels by the giving way of a defective engine step, and a foot crushed, so as to require amputation above the ankle, a verdict of \$16,000 was not excessive.

Appeal from district court, Bexar county; J. L. Camp, Judge.

Action by William Abbey against the Galveston, Houston & San Antonio Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Baker, Botts, Baker & Lovett and Newton & Ward, for appellant.

Perry J. Lewis and H. C. Carter, for appellee.

NEILL, J. This suit was instituted by appellee, William Abbey, against appellant to recover damages for personal injuries alleged to have been inflicted by the negligence of appellant while he was in the company's employ as a locomotive engineer. The appellant answered by general and special exceptions, a general denial, and by pleading specially that appellee assumed the risk of the defect in the fastening of the engine's step by reason of which the alleged injury occurred, and that he was guilty of contributory negligence in failing to discover such defects. The case was tried before a jury, and a judgment rendered upon their verdict against appellant for the sum of \$16,000.

Conclusions of Fact.

On November 22, 1900, appellee, a locomotive engineer of appellant, in starting on his run from Del Rio to Sanderson, after he had run his engine out of the roundhouse, noticed a very bad "pound" on it which he could not precisely locate. For the purpose of locating the "pounding," and ascertaining whether it was caused from actual wear or something else, he got down on the tank step on the left side, and waited until the fireman gave the engine steam, when he placed his left foot on the engine step, which was ahead of and a little lower than the one he was on, in order that he might get as low as possible, so that he might locate the "pounding." When his foot struck the engine step it turned about halfway around, and as it turned dropped from the stem it was on, and appellee fell to the ground with it, and the big driving wheel

*As to what is the proper amount of recovery for loss or injury to leg or arm, see note, 12 Am. & Eng. R. Cas., N. S., 851; Louisville & N. R. Co. *v.* Lowe (Ky.), 1 R. R. R. 363, 24 Am. & Eng. R. Cas., N. S., 363; Yerkes *v.* Northern Pac. Ry. Co. (Wis.), 23 Am. & Eng. R. Cas., N. S., 642; Wimber *v.* Iowa Cent. Ry. Co. (Iowa), 23 Am. & Eng. R. Cas., N. S., 476; Illinois Cent. R. Co. *v.* Stewart (Ky.), 21 Am. & Eng. R. Cas., N. S., 874; Sloniker *v.* Great Northern Ry. Co. (Minn.), 13 Am. & Eng. R. Cas., N. S., 819; Kalfur *v.* Broadway Ferry & M. Ave. R. Co. (N. Y.), 12 Am. & Eng. R. Cas., N. S., 850; Wood *v.* Louisville & N. R. Co. (Tenn.), 11 Am. & Eng. R. Cas., N. S., 525; Elliott *v.* Newport St. R. Co. (R. I.), 2 Am. & Eng. R. Cas., N. S., 388; Berry *v.* Lake Erie & W. R. Co. (U. S.), 3 Am. & Eng. R. Cas., N. S., 654.

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of the engine ran over his foot and ankle, crushing and mangleing them. In consequence of his wounds it was necessary to have his leg amputated about three inches above the ankle joint. The necessary surgical operation was performed the next day in the city of San Antonio. From the time his injuries were inflicted until the amputation was made he suffered the most excruciating physical pain and agony. He still suffers, and the evidence indicates that he will continue to suffer, physical pain in consequence of his wounds. The loss of his foot and ankle has incapacitated him from pursuing the avocation of locomotive engineer, for which he was well fitted and capacitated before his injuries were sustained, from the pursuit of which he was earning upon an average of \$175 per month. He was 35 years old when injured. The engine step turned and slipped from the stem by reason of its being loose and insecurely fastened. Its insecure and defective condition was not open to ordinary observation nor known to appellee until it became evident by the step's turning and giving way when he placed his weight upon it. He was in the discharge of his duty when the accident occurred, and in the exercise of ordinary care.

From these facts, which are shown by the uncontroverted evidence, we conclude (1) that it was through appellant's negligence that the engine step was insecurely fastened, became loose, and so defective as to render it dangerous in the use for which it was designed and intended; (2) that such negligence was the proximate cause of appellee's injuries; (3) that the risk occasioned by such negligence was not assumed by appellee, or such as was ordinarily incident to his employment; (4) that the appellee was guilty of no negligence proximately contributing to his injury; and (5) that by reason of appellant's negligence he has been damaged in the sum of \$16,000.

Conclusions of Law.

1. In his petition appellee alleged that on the 22d day of November, 1900, he was in the employ of defendant in the capacity of a locomotive engineer; that on said date at Del Rio, while in the discharge of his duty, it became necessary for him to put his foot upon the engine step, and that while his foot was placed and resting thereupon the step turned and dropped off, by reason whereof his left leg was thrust under the wheels of the locomotive, which crushed and mangled his foot and ankle to such an extent as to make their amputation necessary; that through defendant's negligence said engine step became loose, defective, and insecurely fastened, so as to make it dangerous when used for the purpose for which it was placed upon the engine; that defendant had negligently failed to inspect said step, which it was its duty to do, in order to discover its defective condition.

The appellant specially excepted to the petition upon the ground that it did not allege how and in what manner defend-

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ant had permitted the step of the engine to become loose, defective, and insecurely fastened, but that only the conclusions of the pleader are therein stated. The court overruled the exception, and its ruling is assigned as error. It is not necessary, in pleading a cause of action growing out of the negligence of the defendant, for the plaintiff to allege "in what manner" the defendant had permitted the negligence to occur. The facts constituting negligence are averred; that is enough. It was the appellant's business to know the condition of its engine when it was started from the roundhouse and appellee put to work upon it. If this business had been attended to, appellant might have ascertained how and "in what manner" it "had permitted the step to become loose, defective, and insecurely fastened." Whether it would have found this out or not, it would have at least discovered that the step was loose and insecurely fastened, and in a condition imperiling the life and limb of its servants in the use for which it was designed. This condition is a mournful fact, when shown to have been the cause of appellee's mangled limb and dreadful suffering. This fact was alleged as negligence, and proof of it, without regard to how or in what manner appellant permitted it to occur, established prima facie the breach of a duty appellant owed the appellee as its servant, which rendered it liable for the injuries sustained in consequence. If the condition of the step did not arise from the failure of appellant to exercise ordinary care to keep it fixed and securely fastened, it, being charged with knowledge of such care as it exercised, should, when appellee alleged and proved facts making a prima facie case of negligence, have shown on its part the exercise of ordinary care to prevent the conditions which caused the accident. The court did not err in overruling the special exception to the petition. *Railway Co. v. Templeton*, 87 Tex. 42, 26 S. W. 1066; *Railroad Co. v. Brinker*, 68 Tex. 502, 3 S. W. 99.

2. The charge upon the measure of damages in such as has been repeatedly approved by this court in cases where writs of error have been refused by the supreme court. After instructing the jury that if they should find for plaintiff, and believe from the evidence he was injured as alleged in his petition, then they should allow him such sum as they believe from the evidence will compensate him for the injury sustained, it simply enumerates certain elements of damages they may take into consideration in determining what sum of money will compensate him for the injury sustained.

3. While the verdict is a big one, we are not prepared to say, in view of appellee's age, the amount of money he was earning before he was hurt, the nature and permanency of his injuries, his intense and continued suffering, and his incapacity to pursue his vocation, that it is excessive.

The judgment is affirmed.

ST. LOUIS & S. F. R. CO. *v.* FURRY.*(Circuit Court of Appeals, Eighth Circuit, March 24, 1902.)*

[114 Fed. Rep. 898.]

Railroads—Negligence—Fellow Servants—Firemen—Telegraph Operator—Construction of Statute.*

Under Sand. & H. Dig. Ark. § 6248, declaring that the employees of a railway corporation shall not be considered fellow servants unless working together to a common purpose of the same grade and in the same department or service, a fireman, who was injured by a collision of trains caused by the failure of a telegraph operator to deliver orders received by him from the train dispatcher, was not a fellow servant with such telegraph operator.

Sanborn, Circuit Judge, dissenting.

In Error to the Circuit Court of the United States for the Western District of Arkansas.

This was an action by Warren G. Furry, a railroad fireman, who sued his employer, the St. Louis & San Francisco Railroad Company, the plaintiff in error, for injuries sustained in a collision between two freight trains on October 17, 1897. The circumstances which occasioned the collision were these: Train known as second 38, on which the plaintiff below was a fireman, arrived at Springdale, Ark., at 8:35 a. m. on October 17, 1897, and took the side track at that station to await the passage of a south-bound passenger train. The freight train (second 38) was running north, and was under orders to meet a south-bound freight train at Rogers, a station some 10 miles north of Springdale. When it took the siding at Springdale, it ran to the north end thereof, so as to be in a position to run out on the main track as soon as the passenger train went by, at which point the engine of the freight train was about one half a mile north of the station. While the freight train was standing on the siding, the telegraph operator at the station received an order directing the two freight trains to meet at Springdale instead of at Rogers, but the operator failed to notify either the conductor or the engineer of second 38 of this order, or to put up the customary red signal that orders were in his hands, as it was his duty to do. In consequence of such neglect on the part of the operator, second 38 proceeded north on the main track, as soon as the passenger train had passed by, and, about two miles north of Springdale, came into collision with the south-bound freight, which had received the order to meet at Springdale instead of Rogers. As a result of the collision Furry was horribly burned and otherwise injured, so as to cripple him for life. In consequence of these facts the jury awarded him damages in the sum of \$16,000. To reverse that judgment, the railroad company brought a writ of error.

*As to different department limitation of fellow-servant rule, see *Louisville & N. R. Co. v. Stuber* (C. C. A.), 22 Am. & Eng. R. Cas., N. S., 840, and note, 847.

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L. F. Parker and B. R. Davidson, for plaintiff in error.
Samuel R. Chew and Joseph M. Hill (Henry Fitzhugh, on the brief), for defendant in error.

Before CALDWELL, SANDBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

On February 28, 1893, the legislature of the state of Arkansas passed an act, the material parts of which, as now contained in Sand. & H. Dig. St. Ark., are as follows:

"Sec. 6248. All persons engaged in the service of any railway corporations, foreign or domestic, doing business in this state, who are entrusted by such corporation with the authority of superintendence, control or command of other persons in the employ or service of such corporation, or with the authority to direct any other employee, in the performance of any duty of such employee, are vice-principals of such corporation, and are not fellow servants with such employee.

"Sec. 6249. All persons who are engaged in the common service of such railway corporations, and who, while so engaged, are working together to a common purpose, of same grade, neither of such persons being entrusted by such corporations with any superintendence or control over their fellow employees, are fellow servants with each other; provided, nothing herein contained shall be so construed as to make employees of such corporation in the service of such corporation fellow servants with other employees of such corporation engaged in any other department or service of such corporation. Employees who do not come within the provisions of this section shall not be considered fellow servants."

This statute is the same, in substance, as one which was enacted by the legislature of the state of Texas on March 10, 1891, and it has since been adopted, in substance, by the legislature of the state of Utah (Rev. St. Utah, 1898, §§ 1342, 1343), and possibly in some other states. On the trial of the case it was admitted by both parties that the plaintiff and the engineer of his train were free from any fault or negligence contributing to the collision; that the defendant company's train dispatcher for the division of the road on which the collision occurred was likewise without blame; and that the disaster was occasioned solely by the neglect of the defendant's telegraph operator at Springdale to communicate to the conductor and engineer of freight train second 38 the fact that an order had been received directing that train to meet the south-bound freight train at Springdale instead of meeting it at Rogers. The question to be decided, therefore, lies within a narrow compass, the question being whether, under the aforesaid statute, Furry, the fireman, and the telegraph operator at Springdale, were fellow servants, as the defendant company contends, or whether, by reason of the statute, they

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cannot be regarded as occupying that relation; this latter being the view which was entertained by the trial court. In the decision of this question, which turns entirely upon the construction of the local statute and a consideration of the purpose which underlies it, it will not aid materially to consider what would be the relation of the two employees in the absence of the statute. We accordingly pretermit any discussion of that question, being willing to concede, as counsel for the defendant in error concede, that but for the statute they would be fellow servants, within the federal adjudications on that subject and according to the doctrine which formerly prevailed in the state of Arkansas. The question now is, what rule did the legislature which enacted this statute intend to prescribe? What was the purpose of the enactment? When that purpose is discovered our duty is to give the statute the effect which it was intended to have, instead of nullifying it by construction.

It is well known to the profession that the fellow-servant doctrine, so termed, which was first enunciated in *Priestly v. Fowler*, 3 Mees. & W. 1, and in this country in *Farwell v. Railway Corp.*, 4 Metc. (Mass.) 49, 38 Am. Dec. 339, and in *Murray v. Railway Co.*, 1 McMul. 385, 36 Am. Dec. 268, although generally followed in the United States, has been applied, in some states, with important qualifications not recognized in other states. For example, it was early held in some states, and the rule is still adhered to, that persons in the employ of the same master are not fellow servants, although the labor that they respectively perform tends to the accomplishment of the same general object or enterprise which the employer has in view, provided they work in different departments of the service and do a different kind or class of work, which does not bring them into habitual association with each other. This qualification had become ingrafted, in several states, on the fellow-servant doctrine, as it was first enunciated, prior to the adoption of either the Arkansas or Texas statute. *Railroad Co. v. Moranda*, 93 Ill. 302, 34 Am. Rep. 168; *Stafford v. Railroad Co.*, 114 Ill. 244, 2 N. E. 185; *Railroad Co. v. Snyder*, 117 Ill. 376, 7 N. E. 604; *Cooper v. Mullins*, 30 Ga. 150, 76 Am. Dec. 638; *Railroad Co. v. Collins*, 2 Duv. 114, 87 Am. Dec. 486; *Madden's Adm'r v. Railway Co.*, 28 W. Va. 610, 621, 57 Am. Rep. 695; *Railroad Co. v. De Armond*, 86 Tenn. 73, 78, 5 S. W. 600, 6 Am. St. Rep. 816. The fellow-servant doctrine had also undergone a further modification in several states, prior to 1893, by the adoption in those states of what is known as the superior servant rule, in virtue of which two employees of the same master are not regarded as fellow servants if one is placed in a position of subordination under the other and is subject to his orders and control in such a way that the one exercising the power of control may reasonably be regarded as exercising the functions of the master. This doctrine once met with the approval of the supreme

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court of the United States (Railroad Co. v. Ross, 112 U. S. 377, 5 Sup. Ct. 184, 28 L. Ed. 787), and is upheld in many judicial opinions, as will appear by a reference to the cases cited under section 43 of McKinney, Fel. Serv. In view of the great contrariety of opinion prior to 1893, and the strong disposition manifested at that time, in some quarters, to modify the fellow-servant doctrine as at first enunciated, and in view of the fact that it had been modified in some states in the respects above mentioned, we have no doubt that it was the intention of the legislature of the state of Arkansas, when it enacted the statute above quoted, to adopt the departmental limitation of the fellow-servant doctrine, as well as the superior servant rule, to the full extent that these doctrines were then recognized in other states. No other reasonable view of the purpose of the lawmaker, in our judgment, can well be taken. Arkansas was one of the states whose courts, up to the time that this statute was enacted, had declined to adopt the departmental limitation or the superior servant doctrine. *Railway Co. v. Triplett*, 54 Ark. 289, 298, 15 S. W. 831, 16 S. W. 266; *Fones v. Phillips*, 39 Ark. 17, 43 Am. Rep. 264; *Railway Co. v. Shackelford*, 42 Ark. 417, 420. The legislature evidently proposed to effect some change in the law as it had been previously declared and enforced by the courts of that state, as otherwise there was no need of further legislation; and our conclusion, based upon the aforesaid considerations, as well as upon the language of the statute itself, is that it intended to adopt the superior servant rule, also to approve and adopt the departmental limitation of the fellow-servant doctrine.

It follows from what has been said that, in determining whether Furry and the telegraph operator at Springdale were fellow servants within the meaning and intent of the Arkansas statute, we must perforce give special weight to the adjudications in those states that have adopted both of the modifications of the fellow-servant doctrine above mentioned. Our attention has only been directed to one case (*Railroad Co. v. Becker*, 67 Ark. 1, 53 S. W. 406, 409, 46 L. R. A. 814, 77 Am. St. Rep. 78), where the local statute has been referred to at length and construed by the supreme court of the state of Arkansas, whose construction of the statute, as a matter of course, is binding upon this court. In that case the question arose whether a fireman on an engine and an inspector and repairer of engines at a divisional point were fellow servants within the terms of the statute. It appeared that when the engine on which the fireman worked was at the roundhouse, where the inspector was stationed, he and the inspector were under the orders of the roundhouse foreman in the mechanical department, and that both had certain duties to perform with respect to the engine; but while the fireman was on the road, he was in the operating department, although even then he was subject to be discharged by the roundhouse foreman. With reference to their relation the court said:

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"When Becker [the fireman] was at Thayer [the divisional point], his and Johnson's duties were different, and were not such as to associate and bring them together in their work, except casually, when they might work on Becker's engine at the same time, Becker cleaning and Johnson inspecting or repairing. They could not be said to have been working together, except when and so long as they were so casually engaged. Their working together was not sufficient to constitute them associates in labor any longer than it continued, no more than the casual meeting of individuals for short periods of time could constitute them associates. As they were not working together in the same department at the time the accident occurred, it follows that they were not fellow servants at the time when Becker was injured."

This extract from the opinion is important, in that it clearly indicates that, as the statute is understood and interpreted by the court which delivered the opinion, persons employed by a railroad corporation in the state of Arkansas are not fellow servants unless they habitually work together, that is, in juxtaposition, to a common purpose, nor unless they are employed in the same department. The language of the statute undoubtedly warrants this construction, because in one paragraph it declares that those are fellow servants "who are engaged in the common service * * * and * * * are working together to a common purpose," while the proviso to the same section declares that "nothing herein contained * * * shall be so construed as to make employees * * * fellow servants with other employees * * * engaged in any other department or service." Better language than this could hardly have been chosen to formulate the doctrine which prevails in Illinois, sometimes termed the "doctrine of consociation"; namely, that two persons in the service of the same master are not to be esteemed fellow servants unless their duties are such as to bring them into habitual association with each other, so that they will exercise a mutual influence upon each other, tending to inspire caution and insure each other's safety. *Steel Co. v. Shields*, 134 Ill. 209, 213, 25 N. E. 569; *Railway Co. v. Moranda*, 93 Ill. 302, 315, 34 Am. Rep. 168.

Turning to decisions in the state of Texas, which was the first to adopt the Arkansas statute, and whose decisions upon the act must, for that reason, be regarded as very persuasive, we find it to be held (*Railway Co. v. Whitlock* [Tex. Civ. App.] 41 S. W. 407) that an engineer on a road engine who ran his engine into a yard that was under the control of a yardmaster, for the purpose of taking out a train which had been made up, and who was injured by reason of the negligence of those employees in the yard whose duty it was to make up trains, might recover against his company, because the persons working in the yard, under the direction of the yardmaster, were not fellow-servants of the engineer, although,

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when the latter came into the yard with his engine, he passed, for the time being, under the jurisdiction of the yardmaster. This decision was based on the ground that the engineer and the persons employed in the yard were not "working together to a common purpose" in the statutory sense. In another case (*Railway Co. v. Harding* [Tex. Civ. App.] 33 S. W. 373), it was held that an engineer on a road locomotive, who was under the control of the yardmaster, and who ran into a railroad yard and was there injured, was not a fellow servant of employees in the yard, who were under the supervision of the yardmaster, because they did not work in the same department, and for the further reason that the engineer of the road engine and the yard men were not working together to a common purpose. It has also been held in that state that a member of a day crew, who were employed to unload ties which the members of a night crew removed, and who was injured by the falling of certain ties which the night crew had negligently left standing, was not a fellow servant of the members of the night crew, because they were not working together at the same time and place and to a common purpose. *Railroad Co. v. Echols* (Tex. Civ. App.) 41 S. W. 488, 491. See also *Railroad Co. v. Talley* (Tex. Civ. App.) 39 S. W. 206; *Mastersson v. Railway Co.* (Tex. Civ. App.) 42 S. W. 1001; *Railway Co. v. Warner* (Tex. Sup.) 35 S. W. 364.

Our attention has been directed to the fact that the words "working together," as employed in the Arkansas statute, are supplemented in the Texas statute (vide *Laws Tex.* 1893, p. 120), by the further words "at the same time and place"; but we are not able to regard this change of phraseology as warranting a different interpretation of the two statutes. It is most likely that the words "working together to a common purpose" were regarded as expressing the same rule intended to be expressed by the Texas statute, in a more concise form.

It is a circumstance worthy of notice that before the Arkansas statute was adopted it had been held in those states like Illinois, which accepted the fellow-servant doctrine only in a modified form, that a section man working on a railroad was not in the same department as a fireman or engineer, and hence that the two were not fellow servants (*Railroad Co. v. Moranda*, 93 Ill. 302, 34 Am. Rep. 168; *Railroad Co. v. Erickson*, 41 Neb. 1, 59 N. W. 347, 29 L. R. A. 137); that a station agent is not in the same department as a conductor (*Railroad Co. v. Snyder*, 117 Ill. 367, 7 N. E. 604); and that a telegraph operator and an engineer are not in the same department, and hence are not fellow servants (*Madden's Adm'r v. Railroad Co.*, 28 W. Va. 610, 621, 57 Am. Rep. 695; *Railroad Co. v. De Armond*, 86 Tenn. 73, 78, 5 S. W. 600, 6 Am. St. Rep. 816). In a recent case decided by the supreme court of the state of Tennessee, it is held that a conductor of a freight train, who assists in switching cars at a station, is not a fellow servant of the station agent, because they are employed in

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different departments of the service. *Railroad Co. v. Jackson* (Tenn.) 61 S. W. 771. Moreover, it has been decided in Ohio, which has adopted a statute somewhat like the Arkansas statute defining who are fellow servants, that, when the act speaks of "departments or branches of service," the term "department" should not be limited so as to include only those large divisions of work which may be created by a railroad company for its own convenience, but that the terms should be understood to refer to those more minute subdivisions of the work "which concern the daily duties of the employees"; and in accordance with that view it was held by the supreme court of Ohio that an engineer of one train was in a separate branch or department of the company's service from a brakeman of another train belonging to the same company. *Railroad Co. v. Margrat*, 51 Ohio St. 130, 37 N. E. 11, 14. See also *Railroad Co. v. Warner* (Tex. Sup.) 35 S. W. 364, 366, wherein it was said by the supreme court of Texas, "The words 'department' or 'service' [as used in the statute of that state] merely mean a subdivision of business, as running a train, clearing away a wreck, repairing a track," etc.

Without pursuing the subject at any greater length, we are forced to conclude that Furry and the defendant's telegraph operator at Springdale, by whose fault the collision was occasioned, were not fellow servants, because, within the meaning of the Arkansas statute, they were not "working together to a common purpose"; the work which they did being of an entirely different character, which only brought them together casually. We are also disposed to think that the two employees were not engaged in the same "department or service" of the corporation, within the true intent of the statute. As this was substantially the view which was entertained by the trial court, the judgment below is affirmed.

SANBORN, Circuit Judge (dissenting). I am unable to assent to the views expressed or the conclusion reached by the majority of the court, because in my opinion the local telegraph operator and the fireman were within the true meaning of the statute of Arkansas "working together to a common purpose,"—the purpose of operating the trains of the company,—and were engaged in the same "department or service," namely, the operating department or service, when the accident occurred. These are the reasons which have forced my mind to this conclusion:

1. The Arkansas statute was enacted in 1893. The terms "department" and "service" in that statute are obviously interchangeable, and have the same meaning. One who is in the same department is in the same service, and vice versa. The ordinary, usual, and accepted meaning of the term "department" in the state of Arkansas, when the statute was passed, as applied to the business of a railroad company, was one of the great natural divisions of that business, such as the operating department, the auditing department, or the legal

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department. It is probably not too venturesome a statement to say that, if all the people of that state had been separately requested to state the meaning of this term, more than 95 per cent. of those who answered at all, legislators and constituents alike, would have thus defined it. To the same extent the usual and accepted meaning of those employees who were "working together to a common purpose" for the same master was those who were working in the same department or service to accomplish the common end of the business of that department, to operate the railroad, to audit its accounts, or to protect the legal rights of the company.

2. This was the authoritative legal definition and meaning of these terms when this statute was enacted, a definition and a meaning which the decisions of the supreme court of the United States had expressly ascribed to them, while a decision of the supreme court of Arkansas had as clearly repudiated the theories of the courts of Illinois, Georgia, Kentucky, Tennessee, and Texas on this subject, which the majority now invoke. *Railroad Co. v. Baugh*, 149 U. S. 368, 384, 389, 13 Sup. Ct. 914, 37 L. Ed. 772; *Railway Co. v. Triplett*, 54 Ark. 289, 295, 296, 15 S. W. 831, 16 S. W. 266; *Railway Co. v. Conroy*, 175 U. S. 323, 337, 20 Sup. Ct. 85, 44 L. Ed. 181; *Railway Co. v. Peterson*, 162 U. S. 346, 355, 16 Sup. Ct. 843, 40 L. Ed. 994; *Oakes v. Mase*, 165 U. S. 363, 364, 17 Sup. Ct. 345, 41 L. Ed. 746; *Railway Co. v. Hambly*, 154 U. S. 349, 357, 14 Sup. Ct. 983, 38 L. Ed. 1009; *Railway Co. v. Frost*, 21 C. C. A. 186, 74 Fed. 965, 967; *Railway Co. v. Camp*, 13 C. C. A. 233, 65 Fed. 952-964; *McKaig v. Railway Co. (C. C.)* 42 Fed. 288-291; *Wright v. Railway Co. (C. C.)* 80 Fed. 261. The supreme court of the United States had said:

"All enter into the service of the same master, to further his interests in the one enterprise. Each knows when entering into that service that there is some risk of injury through the negligence of other employees, and that risk, which he knows exists, he assumes in entering into the employment.

* * * That the running of an engine by itself is not a separate branch of service seems perfectly clear. The fact is, all the locomotive engines of a railroad company are in the one department,—the operating department; and those employed in running them, whether as engineers or firemen, are engaged in a common employment, and are fellow servants." *Railroad Co. v. Baugh*, 149 U. S. 384, 389, 13 Sup. Ct. 914, 37 L. Ed. 772.

The supreme court of Arkansas had carefully considered and repudiated the theories of departments and consociation promulgated by the courts of Illinois, Georgia, Kentucky, and Tennessee, because, as that court said, "it leads to confusion and possible absurdities." *Railway Co. v. Triplett*, 54 Ark. 289, 295, 15 S. W. 831, 16 S. W. 266.

3. When the statute was passed there was no definite mean-

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ing to the terms in question other than that ascribed to them by the supreme court and generally accepted. The decisions in Illinois, Georgia, Kentucky, Tennessee, and Texas on this subject are inconsistent, confused, and irreconcilable. No rational definition of those "working together to a common purpose" or of the "same department or service" can be conceived that will reconcile them. Witness the decisions that an engineer of one train is not in the same department as a brakeman of another train employed by the same company (*Railroad Co. v. Margrat*, 51 Ohio St. 130, 37 N. E. 11); that an engineer who runs his engine into a yard where the other employees in the yard are engaged with him under the direction of the same yardmaster in making up his train was not "working together to a common purpose" with them (*Railway Co. v. Whitlock* [Tex. Civ. App.] 41 S. W. 407); and that the members of a day crew and the members of a night crew engaged in unloading ties were not working together at the same time and place to a common purpose (*Railroad Co. v. Echols* [Tex. Civ. App.] 41 S. W. 488, 491). In view of these decisions would not two men engaged under the same master in unloading cord wood by each lifting and removing a stick alternately be in different departments working to different purposes, because they would not both be engaged in unloading the same stick at the same time? It seems to me extremely improbable that the legislature of Arkansas left the authoritative legal definition and the usual and accepted meaning in that state of the two terms it used in this statute, wandered into other states, and adopted the confusing and uncertain conceptions of their meaning disclosed in these decisions in Illinois, Georgia, Kentucky, Tennessee, and Texas,—conceptions so impracticable that the courts of the states of Virginia and West Virginia, which once attempted to follow and enforce them, have reversed their rulings and repudiated them. *Jackson v. Railway Co.*, 43 W. Va. 381, 27 S. E. 278, 31 S. E. 258, 46 L. R. A. 337; *Railroad Co. v. Nuckol's Adm'r*, 91 Va. 193, 21 S. E. 342.

4. When this statute was enacted, then the ordinary, commonly accepted meaning in Arkansas, and the authoritative legal definition there, of the term "department," as applied to a railroad company, was: "One of the great divisions of its business; such as the operating department, the auditing department, the legal department,"—and the ordinarily accepted and the legal meaning of the term "those employed by the same master, working together to a common purpose," was: "Those working together to accomplish the common end sought to be attained in the department in which they were employed." In the absence of other definitions in the legislation of a state, the legal presumption is that the legislature used and intended to use the words and terms found in a statute in their usual sense at the time and place that the

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legislation was enacted. *Corning v. Board*, 42 C. C. A. 154, 157, 102 Fed. 57, 60. This statute gives no other definition of the words or terms in question,—no evidence of any intention of the legislature to change or modify their accustomed meaning; and the ordinary presumption of law is strengthened by the fact that the authoritative legal definition of the terms was the same as their commonly accepted meaning. These considerations persuade me to believe that the legislature intended to use, and did use, them in this sense in this statute.

5. Indulging for a moment the permissible assumption that this local telegraph operator and this fireman were working in their respective positions on the day this statute became a law, they were, just before it was enacted, "working together to a common purpose," the purpose of operating the railroad, in the same "department or service," the operating department or service, and they were fellow servants. *Railroad Co. v. Camp*, 13 C. C. A. 233, 65 Fed. 952, 954; *Railway Co. v. Clark*, 6 C. C. A. 281, 57 Fed. 125; *Railway Co. v. Frost*, 21 C. C. A. 186, 74 Fed. 965, 967. The statute was passed, but it did not change their relation. It nowhere asserted or intimated that they should not continue to be "working together to a common purpose." On the other hand, it expressly declared that those who were "working together to a common purpose" were fellow servants; and the operator and the fireman were so working. Is not the conclusion irresistible that they continued to be fellow servants? And as they were working in the same way and to the same purpose when the accident occurred, they were then fellow servants, by the express declaration of this statute. Continuing the indulgence of the assumption, these men were in the same department or service when the law passed, and there was nothing in it to divide their department or service, or to place them in different departments or different services. The only suggestion the statute contains on this subject is a proviso that "nothing herein contained shall be so construed as to make employees * * * fellow servants with other employees * * * engaged in any other department or service." This proviso had no application to these men, because they were in the same department or service, and were fellow servants, when it was passed. They were in the same department or service when the accident occurred, and neither the proviso nor the statute itself affected their relations to each other or to their master in this regard. For the reasons which have now been stated, this telegraph operator and this fireman were, in my opinion, fellow servants, within the true intent and meaning of the statute of Arkansas, when the fireman was injured, and the judgment below should be reversed upon that ground.

PLEDGER *v.* TEXAS CENT. RY. CO.*(Court of Civil Appeals of Texas, May 14, 1902.)*

[68 S. W. Rep. 516.]

Injury to Section Hand—Negligence—Instructions.

In an action by a section hand, who was lifting a heavy tie, to recover for injuries alleged to have resulted from the foreman's giving the command to drop the tie when plaintiff was in an unsafe position, an instruction that if plaintiff was injured "by any cause not in obedience to the express order of the defendant's foreman, given with full knowledge of plaintiff's situation," he could not recover, was erroneous, because of the use of the word "full."

Same—Knowledge of Peril.*

An allegation in the complaint that the foreman had knowledge of plaintiff's situation must be limited to actual knowledge, and the question whether he was negligent in failing to discover plaintiff's situation was not in the case.

Appeal from district court, McLennan county; Sam R. Scott, Judge.

Action by T. J. Pledger against the Texas Central Railway Company. Judgment for defendant, and plaintiff appeals. Reversed.

Geo. N. Denton, E. Bodell, and A. W. Cunningham, for appellant.

J. A. Kibler and Clark & Bolinger, for appellee.

FISHER, C. J. This is an action by appellant against appellee to recover damages by reason of the alleged negligence of appellee as follows: Appellant was working as a section hand, and was engaged with two collaborators in lifting a heavy tie, when the defendant's foreman gave the command to "heave her,"—being a command to drop the tie. The collaborators immediately dropped their end of the tie, whereby the appellant sustained the injuries complained of. At the time the command was given the appellant was in such position that he could not with safety to himself drop his end of the tie, which fact was known to the foreman. Verdict and judgment resulted in favor of the railway company.

Appellant's third assignment of error complains of the following charge: "If you find that the plaintiff was injured in any other manner, or by any cause which was not in obedience to the express order, if any, of the defendant's foreman, Mr. O'Brien, with full knowledge of plaintiff's situation at the time, then you will find for the defendant company." This charge is complained of because of the use of the expression "full knowledge." The plaintiff alleged that the command to drop the tie was given by the foreman with the knowledge

*See *St. Louis & S. W. R. Co. v. Threat* (Tex.), 3 Am. & Eng. R. Cas., N. S., 358; *Pierce v. Camden, etc., R. Co.* (N. J.), 5 Am. & Eng. R. Cas., N. S., 548; *Lawhorne v. Millen, etc., R. Co.* (Ga.), 5 Am. & Eng. R. Cas., N. S., 551; *Illinois, etc., R. Co. v. Ihlenberg* (C. C. A.), 5 Am. & Eng. R. Cas., N. S., 573; *Broslin v. Kansas City, M. & B. R. Co.* (Ala.), 9 Am. & Eng. R. Cas., N. S., 99.

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of the plaintiff's dangerous situation. There is a conflict in the evidence whether the command was given, and, if so given, whether it was with knowledge upon the part of the foreman of the dangerous situation of the plaintiff. The word "full" has a tendency to convey the idea that the knowledge possessed by the foreman of the dangerous situation was perfect; that it embraced a degree of knowledge to the utmost extent. As a matter of fact, the foreman might have possessed knowledge of the dangerous situation of the plaintiff without being so perfect and complete that the mind would necessarily grasp, contemplate, and consider all of the facts necessary to constitute a perfect and complete knowledge of the plaintiff's situation. All the elements of danger which arose from the plaintiff's situation might not have been apparent, but the foreman, from his point of observation, may have possessed some knowledge, from the situation of the plaintiff, that obedience to the command might result in injury. We are not unmindful of what the appellee says concerning this charge in response to the contention urged by appellant under his assignments. We think the charge was calculated to convey to the mind of the jury that full knowledge by the foreman of plaintiff's perilous situation was essential in order for plaintiff to recover, and we are of the opinion that the charge was erroneous, and for this reason the judgment will be reversed.

We are somewhat inclined to the view that there was a too frequent repetition in the charge of the theory of the case submitted by the court concerning the question of knowledge which would excuse the appellee from liability. This is complained of in appellant's first and second assignments of error.

The charge complained of in the seventh assignment of error, in view of the grounds of negligence alleged by the plaintiff and presented by the charge of the court, was correct. We construe the plaintiff's allegations to be that the foreman had actual knowledge of the dangerous situation of the plaintiff at the time that the alleged order was given. The charge complained of instructs the jury that, if the foreman did not know of the actual situation as to the danger of the plaintiff, then the latter could not recover. The purpose of this charge evidently was to take from the jury the right to consider whatever facts there might have been in evidence tending to show that the foreman had constructive notice or knowledge of the dangerous situation of the plaintiff. The distinct ground of negligence alleged, as we construe the averments, is that the foreman had knowledge of the situation of the plaintiff; and, in our opinion, this averment must be limited to actual knowledge. The fact that the foreman could have, by the exercise of ordinary diligence, discovered the dangerous situation of plaintiff, was not alleged as negligence. Giving the order to drop the tie, with an actual knowledge upon the part of the foreman of the dangerous

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situation of the plaintiff, as a ground of negligence to authorize a recovery, does not include and embrace as an act of negligence the failure of the foreman to discover the dangerous situation of the plaintiff. The charge complained of in appellant's seventh assignment of error is in accord with the rule announced in *Railway Co. v. Bingham*, 90 Tex. 225, 38 S. W. 162.

For the error pointed out, the judgment is reversed, and the cause remanded. Reversed and remanded.

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(*Supreme Court of Oregon, April 7, 1902.*)

[68 Pac. Rep. 426.]

Killing of Employee—Assumption of Risk*—Pleading.

In an action for the death of an employee, the answer need not allege that he assumed the risk that caused his injury, if the hazard was ordinary.

Same—Same—Coupling Cars.

A railroad employee was used to coupling flat cars loaded with iron rails, which usually shift in transit. In an action for his death, it appears that, while thus employed, a flat car was "kicked" toward a loaded car, and, while endeavoring to couple them, he was caught between the projecting rails and the moving car. No one saw the accident, but it occurred before sunset, and his view of the cars was unobstructed, though what his position was before the cars came together was not shown. It was apparent that he must have stooped to avoid the danger at the time of the accident: *held*, that it was an ordinary risk of his employment, which he had assumed.

Appeal from circuit court, Multnomah county; Alfred F. Sears, Jr., Judge.

Action by Jane Tucker, administratrix of James A. Tucker, deceased, against the Northern Pacific Terminal Company. Plaintiff was nonsuited, and she appeals. Affirmed.

This is an action by Jane Tucker, as administratrix of the estate of James A. Tucker, deceased, against the Northern Pacific Terminal Company, a corporation, to recover damages for a personal injury sustained by her intestate, causing his death. The plaintiff alleges, in substance, that the defendant is in possession of a railroad terminal yard in Portland, Or., and engaged, among other things, in repairing freight cars, readjusting their loads, and in making up trains; that on July 10, 1899, it received from the Southern Pacific Company a freight car in a damaged condition, loaded with iron rails, which had shifted, so that their ends extended over the end of the car from one to three feet; that the company repaired the car but did not rearrange its load, and four days later,

*See *Middle Georgia & A. Ry. Co. v. Barnett*, 12 Am. & Eng. R. Cas., N. S., 532, and note at end of case. Also, see *Railroad Co. v. Hennedey*, 38 C. C. A. 314, and *Choctaw, O. & G. R. Co. v. Holloway*, 114 Fed. 458.

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knowing the condition of the car and its load, and that any attempt to couple it to another car would expose a switchman to unnecessary danger, carelessly ordered James A. Tucker, a car coupler and switchman in its employ, to make such coupling; that, not knowing, and unable to ascertain, the distance which the rails extended, unconscious of the danger to which he was exposed, and in pursuance of the command, he undertook to make the coupling, and while thus engaged, and in the exercise of due care, his head was caught between the projecting rail and an iron guard upon the rear end of the approaching car, and so crushed that he died in a few minutes; that the injury was caused by the negligence of the defendant, without any fault or want of due care, skill, prudence, or caution on the part of the deceased. The answer after denying the material allegations of the complaint alleges, in effect, among other things, that it was the business of the defendant to receive cars from railroads terminating in its yard to be made up into trains; that cars loaded with iron rails are frequently received by it, and inspected by persons appointed for that purpose by the railroad companies whose lines of railway connect with its yard, over whose acts the defendant has no control, whose duty it is to inspect the loads upon cars so received by the defendant, and, if found to be in an unsafe or dangerous condition, the inspector should refuse to accept such car, until the load thereon was properly adjusted by the railroad company delivering it; that, while James A. Tucker was employed as a switchman and car coupler, cars loaded with iron rails were frequently received, and in most cases the ends of the rails extended more or less past the end of the car, and such projection is not an unsafe method of loading, if the extended rails do not come in contact with the next car in the train, which fact Tucker well knew, and he was in the habit of coupling cars with loads in substantially the same condition as the car in question; that such cars can be safely coupled by stooping below the projecting rails, which fact he well knew, and that neither he nor any other car coupler was required to make such coupling, if in his judgment he could not do so with safety. That some of the rails on this car extended over the end, but none more than 24 inches, and in such condition the car was not dangerous, and was accepted by the inspector for the Northern Pacific Railway Company, over whose lines it was to be transported; that when a car approaching the car so loaded had reached a point near enough to be coupled to it, Tucker stooped to make the coupling, but carelessly and negligently failed to stoop low enough to permit the rails to pass over his head, and when the cars came together he sustained the injury causing his death, which is the same injury and death mentioned in the complaint; that the injury was caused solely by the negligence and want of attention on the part of Tucker, and without any fault or negligence of the defendant. The averments

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of new matter in the answer having been put in issue by the reply, the plaintiff introduced her testimony and rested, whereupon the court granted a judgment of nonsuit, and she appeals.

E. B. Watson, for appellant.

Rufus Malory, for respondent.

MOORE, J. (after stating the facts). The question to be considered is whether the testimony introduced at the trial, aided by presumptions based thereon and deducible inferences, was sufficient to require the submission of the cause to the jury. An examination of the bill of exceptions shows that Tucker, at the time of his death, was 23 years old, and for more than a year prior thereto had been employed by the defendant in its yard as a switchman and car coupler; that the defendant owns in Portland, Or., a terminal yard, consisting of a series of railway and side tracks, with which are connected lines of railway, operated respectively by the Northern Pacific Railway Company, the Oregon Railway & Navigation Company, and the Southern Pacific Company, and is engaged in receiving into its yard from said railway companies cars which are uncoupled, and when they are returned or hauled over either of the other lines of railway are made up into trains by the defendant's servants; that on July 10, 1899, the defendant received from the Southern Pacific Company a flat car, 30 feet in length, loaded with iron rails of the same length, which car was to be shipped over the line of the Northern Pacific Railway Company. This car, being out of order when so received, was repaired by the defendant, and set out on one of its side tracks, to be made up into a train for its destination. A flat car, with an automatic coupler, was "kicked" down, to be coupled to the loaded car, which had a common drawhead. No witness was called who saw Tucker when he attempted to make the coupling, so that the manner of his injury is to be inferred from the circumstances. The side track at the scene of the accident runs north and south, at the west side of which his body was found, with the head crushed. In the patent drawhead a coupling link was found fastened, the other end of which was entered in the common drawhead, the pin in the latter having fallen over, and one of the iron rails, extending over the end of the car 29 inches, came within about 3 or 4 inches of an iron cleat surrounding a stake pocket on the end of the car "kicked" down, and blood was discovered upon the end of the projecting rail, and upon this clamp, thus tending to show that the near approach of these blood-marked objects probably caused his death. The testimony also shows that railroad rails shipped on cars usually shift in transit, so that they extend over the end of the car 18 inches or more, and that the only safe way in which a car in this condition can be coupled is by the switchman stooping, so that the rails may pass over his head. The

intestate having been killed at about 7 o'clock p. m., before sunset, and at a point where his view of the cars to be coupled was unobstructed, the question is, assuming from a contemplation of the foregoing testimony, which is a fair resume of that given at the trial, that the defendant was guilty of negligence in not readjusting the rails, was Tucker also guilty of negligence contributing to his injury, and, if so, was the evidence of his want of care so conclusive that the court could, as a matter of law, take the question from the consideration of the jury? The rule is settled in this state that it is unnecessary for a plaintiff, in a complaint in an action to recover damages for a personal injury, to allege or affirmatively show at the trial that he was free from negligence; but if it should appear from his own proof, offered for the purpose of establishing the defendant's negligence, that he was also guilty of negligence, without which the injury complained of would not have occurred, such proof will defeat a recovery. *Grant v. Baker*, 12 Or. 329, 7 Pac. 318; *Scott v. Navigation Co.*, 14 Or. 211, 13 Pac. 98; *Johnston v. Railway Co.*, 23 Or. 99, 31 Pac. 283. The defense of contributory negligence is made upon the theory that, notwithstanding the defendant has been guilty of negligence, the person injured has also been guilty thereof, and, as the law will not measure the degrees of wrong where each party is guilty, the plaintiff cannot recover. The answer denies that the defendant was guilty of any negligence, and avers that the intestate's death was caused by his carelessness and want of attention. It is impossible to say from an inspection of the testimony, or from a consideration of the circumstances attending Tucker's death, whether he had been following the flat car that was "kicked" down, or was standing at the loaded car waiting to make the coupling at the instant of contact. If he occupied the latter position, he would undoubtedly have had sufficient time, and, the sun not having set, ample opportunity, to inspect the car near which he was standing, and, having had experience in coupling cars on which the rails had slipped in this manner, he must have known that he could successfully perform the duty required of him only by stooping, so that the rails might pass over his head when he effected the coupling, and, if he failed to bend forward low enough, the fault was his, and necessarily defeats a recovery. It might be inferred, from the fact that the coupling link was found fastened in the automatic coupler, but not pinned in the common drawhead, that Tucker had inserted the link in the approaching car which he was accompanying, and in the hurry incident to the performance of his dangerous work did not see the shifted rails, and was not conscious of his extreme peril until too late to stoop low enough to permit the protruding obstacles to pass over his head. That he was stooping when he sustained the injury is evident from the testimony, which shows that, if he had been standing erect when attempting to make the coupling, the projecting rail

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would have struck his breast instead of his head. The fact that the coupling link was entered in the common drawhead would seem to refute the inference that he was unconscious of the danger to which he was exposed, for, if he had been following the approaching car until he saw the extended rails, his effort to escape the impending danger would probably have prevented him from attempting, as he must have done, to enter the link in the common drawhead. Another circumstance that seems irresistibly to lead to the conclusion that Tucker must have thought that he stooped low enough to avoid injury is the fact that the bed of the car loaded with iron rails must have been lower than that of the car to which it was to be coupled, for it will be remembered that his head was injured by being between the iron rail and the stake pocket; and, if the cars had been of the same height, the rails would have passed over the deck of the approaching car, so that he may have reasonably supposed, in the hurry of the work, that, his head being below the end of the car that had been "kicked" back, he was out of all danger. Assuming, without deciding, that the defendant was guilty in not readjusting the load, it would seem that the plaintiff's intestate was also guilty of negligence contributing to his injury, in that he did not stoop low enough.

It may be suggested that it was incumbent upon the jury, and not within the province of the court, to deduce inferences of fact from the circumstances attending the injury, in view of which it is deemed proper to consider the question of Tucker's assumption of the risk, in case any error may have occurred in reaching the conclusion that he was guilty of contributory negligence. The plea of an assumption of risk is a defense in which, if the injury results from a peril ordinarily incident to the employment, the question whether the servant was in the execution of due care at the time he sustained the injury is wholly immaterial. *Railway Co. v. Husson*, 101 Pa. 1, 47 Am. Rep. 690. It is not alleged in the answer that plaintiff's intestate assumed the risk that caused his injury, and such averment is unnecessary, if the hazard was ordinary, for the rule of the common law is that when a servant, of suitable age and sufficient intelligence, enters into the employ of the master, he is presumed to understand, and, therefore, in consideration of the rate of compensation agreed to be paid, voluntarily assumes, all the risks ordinarily incident to the business in which he engages (*Johnston v. Railway Co.*, supra; *Brown v. Lumber Co.*, 24 Or. 315, 33 Pac. 557; *Snow v. Railway Co.*, 8 Allen, 441, 85 Am. Dec. 720; *Hare v. McIntire*, 82 Me. 240, 19 Atl. 453, 8 L. R. A. 450, 17 Am. St. Rep. 476; *Wonder v. Railway Co.*, 32 Md. 411, 3 Am. Rep. 143); and whenever the law presumes a fact, it is not necessary to aver the same in a pleading. *Bliss*, Code Pl. (3d Ed.) § 175. The rule appears to be otherwise, however, in respect to extraordinary risks, in which case the servant's

assumption thereof, to be available as a waiver, must be affirmatively alleged in the answer. *Mayes v. Railway Co.*, 63 Iowa, 562, 14 N. W. 340, 19 N. W. 680; *Fisher v. Lead Co.*, 156 Mo. 479, 56 S. W. 1107; *Stock Yards v. Goodwin*, 57 Neb. 138, 77 N. W. 357; *Lloyd v. Hanes*, 126 N. C. 359, 35 S. E. 611; *Lee v. Mills Co.*, 21 R. I. 322, 43 Atl. 536. "The waiver of the negligence of the defendant," says Mr. Justice Beck, in *Wells v. Railway Co.*, 56 Iowa, 520, 9 N. W. 364, "places the case in the same position as though the defendant had not been negligent; and without the negligence of the defendant there can be no recovery." The servant's assumption of extraordinary risks is a waiver in advance of all claims for damage that may arise in consequence of the master's negligence, and, as a plea of such fact admits a right of action in the servant, but seeks to avoid recovery by reason of the waiver, it seems to be necessary to allege such defense, if relied upon. The important question to be considered is whether the shifting of iron rails in transit, so that they project beyond the end of the car on which they are loaded, creates an extraordinary risk. "The ordinary risks of a particular business," say *Shearman and Redfield* in their work on *Negligence* (5th Ed.) § 185, "are those which are part of the natural and ordinary method of conducting that business, even though they might fairly be called extraordinary with reference to a different business, or a different department of the same business." In *Jackson v. Railway Co.*, 104 Mo. 448, 16 S. W. 413, it was held that when a railroad company is in the habit of receiving and transporting cars laden with timbers and iron rails projecting over the ends of the cars, the risk arising therefrom is the ordinary one assumed by a brakeman engaged in the company's service. Mr. Justice Black, speaking for the court, says: "The business of a brakeman is beset with many dangers which are incident to his business, and these risks arising from the cars loaded with projecting timbers and rails are risks incident to this particular business, and as to that business are not extraordinary." In *Railway Co. v. Husson*, supra, a brakeman was killed in coupling cars by having his head crushed between the ends of bridge irons projecting beyond the ends of the cars on which they were loaded, and, it appearing that he was aware of a regulation of the company requiring persons coupling such cars to stoop for that purpose, it was held that the risk run by the brakeman was not extraordinary. In *Railroad Co. v. Plunkett*, 25 Kan. 188, it was held that where a railroad company is in the habit of receiving cars from other roads loaded with timbers projecting over the ends of the cars, so as to make it dangerous for any one except a careful, skillful, and prudent person to attempt to couple the cars together, it is not negligence for the railroad company to order and permit such a person, who has been in the employ of the railroad company doing that kind of business for about five months, to attempt to make

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such a coupling, where the attempt is made in broad daylight, although it may be raining at the time. In *Boyle v. Railway Co.*, 151 Mass. 102, 23 N. E. 827, the plaintiff's intestate, in attempting to couple cars, had his head crushed by projecting timber, and, the injury having occurred in daylight, it was held that he assumed the risk, and that no recovery could be had. In *Day v. Railway Co.*, 42 Mich. 523, 4 N. W. 203, a brakeman, in stooping to couple cars, had his fingers injured by the coupling link, caused by lumber projecting beyond the end of the car, and it was held that the injury resulted from one of the risks incident to his occupation, and that no error was committed in taking the case from the jury. In *Railway Co. v. Gower*, 85 Tenn. 465, 3 S. W. 824, a brakeman, in coupling cars having been injured by lumber projecting beyond the end of the car, brought an action against the railway company for the damages sustained, and it was held that the risk, being necessarily incident to the business of railroad transportation, was assumed by him, and that no recovery could be had. In *Railway Co. v. Shean* (Tex. Sup.) 18 S. W. 151, an experienced switchman, having charge of an engine and its movements, undertook, without objection, to couple a flat car, with its load projecting over the end, to a box car, knowing the dangerous way in which it was loaded, and, having been injured in the performance of his duty, he brought an action to recover the damages sustained, but it was held that he had assumed the risk, and could not recover. For authorities to the effect that a brakeman in coupling cars on which the load projects beyond the end of the car assumes the risk incident to the service, see *Ely v. Railway Co.* (Tex. Civ. App.) 40 S. W. 174; *Brennan v. Railway Co.* (Mich.) 53 N. W. 358; *Railway Co. v. Black*, 88 Ill. 112; *Scott v. Navigation Co.*, supra. The reason upon which the principle rests that material projecting beyond the end of the car is a risk ordinarily incident to the business of a brakeman is thus succinctly put by Mr. Justice Snodgrass, in *Railway Co. v. Gower*, supra, in which he says: "Lumber of all kinds, iron, steel, and finished structures must often necessarily be transported on cars of shorter length than the material to be transported. It may not be practicable or proper to solidify the train by loading upon connected cars, and it must, of necessity, result that this loading will project, and still the cars require to be coupled. To hold that such a service is not to be anticipated by a railroad employee as an occasional, incidental, though extremely hazardous duty to be performed, would be to do so in manifest disregard of the demands of the age upon transportation lines, and their common and well-understood service in conformity to such requirements." It is contended by plaintiff's counsel that this rule has no application to material which, when carefully loaded, would not extend beyond the ends of the car, and that, the car in question being of the same length as the rails which were loaded

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thereon, no necessity existed for any projection of the rails, and that such extension, caused by the shifting of the rails, was not an ordinary risk incident to the business of coupling cars, and hence the court erred in not submitting the cause to the jury. In *Corbin v. Railway Co.*, 64 Minn. 185, 66 N. W. 271, a brakeman in the defendant's employ having been killed while coupling cars, one of which was loaded with steel rails that projected over the end of the car due to careless loading or resulting from displacement while in transit, the administrator of his estate brought an action to recover the damages sustained, and, having secured judgment therefor, the company appealed. The evidence showed that the brakeman knew that the rails projected; that he saw the conductor who had charge of the train uncouple the car in question by stooping below the rails, and was cautioned by him to "look out for that car, as the rails stick over"; that the deceased stooped and made the coupling, but raised his head a second too soon, and a trifle too high, whereupon he was immediately pinned against the adjoining car by the extended rail. It also appeared that material of this character often shifted in transit, and when it extended so far as to interfere with the adjoining car its transportation became dangerous, and it was the custom to reload the car or to side-track it for that purpose; and that, the conductor having knowledge of the condition of the rails on the car, the company had notice thereof, and it was held that the court could not say as a matter of law that the defendant was not negligent in permitting the car to remain in the train, and that the question of the brakeman's contributory negligence was properly submitted to the jury. Mr. Justice Collins, in speaking of the extension of the rails, says: "It is to be remembered that this is not a case where, from the size or shape of the articles carried, they must of necessity project over one or both ends of a car, as will heavy sticks of timber, or heavy castings, or threshing machines, but it is a case where the load is capable of being placed so that no part of it will extend beyond the deck of the car; and that, if the ends of the rails do project, it is because of careless loading, or is the result of displacement in transit; and, further, that such displacement is not an uncommon occurrence,—in fact, according to defendant's witnesses, it is to be expected. It is also to be noticed that, according to these same witnesses, whenever such material projected so far as to endanger an adjoining car, it was customary to put the rails in place, either by moving them by hand, or by pushing them back, using heavy timbers and a locomotive,—'butting' them, as one witness expressed it." In that case no question of assumption of risk was considered, the decision being put upon the alleged negligence of the defendant and the contributory negligence of the plaintiff's intestate. In *Scott v. Navigation Co.*, supra, the plaintiff, a brakeman, having been injured in coupling a car loaded with iron rails

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that extended over the end of the car, secured a judgment against the defendant for the damages sustained, in reversing which Mr. Justice Thayer, in speaking of the plaintiff's employment as an experienced switchman and car coupler, says: "When he engaged in the company's service in that capacity, he assumed all the ordinary risks incident thereto; and, unless the company subjected him to unnecessary danger, it was not liable. This was the gist of the action, and he had no right to have his case submitted to the jury without first proving that the company did subject him to extraordinary risks in the affair, and that his injuries were received as the direct consequence thereof." The decision, however, seems to rest upon the principle of contributory negligence, the majority of the court holding that, as the plaintiff had the right to inspect the car in question, and to refuse to couple it if he found the load thereon dangerous, and not having reported to the foreman in charge of the defendant's yard the condition of the car, he was not free from negligence, nor was the defendant guilty of such negligence as rendered it liable, and that a judgment of nonsuit should have been given. Mr. Chief Justice Lord, in a dissenting opinion, intimates that the rails having shifted on the car in transit was an unusual occurrence, and created an extraordinary risk.

It will be remembered that the defendant is not engaged in operating a line of railway, but in receiving and switching cars, and in coupling them up into trains. The size of its yard, and the length and number of its tracks, are not disclosed by the evidence; and while the care demanded of it in the performance of its business is commensurate with the danger incurred, the same degree of care cannot, upon principle, be required of it as is exacted of a railway company engaged in general transportation business, in which case its trains are moved upon schedule time necessitating hasty coupling and uncoupling of cars at stations, whereby brakemen have not the opportunity for careful observation of the instrumentalities with which they are engaged, nor the time for deliberate action, which switching in a terminal yard affords. In the latter case, the danger incident to coupling cars evidently being less imminent, what might be considered as an extraordinary risk in the coupling of cars at a way station on the line of railroad, where hasty action on the part of the brakeman is demanded, would not be so regarded in coupling cars in a terminal yard. The evidence shows that iron rails shipped on flat cars usually shift in transit, and that a car upon which they have been displaced in this manner can only be coupled safely by the brakeman stooping below the projecting rails and allowing them to pass over his head when the cars come together. The shifting of the rails being usual, the risk incident to coupling cars on which such load has shifted is ordinary, particularly so in a terminal yard. The plaintiff's intestate was an experienced switchman and car coupler, and

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that he must have seen the protruding rails and been conscious of the danger to which he was exposed is evident from the location of the injury, which conclusively demonstrates that he was stooping, as necessity demanded, when he attempted to make the coupling. We think, as to the service demanded of him, that the risk was ordinary, and one which he assumed on entering upon the discharge of his duty, and, this being so, no error was committed in granting the nonsuit.

It follows that the judgment is affirmed.

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(*Circuit Court of Appeals, Eighth Circuit, March 31, 1902.*)

[114 Fed. Rep. 458.]

Negligence of Master—Ordinary Care.

It is error to instruct a jury that it is the duty of the master to provide reasonably safe appliances, tools, or working places for his servants, or to keep them in a reasonably safe condition of repair. The limit of the duty of the master is to exercise ordinary and reasonable care, having regard to the hazards of the service, to provide his employees with reasonably safe appliances, machinery, tools, and working places, and to exercise ordinary and reasonable care to keep them in a reasonably safe condition of repair.

Error—Prejudice Presumed from.*

The legal presumption is that error produces prejudice. It is only when it appears beyond all doubt from the record that the error complained of did not prejudice and could not have prejudiced the complaining party that the rule that error without prejudice is no ground for reversal is applicable.

Error without Prejudice.

Where the court rightly charges the jury, on the conceded facts, that the master was negligent, as a matter of law, an erroneous charge relative to the degree of care required of the master appears beyond all doubt to be error without prejudice, because no question of the negligence of the master was submitted to the jury for their determination.

Master and Servant—Duty of Servant—Assumption of Risk.†

The servant assumes all the ordinary risks of the employment which are known to him, and which would have been known, by the exercise of ordinary care, to a person of reasonable prudence and diligence in his situation. It is his duty to exercise ordinary care and diligence to observe and become cognizant of obvious defects in the machinery and working place; and he is chargeable with a knowledge and assumption of the risk of all such defects which are known to him, or which would have been known by the use of ordinary care to a person of reasonable prudence and diligence in his situation.

Verdict—Sufficiency of Evidence—Inspection.

The court may not reverse a judgment because there was no evidence to support a finding of fact by a jury based upon testimony and an ocular inspection of machinery, a knowledge of the defects of which is

*Duty of railroad company to furnish safe appliances, see note to *Felton v. Bullard*, 37 C. C. A. 8. See *Bussey v. Charleston & W. C. R. Co.*, 11 Am. & Eng. R. Cas., N. S., 475, and note at end of case.

†See *Middle Georgia & A. Ry. Co. v. Barnett*, 12 Am. & Eng. R. Cas., N. S., 532, and note at end of case. Also, see *Railroad Co. v. Hennessy*, 38 C. C. A. 314.

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in issue, because the evidence derived from the inspection is not, and cannot be, presented to the appellate court for consideration.

Negligence—Concurrence of Third Party No Excuse for.

One is liable for an injury caused by the concurring negligence of himself and a third party to the same extent as for one caused entirely by his own negligence.

Injury to Employee—Negligence—Failure to Provide Brakes.

The failure to provide an ordinary road engine with brakes, in the absence of evidence excusing it, is, as a matter of law, evidence of the want of reasonable care to provide a reasonably safe locomotive engine to operate upon a railroad.

Same—Proximate Cause of Collision—Absence of Brakes on Engine May Be.

Collisions and accidents may be reasonably anticipated as the natural and probable consequence of the failure to provide brakes to control the movements of road engines.

Same—Contributory Negligence—Assumption of Known Risks.

Contributory negligence regarding, or assumption by a servant of, known risks, will not constitute contributory negligence regarding, or the assumption of, an unknown risk, nor a defense for the master whose negligence produces it. A servant knew and assumed the risks of running an engine backward, tender foremost, in the night, without any light or employee on the forward end of the tender: *held*, that his contributory negligence and assumption of risks in this regard constituted no defense to his action against the master for negligence in failing to supply the engine with brakes, where he did not know, and a person of reasonable prudence and discretion, exercising ordinary care, would not, in his situation, have known, of the absence of the brakes.

(Syllabus by the Court.)

In Error to the Circuit Court of the United States for the Eastern District of Arkansas.

In the early morning of October 30, 1900, while it was yet dark, a road engine of the Choctaw, Oklahoma & Gulf Railroad Company collided with a horse which was caught in a trestle as the engine was backing, tender foremost, from Brinkley to Hulbert, and injured Will Holloway, the defendant in error. There was no light on the forward end of the tender, and no employee there to warn of danger. There was no brake on the engine, although there was a brake upon the tender. Holloway was a fireman working on the engine. He was aware of the darkness of the night, of the absence of a light and of an employee upon the end of the tender, but he insisted that he did not know that there was no brake upon the engine. He sued the company for negligence, in that it failed to supply the engine with a proper brake; alleged that the accident would not have occurred if such a brake had been provided, and that through its absence he was caught between the tender and the engine when the air was applied to the brake upon the tender, and seriously injured. The court instructed the jury that if there was no brake upon the engine, and Holloway did not know, and would not by the exercise of reasonable diligence and prudence have known, that the engine was supplied with a brake, and if the absence of the brake caused the accident, the company was liable, and they might return a verdict against it, but that, if there was a

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failure of proof of either of these facts, their verdict must be for the defendant. This instruction, and the refusal of the court to instruct the jury to return a verdict for the defendant, are the principal errors assigned by the company, although many others are specified.

E. B. Peirce and C. B. Stuart (J. W. McLoud, on the brief), for plaintiff in error.

J. W. House (M. House, on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge, after stating the case as above, delivered the opinion of the court.

Actionable negligence is a breach of duty. Where there is no breach of duty, there is no negligence, and there can be no recovery. It is not the duty of the master to furnish his servants with reasonably safe appliances, machinery, tools, or working places, or to keep them in a reasonably safe condition of repair. His failure to do so is not the breach of any duty, and it furnishes no basis for an action of negligence. The limit of his duty here is to exercise ordinary and reasonable care, having regard to the hazards of the service, to provide his employees with reasonably safe appliances, machinery, tools, and working places, and to exercise ordinary and reasonable care to keep them in a reasonably safe condition of repair. *Railway Co. v. Jarvi*, 3 C. C. A. 433, 435, 436, 53 Fed. 65, 67, 68; *Gowen v. Harley*, 6 C. C. A. 190, 197, 56 Fed. 973, 980; *Railway Co. v. Linney*, 7 C. C. A. 656, 660, 59 Fed. 45, 48; *Railway Co. v. Needham*, 69 Fed. 823, 825, 16 C. C. A. 457, 459; *Railroad Co. v. Johnson*, 81 Fed. 679, 680, 27 C. C. A. 367, 368; *Railroad Co. v. Myers*, 11 C. C. A. 439, 63 Fed. 793; *Id.*, 22 C. C. A. 269, 76 Fed. 443. A servant may assume that his master has discharged this duty, unless he knows, or by the exercise of reasonable care he would have known, that the duty had not been discharged, and that there were defects in the machinery and appliances with which, or in the place in which, he undertakes to work. On the other hand, the servant assumes all the ordinary risks and dangers of the employment upon which he enters, so far as they are known to him, and so far as they would have been known to a person of ordinary prudence and care by the exercise of ordinary diligence. He is not required to search for latent defects or hidden dangers, but it is his duty to exercise reasonable diligence to observe and be cognizant of all obvious defects in the machinery and appliances with which he is working; and he assumes the risks and dangers of all such defects of which he has knowledge, and of which he would have had knowledge by the exercise of ordinary care and diligence. *Manufacturing Co. v. Erickson*, 55 Fed. 943, 946, 5 C. C. A. 341, 344; *Fordyce v. Edwards*, 60

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Ark. 438, 442, 30 S. W. 759; Anderson v. Railway Co., 39 Minn. 523, 41 N. W. 104; Railroad Co. v. Leverett, 48 Ark. 347, 3 S. W. 50, 3 Am. St. Rep. 230; Wormell v. Railroad Co., 79 Me. 405, 10 Atl. 49, 1 Am. St. Rep. 321; Way v. Railroad Co., 40 Iowa, 341; Batterson v. Railway, 53 Mich. 125, 18 N. W. 584; Illick v. Railway Co., 67 Mich. 632, 35 N. W. 708; Morton v. Railroad Co., 81 Mich. 435, 46 N. W. 111.

The plaintiff in this case alleged that his injury was caused by the failure of the railroad company to provide the engine upon which he was working as fireman with suitable brakes to arrest its motion when occasion required. The court charged the jury that if there was no brake upon the engine, if the absence of the brake caused the injury, and if the plaintiff was not aware of the fact that the engine was not provided with a brake, and if a person of ordinary prudence, exercising reasonable care, would not, under the circumstances of this case, have been aware of this fact, they might render a verdict against the company. It is contended that this charge was erroneous, (1) because there was no substantial evidence to warrant the finding of the jury that the plaintiff did not know, or by the exercise of ordinary care would not have known, of the absence of the brake; (2) because there was no substantial evidence to warrant their finding that the injury could have been avoided by the presence of the brake upon the engine; and (3) because there was no substantial evidence to warrant the finding that the absence of the brake was the proximate cause of the injury. A careful and painstaking examination of the testimony has satisfied us, however, that this position cannot be sustained. The plaintiff testifies that he was not aware that the engine was not furnished with a brake. Another witness, who was employed about the engine as a brakeman for some time, demonstrates by his testimony that he did not know whether there was a brake on the engine or not; and the jury made an ocular inspection of an engine of the same character as that upon which the accident occurred, for the express purpose of determining this question, and they found this issue in favor of the plaintiff. The knowledge upon this question which an inspection of the engine conveyed to the minds of the jurors is not, and cannot be, presented to this court by the record; and we cannot undertake to say that all reasonable men, with the testimony and the knowledge which this jury lawfully acquired, would necessarily come to a conclusion contrary to that which these jurors have reached. McReynolds v. Railway Co., 14 Am. & Eng. R. R. Cas. 172, 174; Railroad Co. v. Hopkins, 90 Ill. 323.

Upon the question whether or not the engine could have been stopped after knowledge of the presence of the horse in the trestle in time to prevent the accident, the testimony was not so clear that it was the duty of the court to withdraw this issue from the jury. Nor can it be properly said, as a matter

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of law, that the absence of this brake was not the proximate cause of the injury. It is undoubtedly true that one of the proximate causes of the accident was the negligence of the party who permitted the horse to stray into the trestle. But if the injury would not have been inflicted if there had been a brake upon the engine, it cannot be truthfully said that the absence of this brake was not another of the proximate causes of the damage, inasmuch as the accident would not have happened if the brake had been provided. If it be true, as the jury have found, that no injury would have been inflicted upon the plaintiff if this engine had been provided with a brake, it is no defense for the railroad company that the concurring negligence of the owner of the horse contributed to the infliction of the injury. One is liable for an injury caused by the concurring negligence of himself and a third party to the same extent as for one caused entirely by his own negligence. It is no defense for a wrongdoer that a third party shared the guilt of the same wrongful act, nor can he escape liability for the damages he has caused on the ground that the wrongful act of a third party contributed to the injury. *Railway Co. v. Callaghan*, 12 U. S. App. 541, 56 Fed. 988, 6 C. C. A. 205; *Railway Co. v. Sutton*, 27 U. S. App. 310, 312, 63 Fed. 394, 395, 11 C. C. A. 251-253; *Railway Co. v. Chambers*, 68 Fed. 148, 153, 15 C. C. A. 327, 332; *Railway Co. v. Needham*, 69 Fed. 823, 824, 16 C. C. A. 457, 458; *Railroad Co. v. Cummings*, 106 U. S. 700, 702, 1 Sup. Ct. 493, 27 L. Ed. 266; *Harriman v. Railway Co.*, 45 Ohio St. 11, 32, 12 N. E. 451, 4 Am. St. Rep. 507; *Lane v. Atlantic Works*, 111 Mass. 136; *Griffin v. Railroad Co.*, 148 Mass. 143, 145, 19 N. E. 166, 1 L. R. A. 698, 12 Am. St. Rep. 526; *Cayzer v. Taylor*, 10 Gray, 274, 69 Am. Dec. 317; *Elmer v. Locke*, 135 Mass. 575; *Booth v. Railroad Co.*, 73 N. Y. 38, 29 Am. Rep. 97; *Cone v. Railroad Co.*, 81 N. Y. 206, 37 Am. Rep. 491.

Nor does the absence of brakes from this engine fall without the legal definition of the proximate cause of the injury which the plaintiff suffered. An injury that is the natural and probable consequence of an act of negligence is actionable, while one that could not have been foreseen nor reasonably anticipated as the probable result of such an act cannot be made the basis of an action for damages. The purpose of brakes upon engines and cars is to quickly arrest their speedy motion, and to prevent collisions and accidents. The natural and probable consequence of their absence from machines as powerful and as rapid in their movements as locomotive engines are the collisions and accidents which it is the purpose of their use to avoid. From the failure to provide this engine with proper brakes to arrest its motion, the accident and injury which resulted, or others of like character, might well have been anticipated as probable consequences; and the evidence in the record is ample to sustain the finding of the jury that the injury to the plaintiff was caused by that absence.

The very fact that it is the common—the almost universal—practice to provide locomotive engines with brakes for the purpose of controlling their movements, and preventing accidents and collisions, is very persuasive, if not conclusive, evidence that such disasters may be reasonably anticipated as and are the probable consequences of their absence. *Railway Co. v. Elliott*, 55 Fed. 949, 5 C. C. A. 347, 20 L. R. A. 582; *Railway Co. v. Kellogg*, 94 U. S. 469, 475, 24 L. Ed. 256.

It is assigned as error that the court instructed the jury that the failure of the company to provide this engine with brakes was actionable negligence, for which the defendant was liable. But this specification is untenable. Actionable negligence in this case was the failure of the railroad company to exercise reasonable care to provide a reasonably safe engine for operation upon this railroad. The plaintiff testified that he had never worked upon an engine before which was not provided with a brake, although he had been in the employment of railroad companies for some years. The knowledge that it is the usual practice to provide road engines with brakes to control and arrest their motion is so common and general that courts cannot assume to be ignorant of it. Courts take judicial notice of business customs and practices which form a part of the common knowledge of the people of the country. *Brown v. Piper*, 91 U. S. 37, 42, 23 L. Ed. 200; 1 Greenl. Ev. 11. There may be, and probably are, circumstances under which the absence of a brake from an operating engine would not constitute a want of reasonable care to provide a reasonably safe locomotive for the purpose to which its use is applied. This might be true of an engine employed in a yard for switching purposes. It might be true under many circumstances which could be shown by evidence. But in the case at bar the defective engine was a road engine, employed in the usual service of moving loaded trains along the railroad. There was no evidence of any circumstances tending to excuse the failure to supply it with the ordinary appliances used to control the movements of such engines. This, then, was the case presented to the court below: Railroad companies ordinarily provide their road engines with brakes. The exercise of ordinary and reasonable care induces carriers to equip their road engines in this way. The purpose of the exercise of this care is to prevent accidents and collisions. Such accidents and collisions are the natural and probable consequences of a failure to exercise this care. The conclusion was inevitable that the failure to provide this road engine with brakes, in the absence of any evidence excusing it, was a failure to exercise ordinary care to provide a reasonably safe engine for operation upon this railroad. And the charge of the court that the defendant was liable for any injury which resulted from the failure to provide the brakes is sustained by the evidence, the law, and the reason of the case.

It is assigned as error that the court refused to instruct the

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jury that a servant is bound to take reasonable care and make reasonable effort to discover any dangers and defects in the place and machinery in which and with which he is to work; that, the greater the risk which attends the work to be done and the machinery to be used, the more imperative is the obligation resting upon him; and that if the plaintiff could, by using ordinary care and diligence, have informed himself of the condition of the engine, as to brakes, and if he failed to do so, and an ordinarily prudent man, under like circumstances, would have done so, his failure to take such precautions was negligence, and would bar his recovery in the case. The rules which measured the respective liabilities of the plaintiff and the defendant in this case have been stated at the opening of this opinion. So far as this requested instruction conforms to those rules, it was given in the general charge of the court; and, so far as it does not conform to them, it was erroneous, and should not have been given. The court charged the jury that if the engine was without brakes, and this fact was unknown to the plaintiff, "and could not have been known to him by the exercise of reasonable diligence, under the circumstances of the case as shown by the evidence," the company might be liable; and, when the entire charge is carefully read, nothing inconsistent with this declaration can be found in it. There was no error in the refusal of the court to give the requests under consideration, in view of the general charge, which presented to the jury all the sound propositions of law stated therein.

Another specification of error is that the court refused to instruct the jury that if the plaintiff was guilty of negligence in riding on an engine backing with the tender foremost in the dark, without a light upon the forward end of the tender, he could not recover. But there was no error in this refusal. The plaintiff could not recover for the negligence of the company in running this engine backward in the night without a light upon the forward end of the tender, because the plaintiff was aware of this negligence, and assumed the risk of it. But he did not know that the engine upon which he was riding was not provided with brakes. The exercise of ordinary care by the defendant would have equipped it with these appliances. He had the right to assume that the defendant had exercised this care. He did undoubtedly indulge in that assumption. The jury have found that the absence of the brakes was not an obvious defect,—not a defect which a person of ordinary prudence, exercising reasonable care, would have discovered under the circumstances of this case. As he was ignorant of the absence of the brakes, he did not assume the risk of that absence; and his assumption of the risk of riding upon an engine and tender in the night, with a headlight upon its forward end, was not an assumption of the risk of operating this engine without brakes. His negligence regarding, or his assumption of, the former risks, was neither

such contributory negligence regarding, nor such an assumption of, the latter risk, as bars him from a recovery for the negligence of the defendant producing it. A servant may not assume a risk, or be guilty of contributory negligence in exposing himself to a risk, of which he is ignorant, and of which an ordinarily prudent person would not have been aware by the exercise of ordinary care and diligence. *Manufacturing Co. v. Erickson*, 55 Fed. 943, 948, 949, 5 C. C. A. 341, 346; *O'Neill v. Railway Co. (Neb.)* 86 N. W. 1098; *Railway Co. v. Keegan*, 87 Fed. 849, 852, 31 C. C. A. 255, 258.

Counsel for the defendant also complain that, when the jury were sent to inspect to engine, the court instructed them to "go inside, and try to put themselves only in the same place that the fireman would naturally occupy, and then, occupying that place, to determine whether the wheels of the engine on which the brakes would be could be seen from there, without looking for them, while a man was employed for several hours doing work on the engine as a fireman; that is to say, whether he could easily see them by just keeping his eyes open." If this excerpt from the instructions of the court had been all that was said to the jury on this subject, it might have been erroneous. But it was followed with the direction that "a man cannot shut his eyes, and say he don't want to see anything which a reasonable man could not help but see if he kept his eyes open," and that "if the fact that there were not any brake shoes on that engine was obvious to any reasonably prudent man who runs on it as a fireman for several hours, as the evidence shows that this plaintiff did for six hours, from Hulbert to Brinkley, before he went back again before the accident happened, that is perfectly obvious to a man who is fireman and traveling for six hours without hunting for it, then the court will tell you that he had knowledge of, and ought to have known of, it, and he is chargeable with it as if he had known it," and that "if in getting off and on and working and firing for six hours as any reasonably prudent person would have noticed it, then you are to consider that fact. If, on the other hand, a man could not have noticed it, who was a fireman, by getting on and off, and then attending to his duty and business, as the evidence shows plaintiff is, you may reach another conclusion." Excerpts from a charge cannot be wrested from their connection and relation, and fairly criticised. The entire charge upon a given subject must be taken together, and if, when so read, it conforms to the law, no just objection to it can be urged. When the instruction of the court upon the duty of the jury in inspecting this engine is so read, it will be found to be in accordance with the established rules of law which control this case, and which are stated in the opening of this opinion. There was no error in the instruction of the court upon this subject.

It is assigned as error that the court repeatedly instructed the jury that it was the duty of the company to furnish its

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servants with reasonably safe machinery and a reasonably safe working place. This instruction was a patent and unquestionable error. It has been so declared by this court repeatedly, from *Railway Co. v. Jarvi*, 3 C. C. A. 433, 435, 436, 53 Fed. 65, 67, 68, decided in 1892, through *Gowen v. Harley*, 6 C. C. A. 190, 197, 56 Fed. 973, 980, *Railway Co. v. Linney*, 7 C. C. A. 656, 660, 59 Fed. 45, 48, *Railway Co. v. Needham*, 69 Fed. 823, 825, 16 C. C. A. 457, 459, to and including *Lesser Cotton Co. v. St. Louis, I. M. & S. Ry. Co.*, 114 Fed. 133, decided in 1902. The limit of the duty of the master to the servant in the matter of place of service, of machinery, and of appliances, is to exercise ordinary care to furnish him with a reasonably safe place and reasonably safe appliances, and to use ordinary care to keep the place and the appliances in a reasonably safe condition. Moreover, the presumption is that error produces prejudice. It is only when it appears so clear as to be beyond doubt that the error challenged did not prejudice, and could not have prejudiced, the complaining party, that the rule that error without prejudice is no ground for reversal is applicable. *Association v. Shryock*, 20 C. C. A. 3, 117, 3 Fed. 774, 781; *Railway Co. v. McClurg*, 8 C. C. A. 322, 325, 326, 59 Fed. 860, 863; *Deery v. Cray*, 5 Wall. 795, 807, 808, 18 L. Ed. 653; *Smiths v. Shoemaker*, 17 Wall. 630, 639, 21 L. Ed. 717; *Moore v. Bank*, 104 U. S. 625, 630, 26 L. Ed. 870; *Gilmer v. Higley*, 110 U. S. 47, 50, 3 Sup. Ct. 471, 28 L. Ed. 62; *Railroad Co. v. O'Brien*, 119 U. S. 99, 103, 7 Sup. Ct. 118, 172, 30 L. Ed. 299; *Mexia v. Oliver*, 148 U. S. 664, 673, 13 Sup. Ct. 754, 37 L. Ed. 602; *Railroad Co. v. O'Reilly*, 158 U. S. 334, 337, 15 Sup. Ct. 830, 39 L. Ed. 1006; *Peck v. Heurich*, 167 U. S. 624, 629, 17 Sup. Ct. 927, 42 L. Ed. 302. But in the case at bar the record makes it clear beyond all doubt that this error did not prejudice, and could not have prejudiced, the railroad company, because no question concerning its duty or its negligence was left to the jury to consider by the charge of the court. The railroad company conceded that there were no brakes upon the engine. The absence of brakes upon this road engine, in the absence of any evidence excusing it, was conclusive evidence, as a matter of law, of the lack of ordinary care to provide reasonably safe machinery to operate this railroad. The court clearly and positively instructed the jury to this effect. It instructed them that the railroad company was liable for any injury that was caused by the failure to supply this engine with brakes, unless the plaintiff knew and assumed the risk of their absence. This left the jury nothing to consider relative to the care or the negligence of the company, and limited the issues they were to determine to the questions whether or not the absence of the brakes was the proximate cause of the injury, and whether or not the plaintiff knew, or ought to have known, and hence assumed the risk, of this absence. As there was no question of the care or negligence of the

company submitted to the jury, it conclusively appears beyond all doubt that the erroneous charge upon that subject could not have prejudiced the defendant, and error without prejudice is no ground for reversal.

There are other specifications of error which have not been recited in detail. They have all been carefully considered. So far as they present any debatable question, they have been disposed of by the rules and principles to which we have adverted, and the discussion in which we have already indulged. Suffice it to say that a patient and painstaking review of all the evidence, of the charge of the court, and of all the assignments of error, has led us to the conclusion that this case was fairly and impartially tried, and that the rulings and charge of the court were free from prejudicial error. The judgment below must therefore be affirmed, and it is so ordered.

THAYER, Circuit Judge. I concur in the order affirming the judgment below for the reasons stated in the foregoing opinion, but I would not be understood as concurring in the broad statement, which the opinion contains, that a servant "assumes the risks and dangers of all * * * defects [in machinery and appliances] of which he has knowledge, and of which he would have had knowledge by the exercise of ordinary care and diligence." Nor do I think that such a broad statement of the law is necessary to a correct decision of the case. It is well settled that a servant who uses machinery, tools, or appliances known to be defective, but, in pursuance of a promise by the master that they will be repaired, does not assume the risk of injury, but may recover if hurt, excepting where the risk of injury is so imminent that a prudent person would not have used them at all. And I conceive that there may be other exceptions to the rule. *Hough v. Railway Co.*, 100 U. S. 213, 225, 25 L. Ed. 612, and cases cited; *Mining Co. v. Fullerton*, 16 C. C. A. 545, 549, 69 Fed. 923. See, also, *Southern Pac. Co. v. Yeargin*, 48 C. C. A. 497, 109 Fed. 436, 441.

CALDWELL, Circuit Judge, joins in the views expressed in this concurrence.

TEXAS CENT. R. CO. v. WALLER *et ux.*

(*Court of Civil Appeals of Texas, Jan. 18, 1902.*)

[66 S. W. Rep. 466.]

Injury to Employee—Negligence—Brake Beams—Height from Ground.*
It was not negligence for a railroad company to fail to equip its cars with brake beams hung high enough to pass over a brakeman lying on the ground between the rails.

*See generally, 20 Am. & Eng. Enc. Law (2d Ed.) 54 et seq.; 5 Rap. & Mack's Dig. 16 et seq.

Appeal from district court, Erath county; W. J. Oxford, Judge.

Action by J. M. Waller and wife against the Texas Central Railroad Company. From a judgment for plaintiffs, defendant appeals. Reversed.

Martin & George and L. W. Campbell, for appellant.

Capps & Contey, Daniel & Keith, and Theodore Mack, for appellees.

HUNTER, J. This suit was brought by the appellee and his wife to recover damages from the appellant occasioned by the alleged negligent killing of their son, aged 25 years, at Cisco, Tex., on April 11, 1899, and who was in the employment as brakeman. The negligence alleged was the bad condition of the track at the place he was killed, and the negligent and improper construction of the car which run over and killed him, and the negligence of the engineer, fireman, and other employees of the train. The evidence tended to prove that the train crew were switching cars by "kicking" them back on the side track; that the side track was rough, caused by the sinking of the dirt between the ties, so as to leave the ties several inches above the ground between them. A car was "kicked" back, and was moving at the rate of about five or six miles an hour, when the deceased went on the track in front of it in order to place a coupling pin in the drawhead, which had fallen from another car, and stood in the middle of the track until the car came near enough to place the pin in the drawhead, running backwards to keep the car from knocking him down, and attempted to leave the track, when his foot, it seems, struck a tie, and he fell, and in his effort to rise the car struck him, and knocked him down, and passed over him, the brake beam thereof rolling him, and crushing him to death. The evidence tends also to show that this car was an old type of freight car, not much in use now, and that the brake beams thereof hung lower than they do as a rule on more modern cars; that they hung within about $3\frac{1}{2}$ inches of the top of the rail. But the only rule of the master car builders on the subject is, as the evidence tends to show, that the beam shall not hang lower than $2\frac{1}{2}$ inches above the top of the rail.

On the trial the court charged the jury as follows: "Or if you find and believe from the evidence that the said John Waller was knocked down by said car, and that he could not escape its passing over him after being so knocked down, and that he then lay flat, with his face to the ground, for the said car to pass over him; and if you further find and believe from the evidence that the brake beam upon said car came so low and close to the track that it caught and crushed said John Waller, and thereby killed him; and if you further find and believe from the evidence that the closeness to the ground to which said brake beam hung on said car constituted a defect

in said car, and that said defect (if you find it was a defect) in said car was the direct and proximate cause of the injuries which resulted in John Waller's death; and you further find that it constituted negligence in defendant to permit the use of said car with such brake beam; and if you further find and believe from the evidence that said Waller was not informed and did not know of said defect in said car which caused his death (if you find that it did so and was a defect); and you further find and believe that in going in front of said car at the time and place and under the circumstances said Waller went in front of same was such as an ordinarily prudent brakeman would have done under the same or similar circumstances; and you further find that the plaintiffs were damaged by his death," etc.,—"you will find for the plaintiffs."

Appellant contends that this charge was error, "because the defendant company is not required to construct its brake beams in such a way as that they will pass over persons lying upon the track, and the defendant company would not be guilty of negligence in failing to so construct its cars; and because it was not contemplated by the builders of railroad cars that any prudent person would ever place himself upon the track and lie down for the purpose of permitting such cars, and brake beams attached thereto, to pass over them; and because there is no law requiring any standard height to brake beams, and no law requiring them to be sufficiently high above the track or the ties to permit them to pass over persons lying upon the track."

We think this assignment will have to be sustained. Car builders are not required to fix their brake beams high enough to pass over persons who may fall upon the railroad track, any more than they should make them light enough not to cut off a man's leg if they should happen to run over it. They are built with the view of bearing burdens and carrying them safely, and the brakes are constructed and placed where they will be most efficient in stopping the car when necessary to apply them. Persons must not place themselves where they will be knocked down and run over by cars. If they do, in cases where they are not ordered there, or where their duty does not require them to go there, they assume the risk of being injured by the brake beams if they are knocked down or fall down and the car passes over them. Unless, therefore, the appellant was guilty of negligence in some other respect besides the placing of the brake beam where it was, it is not liable for the injury complained of, and the learned court below erred in submitting this issue to the jury, and in allowing a recovery on that ground.

The third assignment complains of the admission of the evidence of A. G. Hawkins, drawn out by appellees on cross-examination, to the effect as follows: "Q. Was not the engineer reckless, and did he not have the reputation of being a reckless engineer? A. I never considered him so. Q. Had

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he not killed three men before this? A. I don't remember how many have been killed by this train. There was one I remember in particular." This was objected to because it was "immaterial, and calculated to prejudice the rights of defendant with the jury." We think this objection was well taken. There was no allegation of recklessness of the engineer, and the examination in chief did not require or permit such questions to be asked. The evidence was plainly calculated to prejudice the minds of the jury against the defendant, and was not admissible under the allegations of the petition.

We find no other material error in the record, but, because the court erred in giving the charge and admitting the evidence aforesaid, the judgment is reversed, and the cause remanded for a new trial.

GREEN v. BRAINERD & N. M. RY. CO.

(*Supreme Court of Minnesota, Jan. 3, 1902.*)

[88 S. W. Rep. 974.]

Injury to Employee—Contributory Negligence in Disobeying Rules.*

It is the duty of the employees of a railroad company to implicitly obey all reasonable orders or rules, and a failure so to do will defeat recovery by an injured employee, if his disobedience was the proximate cause of his injury, unless obedience was impracticable under the circumstances. The nature of the employment requires, and the character of the business demands, compliance. Such orders and rules are promulgated and are to be enforced for the protection of the public, of fellow servants and of the employer's property, and cannot be disregarded or annulled by an employee with impunity. The latter cannot disobey orders upon the ground that, in his opinion, there is no reason for their further observance.

Same—Voluntarily Going to Work at Different Place from That Assigned.

When one employed to do a designated kind of work, or to work at a particular place, voluntarily goes to a place different from that assigned by the contract of employment, he cannot successfully insist that he is within the protection of the rule that the master must exercise ordinary care to protect him against injury.

Same—Same—Proximate Cause.

Held, in this case, that the proximate cause of the death of plaintiff's intestate, a rear brakeman on a logging train, was his violation of a reasonable order given to him by the conductor in charge, and that, under these circumstances, the law forbids a recovery of damages. (Syllabus by the Court.)

Appeal from district court, Crow Wing county; W. S. McClenahan, Judge.

Action by Alice J. Green, as administratrix of Louis M. Brown, deceased, against the Brainerd & Northern Minnesota

*See Galveston, etc., Ry. Co. v. Adams (Tex.), 20 Am. & Eng. R. Cas. N. S., 274, and note, 277 et seq.

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Railway Company. Verdict for defendant. From an order denying a new trial, plaintiff appeals. Affirmed.

F. D. Larrabee, for appellant.

Koon, Whelan & Bennett, for respondent.

COLLINS, J. Plaintiff's intestate, her son Louis M. Brown, was killed while employed as a brakeman upon one of the defendant's logging trains in the northern part of the state. She brought this action to recover damages, and at the close of the testimony the court below dismissed her case upon defendant's motion. This appeal is from an order denying her motion for a new trial, based upon a settled case and all files and records.

The facts were that Brown was rear brakeman upon a section of three cars which were being moved out along a spur to defendant's main-line track, which ran north and south. The spur track, less than a mile long, approached from the east, running in a northerly direction, with a sharp curve at the intersection. Brown was an experienced man on logging trains, and had been at work some two weeks upon this same spur track. The grade thereon was very heavy towards the main line, and the engine engaged in the work made a practice of hauling but three loaded cars at a time. These cars would be hauled on to the main track, the switch would then be turned, and the cars pushed south, where they would remain on the main line until a train was completely made up, and it would then be pushed—the engine being in the rear—southerly to its destination. The cars used for this work were flats and "dinkeys." On the flats two lengths of logs could usually be piled, and on the dinkeys, built expressly for logging purposes, but one length could be loaded. All of the cars were equipped with hand brakes, and part with air brakes. All of the time, work was done at night; the cars being loaded at the end of the spur during the daytime by the log owners. On the night in question, nine cars had been moved out in three sections, and the engine returned to the end of the spur for the purpose of hauling out the last section,—one flat car and two dinkeys,—each loaded with logs, and equipped with both air and hand brakes. These cars had been loaded in the usual manner, by first putting on two or more tiers of logs, and then binding with chains, then putting on one or more tiers, and again binding with chains, and finally placing one or more binding logs on top, which were not chained or otherwise fastened, but were supposed to press down upon the chains below so as to bind the entire load. There is no dispute but that the logs were loaded in the customary manner, although it is claimed that on one of the dinkeys they were improperly chained. This car was in the middle of the three, the flat being in the rear. When the section was ready to be moved from the loading place, the conductor, Coulter, boarded the cab of the locomotive;

Logan, the head brakeman, and Brown, took positions upon the rear footboard of the engine, on the east side of the draw-bar; thus placing themselves between the first car and the tender; and the train started, running about three or four miles per hour. When it came to the main track, and the tender of the engine had reached a point thereon about 30 feet north of the switch stand, which was on the west side of the main track, Brown stepped off to the east. He was killed almost immediately by the falling of the only binding log upon the middle car, and it was shown that the chains upon that car were so loose that two other logs had partly dropped out of place and were hanging down. Why he stepped down from the footboard is a matter of surmise. He was on the wrong side of the section to turn the switch whereby the cars could be moved out upon the main line, and while he had authority to throw this switch, if convenient, it was Logan's duty, as head brakeman, to attend to it on this occasion, not Brown's duty. This stands admitted. He might have gotten off so as to give Logan an opportunity to step from the footboard, or it might have been his intention to walk to the southerly end along the main track until he reached the nine cars already standing somewhere below the clearing point between the spur and the main track, then to signal the engineer as the section approached the standing cars, and then to make the necessary coupling, as was his duty, unquestionably, as rear brakeman. But the record is silent as to how far distant the nine cars stood. They may have been just south of the clearing point, about 125 feet from where Brown stepped off the footboard, or they may have been much further away. This, like Brown's purpose in stepping off, is mere surmise. It does not appear that he had any duty to perform at that place. About two weeks prior to the accident a section of cars, while being hauled out on this spur, had broken in two; and, because there was no brakeman in the rear to apply the hand brakes, a part of the cars ran back down the grade and collided with and damaged others at the loading place. Thereupon the conductor, Coulter, ordered Brown, as rear brakeman, to always ride on the rear of the section, giving two reasons for such order: One, that he might be in position to set the hand brakes and prevent the running back to the end of the spur in case the train should break in two; the other, that he might be able to see logs which might drop off the cars—a common occurrence—fall upon the track, and possibly ditch the engine or the empties when returning. This order was given while at work on this spur, and applied to the main line, also, according to the testimony of the conductor. So far as was known, Brown invariably obeyed the order from the time it was given, and it was shown that in taking out the first three sections on the night of the accident he had gone to and had remained upon the rear car while it was in motion. It stands conceded that

he disobeyed in riding out with the last section, and that the conductor did not know of the disobedience; and it is obvious that he would not have been struck by the falling log if he had taken his proper position, and had remained on the rear of the last car, instead of riding on the footboard. His object in going there did not appear, but that is immaterial, as we regard the testimony.

We assume, for the purposes of this appeal, that the negligence of the defendant company was sufficiently established; and this brings us to inquire whether Brown's disobedience of orders and apparent breach of duty will prevent a recovery in this action. Was Brown violating the order of his superior unjustifiably, and was this violation the proximate cause of his death? The right of the employer to promulgate rules, and the duty of the employee to obey them, are reciprocal. If the right exists in the master, and is exercised by him, public policy requires compliance therewith by the servant. It seems to be well settled by the authorities—and there is no discord—that it is the duty of the employees of a railroad company to implicitly obey all reasonable orders or rules, and a failure so to do will defeat a recovery by an injured employee, if his disobedience was the proximate cause of his injury, unless obedience was impracticable under the circumstances. 3 Elliott, R. R. § 1280 et seq.; 7 Am. & Eng. Enc. Law (2d Ed.) 425. See, also, *Merritt v. Railway Co.*, 81 Minn. 496, 84 N. W. 321; 19 Am. & Eng. R. Cas., N. S., 775. It is very generally held that disobedience of the orders and rules of the employer constitutes contributory negligence, when injury results to an employee. There may be circumstances which will excuse disregard of orders or rules, but prima facie disobedience is always negligence, and it is only in clear cases that it can be excused. Obedience to all reasonable rules brought to the attention of the employee is part of his contract of employment. Such orders and rules are promulgated and are to be enforced for the protection of the public, of fellow servants, and of the employer's property, and cannot be disregarded or annulled by employees with impunity. *Gordy v. Railway Co.*, 75 Md. 297, 23 Atl. 607, 32 Am. St. Rep. 391; *Connors v. Railway Co.*, 74 Iowa, 383, 37 N. W. 966; *Railroad Co. v. Wilson*, 88 Tenn. 316, 12 S. W. 720; *Railway Co. v. Thomas*, 51 Miss. 637; *Eastburn v. Railway Co.*, 34 W. Va. 681, 12 S. E. 819; *Railroad Co. v. Mothershed*, 110 Ala. 143, 20 South. 67. The rules of law applicable to the subject, with apt reference to the adjudications, are well stated in 2 Bailey, Pers. Inj. § 3392 et seq.; also in note to *Ford v. Railway Co.* (Iowa) 24 L. R. A. 657 (s. c. 59 N. W. 5). See, also, Elliott, R. R. § 1313 et seq. In order to make a party liable in the capacity of an employer for injuries resulting from negligence, the plaintiff must affirmatively prove that at the time of the injury he was acting within the line of his duty as an employee. If the time when,

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and the place where, the injury is received, are not within the scope of the contract of employment, the relation of master and servant cannot be justly said to exist, and no recovery can be had against a defendant in the character and capacity of a master or employer. When one employed to do a designated kind of work, or to work at a particular place, voluntarily goes to a place different from that assigned by the contract of employment, he cannot successfully insist that he is within the protection of the rule that the master must exercise ordinary care to protect him against injury. Elliott, R. R. § 1303, and citations. There is, of course, in cases of this character, the presumption that the servant is acting within the line of his duty; but this presumption may be rebutted, and we are of the opinion that it was completely met and overthrown in this case. Brown was not at a place where he could perform the duty assigned to him by the conductor when he rode on the footboard, or when he was struck by the falling log. His station was then upon the rear end of the flat car, there to attend to the brakes, watch for falling logs, and to perform the general duties of a rear brakeman; and this was particularly true when the section reached the main line, and the car he should have been on was brought in front of the section as it was backed southerly towards the balance of the train.

To obviate the application of well-established rules, it is argued with much force and ability by counsel for plaintiff that there was no reason for Brown's observance of the order or rule on this particular occasion, and therefore he was justified in his disregard of it, and in taking position upon the footboard, because the three cars were fully equipped with air brakes operated from the engine, acting automatically, and firmly setting the brakes on the detached cars if the train broke in two. There was no necessity for Brown's remaining upon the rear car to handle brakes, and this excused his disregard of the order, urges counsel. And because the track was practically level with the surrounding country, it was also unnecessary for him to remain at the rear to observe logs which might fall off the cars. In other words, there could arise no necessity to use the air brakes, and it was impossible for logs falling from the cars to drop upon the track, because of the level character of the ground. This assumes, in the first place, that the air brakes would always work. If they did, it is conceded that they would be more effective than hand brakes in case the train should separate. But it is a well-known fact that the air does not always work, and for this reason cars are equipped with hand brakes, as were those in question, and brakemen were employed to attend to them. And it assumes that logs, when falling from the train, could not drop upon the rails where the adjacent ground is practically level. Whether they dropped upon the rails, or in dangerous proximity thereto, would largely depend upon the

cause and manner of falling, and the position in which they struck the ground. Just where they would strike and remain is all a matter of conjecture. And it assumes, in the second place, that Brown had a right to ignore and annul the order of the conductor that he should ride upon the rear of the section, as rear brakeman. It was not for Brown to disobey the order upon the ground that, in his opinion, there was no reason for its further observance. If this were the law, a reasonable and necessary order, as this was, designed to protect the public, fellow servants, the employee himself, and the company's property, could be set aside at will. One order or rule would govern to-day, and another to-morrow. As to those persons in the service of a railway company, there must be a strict compliance with all reasonable regulations. Bailey, Per. Inj. §§ 3332-3398a, and cases cited. The contract of the employment requires, and the character of the business demands, such compliance. No cases in opposition to the rules of law herein stated have been cited by plaintiff's counsel, and we believe there are none.

Counsel also contended that it cannot be said that Brown's violation of the order was the proximate cause of his death, because—First, the order was not in force from the time the section reached the main line; and, second, that from the testimony it appeared that a brakeman had a right to "get off anywhere." The premises relied on are unfounded, as we read the evidence. Taken as a whole, it was conclusive that Brown's place was at the rear on both spur and main tracks while the cars were in motion, and the necessity therefor was greater when on the main line than when on the spur. And while the conductor did testify that a brakeman had a right to "get off anywhere," it is beyond question that this was not to be understood as permitting a brakeman to get off as he pleased, or when duty, or necessity did not require it, or when orders required him to remain on the cars. If Brown had been killed after he had stepped off the rear of the car, counsel's argument might be in point and potent. Brown was in fault when he disobeyed the order, and was not in the discharge of his duty when killed. The proximate cause of his death was his violation of the order. By his disobedience in riding upon the footboard, stepping therefrom, and standing besides the moving cars, from which, by observation and experience, he knew logs frequently fell while in transit, he assumed an unnecessary risk, not in the line of his duty, and was guilty of contributory negligence. Under such circumstances, the law forbids a recovery.

We have carefully examined the rulings of the trial court when receiving testimony, of which counsel complains, but find no error. None need special consideration.

Order affirmed.

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[63 N. E. Rep. 541.]

Injury to Car Repairer—Sufficiency of Rules Regulating Operation of Kicking Cars.*

In an action against a railway company for negligence causing the death of a car repairer as the result of kicking cars from a main track onto a siding where he was at work under a car, evidence examined, and *held*, that the rules of defendant company were insufficient.

Same—Assumption of Risk—Burden of Proof.

In an action against a master for negligence, the burden of establishing an assumption of the risk is on the master.

Same—Same—Same.

In the absence of evidence conclusively establishing assumption by a servant of the risk of his employment, the fact that the servant did not establish affirmatively that he had no knowledge of the risk, and therefore did not waive it, will not prevent a finding that he was not chargeable with knowledge.

Appeal from supreme court, appellate division, Fourth department.

Action by Mary Dowd, administratrix of Michael Dowd, against the New York, Ontario & Western Railway Company. From a judgment of the appellate division (70 N. Y. Supp. 1138) affirming a judgment for plaintiff, defendant appeals. **Affirmed.**

This action was brought to recover damages sustained by the plaintiff through the death of her intestate, caused, as alleged, by the negligence of the defendant. The answer, after a specific denial of all the allegations of negligence on the part of the defendant, alleged that the death of the decedent was caused by his own negligence and that of his fellow servants. At the village of Sidney, in this state, the defendant's railway intersects that of the Delaware & Hudson. There is so much traffic between the two roads at this point that the defendant maintains a yard in order to provide for the storage of cars and the handling of trains. The yard consists of several side tracks connected by switches with the main line, and constructed upon a grade descending gradually toward the north for convenience in moving cars by gravitation. Some freight and many coal cars were usually stored upon the sidings, and, if any needed such slight repairs as could be conveniently made away from the shop, it was the duty of the car repairers to attend to them while they thus stood in the yard. For the protection of the repairers while thus engaged it was provided by a rule known as "No. 38," that: "A blue flag by day and a blue light by night, placed

*As to the master's duty to make rules for the protection of its employees, see *Delaware, L. & W. R. Co. v. Voss* (N. J.), 12 Am. & Eng. R. Cas., N. S., 820, and note, 823; 20 Am. & Eng. Enc. Law (2d Ed.) 101 et seq.; 5 Rap. & Mack's Dig. 27 et seq.

on the end of the car, denotes that car inspectors are at work under or by the car or train. The car or train thus protected must not be coupled to or moved until the blue signal is removed by the car inspectors." There were other rules, of which the following were read in evidence upon the trial: "Rule No. 25. Red signifies danger, and is a signal to stop." "Rule No. 5. The fact that any person enters or remains in the service of the company will be considered as an assurance of willingness to obey its rules. No one will be excused for the violation of any of them, even though not included in those applicable to his department." For eight or nine years prior to the accident which gave rise to this action the custom prevailed in the defendant's yard of "kicking" cars, or trains of cars, from the main branch onto the sidings. This custom was general; and there was another, but less general, to kick trains in on sidings where car repairers were at work, even when the blue signal was up. Cars were kicked by backing them rapidly from the main track onto the siding, suddenly detaching the engine, and leaving them to run on the descending grade by gravitation and their own momentum. On the 31st of August, 1892, the plaintiff's intestate had been in the employ of the defendant as a car repairer for about six weeks, but not continuously. On that day, shortly after noon, he was at work under a car situated near the middle of a train consisting of 25 empty coal cars standing without an engine on siding No. 3. A blue as well as a red flag was flying at the rear or southerly end of the train. A milk train, consisting of an engine, express car, passenger car, and three or four milk cars, came in at this time, and stopped at the station to transact its usual business. It was a little late, and, after discharging the passengers and freight, the engineer ran south past the switch, and then, as was his custom, backed rapidly, severed his engine, and kicked the train upon siding No. 3. Of the three trainmen belonging to this train, but one remained thereon to manage the brakes, and he was unable to control its movements. After some delay, he succeeded in setting the hand brake, and then struggled with an air brake, but without success. The result was that the milk train ran down the grade without control, until, colliding with the empty cars, it shoved them forward about two car lengths, and caused one of them to run over the plaintiff's intestate as he was working under it, and injured him so severely that he died within a few days. Upon the trial the jury was instructed to find whether the defendant furnished to the decedent a reasonably safe place to work; whether its rules were sufficient under the circumstances, or whether it was its duty to make further regulations for the safety of the repairers; and, finally, whether the decedent knew, or ought to have known, of the danger of repairing a car under the circumstances which surrounded him when he was injured. The jury found for the plaintiff, and, after affirmance by the appel-

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late division, one of the justices dissenting, the defendant came to this court.

Udelle Bartlett and P. W. Cullinan, for appellant.

Elisha W. Powell and Louis C. Rowe, for respondent.

VANN, J. (after stating the facts). The practice of kicking cars from one track to another, upon which men are at work, and so situated that they cannot see the approaching danger, was recently condemned by us as dangerous and reckless. *Doing v. Railroad Co.*, 151 N. Y. 579, 583, 45 N. E. 1028, 9 Am. & Eng. R. Cas., N. S., 69. We held that, when such a practice is known to the company, it is bound, in the proper discharge of its duties toward its employees, to guard against it by proper rules and regulations so far as reasonable and practicable. Judge O'Brien, writing for the court upon this branch of the case, said: "We will assume, then, what cannot be questioned, that the workmen were doing the defendant's work in a dangerous and reckless manner. But these workmen were doing nothing but what, according to the testimony, they had been doing for years before. If the defendant permitted its employees to carry on its operations upon these three tracks outside the shop in such a manner as to endanger the lives of those inside, who could not protect themselves, it failed to discharge to the deceased the duty which the law imposed upon it of furnishing him a reasonably safe place to do his work. The defendant had the power to control and regulate its business. The law imposed upon it the duty of making and enforcing such reasonable rules and regulations for the government of the men in its service as to prevent or guard against injury by one servant to another in so far as that was reasonable and practicable. It could certainly put an end to the practice of propelling cars upon these tracks by a force that could not be controlled, and it could provide for moving them in some other and safer way. In other words, it could change this method of doing the work by making proper rules and regulations to that end. The jury could have found from the evidence that the practice of kicking or shunting cars upon these tracks in the direction of the doors of the repair shop was known to the defendant. The danger to be apprehended from such a practice was so obvious that the defendant, in the proper discharge of the duties which it owed to its employees, was bound to guard against it by proper rules and regulations so far as that was reasonable and practicable." The case now before us does not differ in principle from the one cited, for in both the car repairers were so situated that they could not see the approaching train, and the practice of kicking cars had prevailed so long that the company is presumed to have known of its existence. In the earlier case there were no rules pertaining to the subject, as the jury might have found, and in this case the jury found that the rules were insufficient. We think they were justified in so finding. While the rules of the defendant

might be adequate for the protection of standing cars from an approaching train, which, having an engine attached, could be controlled, the inference was permissible that they were inadequate as against a train moving without an engine on a descending grade, through momentum acquired before the engine was cut off. Signals alone will not stop a train, as they are simply notice to stop. Cars moving without an engine have no inherent power to stop, but must be stopped by brakes, blocks, or similar appliances. Miscalculation by the engineer or trainmen as to the force applied, or necessary to be applied, by either; the failure of the brakes, for any reason, to work promptly or efficiently; a temporary absence of one or more trainmen; or any error of judgment or slight accident resulting in the loss of a few seconds of time,—might permit the moving cars to crash into those standing on the same track, and kill or maim the repairers working thereunder in ignorance of their danger. With an engine attached, however, the movement of the train would be under control, and the hazard greatly reduced. When dangerous work is to be done, the care should be proportionate to the danger, and reasonable precautions taken to protect human life. The principle that servants assume the risks of the business is qualified by the duty of the master to protect them from unnecessary hazards, including the negligence of fellow servants, by making such reasonable rules as the situation requires. *Abel v. Canal Co.*, 128 N. Y. 662, 28 N. E. 663, 48 Am. & Eng. R. Cas. 430. The evidence authorized the jury to find that the defendant had not discharged its entire duty in this regard, and that some further regulation was required to protect the car repairers from the danger arising from the practice of kicking cars, which for years had prevailed in this yard. A rule prohibiting the running of a train, without an engine attached to control it, upon a track occupied by standing cars when repairers are at work on them, or forbidding the kicking of cars on a track thus occupied, would doubtless have prevented the accident which resulted in the death of the plaintiff's intestate. If we cannot say, as matter of law, that some such rule was reasonable and practicable, the jury could so find as matter of fact.

The defendant, by an appropriate exception, raised the question of law that the evidence did not authorize the jury to find that the decedent was not chargeable with knowledge of the practice that caused his death. If he knew of the practice, and continued to work without any promise by the defendant to correct its methods, he assumed the danger, and waived any claim for damages on account thereof. *Crown v. Orr*, 140 N. Y. 450, 35 N. E. 648. The decedent was chargeable, not only with what he actually knew, but also with what he ought to have known by the exercise of ordinary diligence. He had worked for the defendant about six weeks in all, at different times, between the first of April and the last

of August, when he was hurt. "He was repairing cars all the time he was there," which kept him in a position where he could not well see the ordinary movement of trains in the yard. A witness who worked "in the same gang with him the most of the time" testified that he had never seen cars kicked "on the sidings where cars were being repaired" while he was working with him. It appeared that cars were kicked upon the sidings every day, and sometimes, but not so often, when the signals were up. There was little other evidence upon the subject, and none showing that the decedent was ever in such a position as necessarily to have seen cars kicked on a track where repairers were at work. If the burden of proof was upon the plaintiff to show affirmatively the absence of knowledge on the part of her intestate, it may be that the evidence was insufficient for the purpose. If, however, the burden of proof in this regard was upon the defendant, the finding of the jury should be sustained because the evidence did not conclusively establish the fact in accordance with its theory. When the plaintiff's intestate entered the service of the defendant he impliedly assumed the obvious risks of the business, and waived any right of action on account thereof. The common law makes this a part of the contract of employment, the same as if an express stipulation to that effect, committed to writing, had been signed by both parties. Furthermore, by continuing at work, with no prospect of a change of method, he waived such damages as he subsequently discovered. The doctrine of assumed risks rests upon the implication of a promise by the employee to waive the consequences of dangers of which he is fully aware. It is distinct in principle from the doctrine of contributory negligence, although they have frequently been confounded by the courts. In many cases this was owing to the fact that it appeared from the plaintiff's own showing that he knew of the dangers in advance, and hence his complaint was properly dismissed. Whether the fact of a known or obvious risk is proved by the one party or the other is immaterial, provided it is proved at all; but the question now before us is, upon whom rests the burden of proof in this respect? If the plaintiff knows the danger, under ordinary circumstances he waives it; but is the waiver a defense to be alleged and proved by the defendant, or only a form of contributory negligence, the absence of which is a part of the plaintiff's case?

Contributory negligence prevents a recovery because the plaintiff, of his own volition, intervenes between the negligence of the defendant and the injury received, so that the former is not the sole cause of the latter. Negligence implies a voluntary act or omission. Upon the assumption that the defendant is guilty of a negligent act, and that, intervening between it and the injury, the plaintiff is guilty of a negligent act also, which contributes to the injury, as the defendant's negligence is not the sole juridical cause of the accident, the

plaintiff cannot recover. The reason does not rest upon contract, but on the inherent nature of negligence. As Mr. Wharton says: "The true ground for the doctrine [of contributory negligence] is that by the interposition of the plaintiff's independent will the causal connection between the defendant's negligence and the injury is broken." Whart. Neg. § 301, and cases cited; Pol. Torts, 434. On the other hand, the doctrine of assumed risks rests upon a contract impliedly made before the negligent act of the defendant which caused the injury was committed. The plaintiff impliedly assumed the risk in advance, and his compensation is presumed to have been adjusted on that basis. Before commencing to work at all, he agreed to waive any right of action which he might otherwise have on account of the habitual or occasional negligence of the defendant, known to him before the accident happened. He impliedly agreed to waive the negligence of the defendant, not the results of his own negligence, for a contract is implied only when reasonably necessary, and the law provides for his own negligence without any agreement. One who is injured by his own negligence is regarded by the law as not having been injured at all, so far as other parties are concerned. By assuming the risk, the plaintiff does not intervene, but waives. Intervention, in order to break the causal connection between the negligent act and the injury, must come in between them. The assumption of the risk does not come in between, but is in advance of both. The independent will of the plaintiff is not exercised by intervening, but by voluntarily waiving and releasing, when he enters the service, any right of action which might accrue to him from the cause stated. "Willingness to enter on the danger" differs in principle from "negligence when in it." *O'Maley v. Gaslight Co.* (Mass.) 47 L. R. A. 161, and note (s. c. 32 N. E. 1119.) Nearly all courts recognize the doctrine of assumed risks as resting upon implied contract, although in applying it they frequently refer to the result, without discussion, as contributory negligence. *Wright v. Railroad Co.*, 25 N. Y. 562, 566; *Laning v. Railroad Co.*, 49 N. Y. 521, 533, 10 Am. Rep. 417; *Gibson v. Railway Co.*, 63 N. Y. 449, 20 Am. Rep. 552; *De Forest v. Jewett*, 88 N. Y. 264, 8 Am. & Eng. R. Cas. 495; *Dana v. Railroad Co.*, 92 N. Y. 639; *Powers v. Railroad Co.*, 98 N. Y. 274, 21 Am. & Eng. R. Cas. 609; *Sweeney v. Envelope Co.*, 101 N. Y. 520, 5 N. E. 358, 54 Am. Rep. 722; *Hickey v. Taaffe*, 105 N. Y. 26, 35, 12 N. E. 286; *Appel v. Railway Co.*, 111 N. Y. 550, 553, 19 N. E. 93; *Buckley v. Manufacturing Co.*, 113 N. Y. 540, 545, 21 N. E. 717; *Williams v. Railroad Co.*, 116 N. Y. 628, 634, 22 N. E. 1117, 10 Am. & Eng. R. Cas., N. S., 147; *McGovern v. Railroad Co.*, 123 N. Y. 280, 287, 25 N. E. 373; *Ford v. Railway Co.*, 124 N. Y. 493, 498, 26 N. E. 1101, 12 L. R. A. 454, 48 Am. & Eng. R. Cas. 201; *Huda v. Glucose Co.*, 154 N. Y. 474, 48 N. E. 897, 40 L. R. A. 411; *Limberg v.*

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Glenwood Co. (Cal.) 49 L. R. A. 33, and cases cited in note (s. c. 60 Pac. 176). Sometimes the principle which exempts the master from liability when the risk is obvious is placed upon the ground of waiver; but this is the same in effect, so far as the question under consideration is concerned, for a waiver exists either by contract or estoppel, and, unless shown by the plaintiff in developing his case, must be proved by the defendant as a defense. Thus, in a recent case, where the question related to obvious risks in connection with the factory act, we said: "Where the obvious risks of the business result in injury, the inability of the employee to sue is due to the fact that he voluntarily assumed those risks, not necessarily under an implied contract to do so, but by an independent act of waiver evidenced by his entering the employment with a full knowledge of all the facts. This distinction is not, however, of great importance, in the view we take of the statute and its effect upon the rights of the parties. We are of the opinion that there is no reason in principle or authority why an employee should not be allowed to assume the obvious risks of the business as well under the factory act as otherwise. There is no rule of public policy which prevents an employee from deciding whether, in view of increased wages, the difficulties of obtaining employment, or other sufficient reasons, it may not be wise and prudent to accept employment subject to the rule of obvious risks. * * * The facts in the case at bar, whether it be considered as an action for negligence at common law or under the statute, show conclusively that the plaintiff assumed the obvious risk of working on the machine in operating which she was injured." *Knisley v. Pratt*, 148 N. Y. 372, 42 N. E. 986, 32 L. R. A. 367. The elementary writers, as a rule, place the exemption upon implied contract. 2 *Thomp. Neg.* (1st Ed.) p. 1008; 1 *Thomp. Neg.* (2d Ed.) §§ 183, 184; *Thomas, Neg.* p. 840; *Deering, Neg.* § 201; 3 *Elliott, R. R.* § 1288; *Whitt. Smith, Neg.* 166; 20 *Am. & Eng. Enc. Law* (2d Ed.) 112. *Shearman & Redfield*, in the first and second editions of their work on *Negligence*, said: "In actions brought by servants against their masters, the burden of proof as to the master's knowledge, or culpability in lacking knowledge, of the defect which led to the injury, whether in the character of a fellow servant or in the quality of materials used, rests upon the plaintiff. But, the plaintiff having proved the fault of the master in this respect, the burden of proving that the plaintiff also knew of such defect, and commenced or continued his service with such knowledge, rests upon the defendant." Section 99. In the fourth edition they are inclined to recede from this position as unsound (section 208), but in the fifth and last they returned to the doctrine of implied contract, and, after placing the implication largely on usage and custom, finally said that "no intelligible reason, other than that of implied contract, has ever been suggested by the courts; and they have

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always assigned that reason, even when suggesting others."

We think that the burden of showing that the servant assumed the risk of obvious dangers rests upon the master, and hence we cannot say, as matter of law, that the jury, in the case before us, was compelled to find that the plaintiff's intestate knew, or should have known, of the practice of kicking cars on a track where car repairers were at work. If he did not know of the practice, he did not waive the danger. As no other question requires discussion, it follows that the judgment appealed from should be affirmed, with costs.

PARKER, C. J., and O'BRIEN, MARTIN, CULLEN, and WERNER, JJ., concur. GRAY, J., concurs in result.
Judgment affirmed.

KENT v. MUSCATINE, N. & S. RY. CO. *et al.*

(*Supreme Court of Iowa, Jan. 27, 1902.*)

[88 N. W. Rep. 935.]

Laborer's Lien on Railroad Aid Taxes—Necessity of Claiming.

Under Code, § 2091, providing that laborers shall have a lien on any tax voted in aid of a railway company for the amount due them for labor performed in the construction of the road, no statement of the demand due need be filed, or other act indicative of an intent to claim the lien done, to entitle the laborer to avail himself thereof; and hence the assignment of a laborer's time check carries with it the right to enforce the lien.

Same—Assignability.*

The lien is not personal to the laborer, but is assignable.

Pleading.

Under Code, § 3622, undenied allegations of a petition must be treated as true.

Appeal from district court, Muscatine county; W. F. Brannan, Judge.

Suit in equity to establish and enforce laborers' liens on a tax voted in aid of the defendant railway company. The trial court granted the relief prayed, and defendants appeal. Affirmed.

Jayne & Hoffman and Geo. W. Seevers, for appellant.
Arthur Hoffman, for appellee.

DEEMER, J. The latter part of section 2091 of the Code reads as follows: "Laborers shall have a lien upon any tax voted in aid of a railway company for the amount due them for labor performed in the construction of said railroad." From an opinion filed by the learned trial judge we extract the following statement of facts material to the questions presented on this appeal: "Labor was performed by certain persons in the construction of the railway of said defendant. Time checks were issued to these laborers by the foreman of the

*As to whether such liens are assignable, see 6 Rap. & Mack's Dig. 299; 19 Am. & Eng. Enc. Law (2d Ed.) 25 et seq.

particular work on which they were employed, and which represented the amount of wages due the laborers at the time the checks were issued. The time checks in this case were, by the laborers to whom they were given, assigned to the plaintiff, Kent, and represented about the sum of \$300. The contract for the construction of said railway was, it appears, made with the Tennis Construction Company. Balch, Peppard & Johnson became subcontractors under the Tennis Construction Company, and John S. Wolf & Co. became subcontractors under Balch, Peppard & Johnson. The work done by the said laborers was on the portion sublet to the said John S. Wolf & Co.; but, while a firm name was used by the latter, yet it appears that John S. Wolf had no partner. At the time this suit was commenced nothing was due from the defendant railway company to either the Tennis Construction Company, Balch, Peppard & Johnson, or to John S. Wolf & Co. under their respective contracts. Wolf, it appears, absconded without paying the wages due on these time checks." It was under these circumstances that the laborers who held these time checks sold and assigned them to the plaintiff. Appellants contend that the lien given by section 2091 is a mechanic's lien; that it is a mere privilege to the laborer, and cannot be assigned until the laborer has filed a statement of the demand due, or done some other act indicative of an intent to claim a lien. If it be true that, in order to avail himself of the lien, the laborer must file a statement of his demand, substantially as required by section 3092 of the Code, relating to mechanics' liens, then there is ground for saying that, until something is done looking toward the establishment of a lien, an assignment of the debt does not operate as a transfer of the lien. *Merchant v. Water Power Co.*, 54 Iowa, 451, 6 N. W. 709; *Brown v. Smith*, 55 Iowa, 31, 7 N. W. 401; *Langan v. Sankey*, 55 Iowa, 52, 7 N. W. 393. However, these cases were reviewed in *Peatman v. Power Co.*, 105 Iowa, 1, 74 N. W. 689, 67 Am. St. Rep. 276, and it is evident from that decision that some of the language used in the *Merchant Case* can no longer be considered authoritative. But we do not think section 2091 creates a mechanic's lien. True, a lien is given a laborer, but the general statutes relating to mechanic's lien do not apply to the lien thus created. The lien is upon the tax voted in aid of the construction of the railway, and no conditions or limitations are imposed on the right to establish and enforce it. It is purely a statutory lien, and, as the statute provides no remedy for its enforcement, a court of equity will assume jurisdiction for the protection and establishment thereof. *Davis v. Alford*, 94 U. S. 545, 24 L. Ed. 283; *Railroad Co. v. Fackney*, 78 Ill. 116; *Abraham v. Hall*, 59 Ala. 386. If the statute were simply declaratory of a common-law lien, no doubt the lienholder would have simply a right of detention, and, in the absence of statute, would have nothing which he could assign. Caldwell

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v. Lawrence, 10 Wis. 331; Glascock v. Lemp (Ind. App.) 59 N. E. 342; Tewksbury v. Bronson, 48 Wis. 581, 4 N. W. 749. But the statute is not declaratory of the common law, and, as we have already said, the lien is purely a statutory creation. In such a case the character, operation, and extent of the lien are to be ascertained from the statute itself. The statute now under consideration does not require the filing of a statement or any other act of the claimant, as does the mechanic's lien law, and we are not justified in adding to its terms. Rogers v. Currier, 13 Gray, 129; Wilson v. Rudd, 70 Wis. 98, 35 N. W. 321.

2. Defendants further contend that the lien is personal to the laborer, and cannot be assigned. Here again we must determine the nature of the lien in order to properly decide the question argued. The lien, as will be observed, is not on property, but on taxes voted in aid of the construction of a railway, and it is manifest that possession is not essential to its legality or enforcement. Such liens are, by the general consensus of opinion, assignable. Davis v. Bilsland, 18 Wall. 659, 21 L. Ed. 969; Duncan v. Hawn, 104 Cal. 10, 37 Pac. 626; Pearsons v. Tincker, 36 Me. 384; Tuttle v. Howe, 14 Minn. 150 (Gil. 113), 100 Am. Dec. 205; Skyrme v. Mining Co., 8 Nev. 219; Iaege v. Bossieux, 15 Grat. 83, 76 Am. Dec. 109. And an assignment of the claim will carry with it the right to the lien. Westmoreland v. Foster, 60 Ala. 448; Sinton v. The R. R. Roberts, 46 Ind. 476; Murphy v. Adams, 71 Me. 113, 36 Am. Rep. 299; Duncan v. Hawn, supra; Railroad Co. v. Sturgis, 44 Mich. 538, 7 N. W. 213. The following quotation from Murphy v. Adams, supra, is a correct exposition of the law on this subject, as we understand it: "A laborer's statutory lien is assignable, and not personal to the laborer. The object of a statute giving such a lien is to make certain the payment of the laborer, and it would detract much from the benefit designed to be conferred to hold that the laborer must personally incur all the delay and expense that not infrequently arise from the tedious litigation that follows an effort to enforce a lien of this character. It certainly would be laying a burden upon the laborer, for whose benefit the statute was designed, to say that he could not avail himself of the security which the statute gives him in the way most beneficial to himself."

3. The last point made is that the statute construed as contended for by appellee destroys or abridges the right of contract, prevents proper and timely performance of contract obligations, and leads to a multiplicity of suits and interminable confusion. Such arguments might properly be addressed to the legislature, but they can be given but little weight by the courts. The statute was in force at the time the defendant made its contracts, and these contract rights and obligations must be subordinated to the provisions of the statute. As said by Chief Justice Shaw in Donahy v. Clapp, 12 Cush.

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440: "Such a contract, by force of the existing law when it was made, of which the owner is supposed to be cognizant, gives his irrevocable power to his contractor to charge and bind his estate; and when such power is executed by the actual making of subcontracts, it is in law the act of the owner hypothecating his own estate to the extent of the price of such labor." There is no doubt of the constitutionality of the law.

It is also suggested that there is no evidence that any taxes were voted in aid of defendant company, or that defendant had any title to the taxes so voted. A sufficient answer to this is that the evidence does show that taxes were voted; and, although the petition charged the voting of the tax to the defendant company, and that defendant was entitled to the tax, the defendant made no denial thereof in its answer. This answer contained certain specific denials, which did not refer to the voting of the tax in any manner. These undenied allegations of the petition must be treated as true. Code, § 3622, and cases cited.

The decree of the district court is right, and it is affirmed.

MEXICAN CENT. RY. CO., Limited, v. SPRAGUE.

(Circuit Court of Appeals, Fifth Circuit, March 4, 1902.)

[114 Fed. Rep. 544.]

Master and Servant—Negligence of Fellow Servant—Laws of Mexico.*

The common-law doctrine as to the nonliability of employers to an employee for the negligence of a fellow servant is not in force in the republic of Mexico; and under the laws of that country a railroad company is liable for all faults or accidents which may occur through the negligence, imprudence, or want of capacity of its employees, whether the person injured be an employee or a stranger.

In Error to the Circuit Court of the United States for the Western District of Texas.

T. A. Falvey and Waters Davis, for plaintiff in error.

Millard Patterson and C. N. Buckler, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. The defendant in error, W. B. Sprague, plaintiff below, brought suit against the Mexican Central Railway Company, Limited, to recover damages for personal injuries sustained by him September 20, 1899, at or near Cardenas, republic of Mexico, while engaged in his duties as engineer and road master of the railway company, in riding on one of said company's cars which was wrecked. This case grew out of the same accident which resulted in the injury of E. S. Conway, who had a suit here on writ of error at the last term of this court. *Railway Co. v. Conway*, 48 C. C. A.

*See 5 Rap. & Mack's Dig. 644 et seq.

147, 108 Fed. 932. The issues in this case, however, are different from those in the Conway Case. In both cases the ground of recovery is upon two allegations of negligence, namely: First, the negligence of P. T. Lavelle, the engineer in charge of the engine, in running his engine recklessly; and, second, negligence in having a defective triple valve on the caboose on which plaintiff and Conway were riding. In the Conway Case it was contended that the company was negligent in retaining Lavelle in its service, he being incompetent on account of drunkenness, which incompetency was brought to the notice of defendant railway company through Lavelle's general reputation. In the present case, however, it is not contended that Lavelle was incompetent, or that the defendant had any notice of his incompetency, but it is insisted that he was negligent upon this particular occasion. In the Conway Case defendant failed to present any proof as to the condition of the triple valve on the caboose, and Conway's statement that it was out of order was not in said former case controverted. On the other hand, Conway's statement was strenuously denied in the present case, and defendant produced proof to show that the triple valve was in good condition. The proof in the present case establishes the negligence of Lavelle in the operation of his engine, but may be said to leave in doubt the question of the condition of the triple valve, upon which question the testimony was conflicting. The court upon this statement of the evidence, nevertheless, charged the jury to find a verdict for the plaintiff. In view of the conflicting evidence as to whether or not the triple valve was really defective, the action of the court in instructing to find for plaintiff is erroneous, unless defendant is liable in this suit for the negligence on the part of Lavelle.

The plaintiff, an engineer and road master of the railway company, was at the time of his injury, and while riding on the train of which Lavelle was the engineer, a fellow servant with Lavelle (see *Railroad Co. v. Stuber*, 48 C. C. A. 149, 108 Fed. 934; *Railroad Co. v. Smith*, 14 C. C. A. 509, 67 Fed. 524, 31 L. R. A. 321; *Tomlinson v. Railroad Co.*, 38 C. C. A. 148, 97 Fed. 252); and thus the question before us, shortly stated, is whether the court below erred in holding that, under the pleadings and proof in this case and the legal presumptions applying in such cases, the common-law doctrine denying the liability of employers to an employee for the negligence of a fellow servant is not in force in the republic of Mexico.

The plaintiff pleaded and proved the following laws from the Codes of the republic of Mexico:

"Art. 301. The civil liability arising from an act or omission contrary to a penal law consists in the obligation imposed on the party liable, to make (1) restitution, (2) reparation, (3) indemnization, and (4) payment of judicial expenses."

"Art. 304. Reparation comprehends: The payment of all

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the damages caused to the injured party, to his family or to a third person, existing and not simply possible, if such damages are actual, and arise directly and immediately from the act or omission complained of, or there be a certainty that such act or omission must necessarily cause, as a proximate and inevitable consequence."

"Art. 326. No person can be charged with civil liability upon an act or omission contrary to a penal law, unless it be proven that the party sought to be charged usurped the property of another; that without right he caused, by himself, or by means of another, damages or injuries to the plaintiff; or that, the party sought to be charged being able to avoid the damages, they were caused by a person under his authority.

"Art. 327. Whenever any of the conditions of the preceding articles are established, the defendant shall be civilly liable without regard to whether he be absolved or condemned to criminal liability."

"Art. 330. In order that masters may be held civilly liable through their clerks and servants, according to the provisions of articles 326 and 327, it is an indispensable condition that the act or omission of the clerks or servants causing the liability shall occur in the service for which they were employed.

"Art. 331. Under the condition of the preceding article, those liable are * * * railroad companies."

Transitory Law, Penal Code:

"Art. 26. Until it is determined in the new code of procedure what judges shall have jurisdiction and the mode of proceeding, in suits to enforce civil liability, the following rules shall be observed: * * * (5) Actions to enforce the civil liability may be brought before a court of civil jurisdiction, whether or not the criminal proceeding has been commenced; but while the latter is pending, the proceeding in the former shall be stayed."

"Art. 184. Companies [railway] are liable for all faults or accidents which may occur through tardiness, negligence, imprudence or want of capacity of their employees."

The following is from the statement of Lic Andres Horcasitas, one of the judges of the supreme court of the republic of Mexico, which was introduced in evidence without objection:

"In answer to the question as to whether or not under the laws of Mexico, where two men are employed by the same employer or by the same railroad, and are engaged in the same common service, and through the negligence or carelessness of one of the men so employed the other receives an injury without any fault upon his part, the courts of the republic of Mexico hold the master or railroad company liable for such injury, I will state that, although it would not be easy to designate any sentence in which such a case has been decided, I certainly can assert that, according to the articles of the Penal Code before mentioned, the liability of the railroad

company for compensation for loss and damage caused by the negligence of its employees is clearly shown, whether the injured party is a stranger to the company or whether he bears the character of an employee of the same company; and a philosophical study of the law will at once show that the liability of the company cannot be altered by the character of the injured party, unless in the case where he himself is the person to be held liable. In my opinion, there can be no doubt that articles 326, 327, 330, and 331, and others of the same character, in the Penal Code of the Federal District, establish the liability of the railroad companies for the personal injuries that are caused through the negligence of one of their employees, and suffered by another employee of the same company, and that the same rules are laid down in the penal legislatures of the States of the Federation, which, as already, have almost all adopted the same penal code, while those which have enacted different penal laws did not make any provision on this point different to those of the Federal District."

Under our construction of these articles in the codes of Mexico, in connection with the evidence of Judge Horcasitas, the common-law doctrine as to the nonliability of employers to an employee for the negligence of a fellow servant does not exist in Mexico, but, on the contrary, railway companies in the republic of Mexico are liable for all faults or accidents growing out of the negligence, imprudence, or want of capacity of their employees, and the employee of a railroad corporation does not assume as one of the risks of his employment the negligence of his co-employee to the exclusion of the employer's liability.

This construction of the laws of Mexico proved in this case is supported by the fact that in the republic of Mexico the common law never did prevail, but the prevailing system was that of the civil law, under which, as we understand, the fellow-servant doctrine as known in the common law never was recognized. This construction is also supported by the following: *Railroad Co. v. McDuffey*, 25 C. C. A. 247, 79 Fed. 934; *Railway Co. v. Robinson*, 14 Can. Sup. Ct. 105; *Barksdale v. City of Laurens* (S. C.) 36 S. E. 661; *Pol. Torts*, 85.

Entertaining these views, we find no error in the record of this case warranting a reversal of the same, and the judgment of the circuit court is therefore affirmed.

NEWPORT NEWS & O. P. RY. & ELECTRIC CO. v. BRADFORD.

(*Supreme Court of Appeals of Virginia, March 13, 1902.*)

[40 S. E. Rep. 900.]

Accident at Crossing—Piling Snow—Liability of Street Railway.

In an action against a street railway for injuries sustained, owing to the piling of snow on a crosswalk by defendant, it having been assumed

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that the street was a public highway, and it being shown that there was a crossing constantly used, the importance of which the company recognized, as shown by the evidence of the superintendent that he directed the men to clean the snow from all crossings, and that he knew they removed it from that particular crossing, a contention that the street was not a public highway was of no avail to defendant, inasmuch as such question was immaterial.

Same—Same—Contributory Negligence—Evidence That Others Had Used Crossing.

It was not error to permit plaintiff to prove that others than herself had walked over the snow bank.

Same—Same—Negligence—Instruction.

Defendant asked the court to instruct that, if its tracks were covered with snow, it had the right to remove it therefrom, provided that in doing so it exercised ordinary care, to which instruction the court added, "and, where the snow might reasonably have been deposited so as not to obstruct the way of pedestrians passing along the crosswalk, the depositing of snow at such a point so as to create an obstruction is a negligent act": *held*, that the instruction as amended was proper.

Same—Same—Same—Same.

The snow having been removed from tracks by hand, it was not error to refuse to add to the former instruction, "if the snow was allowed to remain for an unreasonable time," since the negligence of the company consisted, not in its failure to remove within a reasonable time, but in putting the snow in the first instance on the crossing.

Same—Same—Contributory Negligence—Using Crossing with Knowledge of Obstruction.

Plaintiff testified that she knew that the crossing was obstructed by snow, which made it dangerous, but she had passed over the crossing shortly before the accident, and it was shown that many other persons had made their way over the same obstruction; and the court instructed that though plaintiff saw the heap of snow, and knew it was dangerous, she was not guilty of contributory negligence, if she was exercising such care as persons of ordinary prudence would exercise under the circumstances: *held*, that the instruction was not erroneous.

Same—Same—Trial—Reading Law to Jury.

Where defendant claimed it was not guilty of negligence unless the snow was allowed to remain for an unreasonable time, it was proper not to permit counsel to read the jury a definition of "reasonable time" from a reported case, and to read from another case a discussion as to what constitutes contributory negligence.

Excessive Verdict.*

In an action for personal injuries, a verdict for \$2,500 as compensation for a broken leg and much consequent suffering will not be disturbed as excessive.

Error to circuit court, Elizabeth City county.

Action by Mary E. Bradford against the Newport News & Old Point Railway & Electric Company. From a judgment in favor of plaintiff, defendant brings error. Affirmed.

S. Gordon Cummings and O'Ferrall & Regester, for plaintiff in error.

E. E. Montague and Bickford & Stuart, for defendant in error.

HARRISON, J. An opinion was handed down in this case in January, 1901, reversing the judgment of the circuit court

*As to what is the proper amount of recovery for loss of or injury to arm or leg, see *Yerkes v. Northern Pac. Ry. Co. (Wis.)*, 23 Am. & Eng. R. Cas., N. S., 642, and foot-note, 644.

for error in the instructions, and remanding the case for a new trial. *Electric Co. v. Bradford*, 37 S. E. 807.

The second trial, upon practically the same evidence, has resulted, as before, in a verdict for the defendant in error, and the case is again before us for a review of certain rulings of the circuit court which it is contended were erroneous.

Proceeding to the consideration of these several assignments of error in their convenient order:

The court is of opinion that the contention is not sound that Hope street was not proven to be a public highway. This question was not raised upon the former hearing of the case in this court, nor was it raised in the lower court upon either trial. On the contrary, the case has proceeded to this point upon the theory that Hope street was a public thoroughfare. The declaration alleges that the accident occurred at "the intersection of Mellen street with another thoroughfare known as 'Hope Street.'" It was assumed throughout the trial, by questions propounded by the plaintiff and defendant, and by the answers of witnesses thereto, that Hope street was one of the streets in Phœbus, and that it intersected Mellen street at the point of the accident. Apart, however, from these considerations, it is abundantly shown that at the intersection of these two streets, whether private or public, there was a crossing constantly used in passing from one side of Mellen street to the other. This crossing is characterized by witnesses as the main or principal crossing in Phœbus. The defendant company knew of the crossing; recognized its importance, and that it had no right to impede travel thereon by obstructing it with snow thrown from its railway. This is shown by the evidence of the superintendent of the company, who says that he directed his men to clean the snow from all the crossings, and that he is positive they did remove the snow from this crossing at Hope street. Under these circumstances, it is immaterial whether Hope street was or was not an established public highway.

The court is further of opinion that there was no error in permitting the plaintiff to prove that persons other than herself had walked over the bank of snow alleged to have been piled upon the crossing by the defendant. This evidence was proper to be considered by the jury in connection with other facts and circumstances bearing upon the question of contributory negligence. This court said in its former opinion that other persons having passed over the obstruction was not conclusive of the question of contributory negligence, but that such evidence was to be considered, in connection with all the facts and circumstances of the case, in determining the question of due care on her part.

The court is further of opinion that there was no error in the action of the court with respect to the instruction embodied in bill of exceptions No. 2. It appears that the company asked for the following instruction: "The jury

is instructed that the defendant railway company was entitled, under its charter, and the orders made by the board of supervisors of Elizabeth City county, to the use of the bed of Mellen street for the purpose of a street railway; and, if its tracks were covered with snow, it had the right to remove it therefrom, provided that in doing so it exercised ordinary care and prudence."

To this instruction, over the protest of the defendant, the court added these words: "And where the snow might reasonably have been deposited so as not to obstruct the way of pedestrians passing from one side of the street to the other at street crossings, the depositing of snow at such point so as to create an obstruction is a negligent act."

This instruction, as amended, conforms precisely to that given on the first trial, and heretofore approved; this court saying that the amendment made by the court did not change the legal effect of the instruction as asked for; that it only made the instruction a little more specific, and brought pointedly to the attention of the jury that the defendant, in the exercise of ordinary care and prudence, did not have the right to obstruct the street crossing in removing the snow, if it could reasonably have deposited the same elsewhere.

After the addition was made to the instruction, the defendant moved the court to further add the following words: "If the snow was allowed to remain for an unreasonable time." In this connection, the contention of the defendant is that it was not guilty of negligence in leaving the snow upon the crossing for about three hours after it had been thrown thereon from the railway track.

This contention was made in the same words when the case was first before us, and the court said: "From the necessity of the case, it would seem that a street car company, in operating its cars upon a street, would have the right to remove snow from its track to another part of the street; but in doing so it would not have the right to bank up the snow so as to make it dangerous to use or cross the street, unless the work of cleaning the track necessarily obstructs passage, and then the company is bound to do all that ordinary care requires in removing the obstruction,"—citing *Elliott, Roads, Shear. & R. Neg.*, etc. In the case at bar the negligence of the company consisted, not in its failure to remove the snow in a reasonable time, but in putting the snow in the first instance on the crossing. The snow was removed from the tracks of the company by hand and with shovel, and the contention of the plaintiff was that this method of removing the snow enabled the company, in the exercise of ordinary care, to avoid obstructing the crossing, by throwing the snow to either side thereof. When two methods of depositing snow, of equal convenience, or of nearly equal convenience, may be adopted, that method must be chosen which will result in least injury. Whether the company exercised its right to

clear its track with due care to avoid obstructing the crossing, and in such manner as to avoid unnecessary injury and inconvenience to the public, was the question in the case, to be determined by the jury in the light of all the facts and circumstances before them.

The court is further of the opinion that there was no objection to the following instruction given by the court at the request of the plaintiff:

"The court instructs the jury that though they may believe from the evidence that the plaintiff, Mary E. Bradford, saw the heap of snow alleged to have been piled or thrown up by the defendant company, and knew that it was of a dangerous character, her attempt to cross the same is not contributory negligence, provided that, under all the facts and circumstances of this case, in making such attempt she was exercising such due and reasonable care as persons of ordinary prudence would exercise under the same or similar circumstances."

This instruction is in conformity with the views expressed in the former opinion of this court, and the principle therein announced is supported by abundant authority. *Shear. & R. Neg.* § 376; *Beach, Contrib. Neg.* (3d Ed.) § 447; *Burwell, Pers. Inj.* § 138; 1 *Mun. Corp. Cases*, pp. 60, 483, 490; *Gordon v. City of Richmond*, 83 Va. 436, 2 S. E. 727; *City of Lynchburg v. Wallace*, 95 Va. 640, 29 S. E. 675. See, also, *Bass' Adm'r v. Light Co.* (Va.) 40 S. E. 100.

The mere fact that a street crossing is in a dangerous condition, and the danger is known, does not make the act of attempting to cross, in the exercise of ordinary care, negligence, as matter of law. To be negligence per se, the danger must be so apparent that in the use of ordinary care the traveler should not attempt to cross the street. If reasonably fair-minded men would differ as to the propriety of encountering the danger with ordinary care, then it is a question for the jury to determine upon all the facts and circumstances of the case.

The law is well settled in *Lyons v. City of Red Wing* (Minn.) 78 N. W. 868, as follows: "The mere fact that a person knows that a sidewalk is in a defective and dangerous condition does not, as a matter of law, impose upon him the duty of abandoning the use of the street, or else use it at his peril. He is bound in such case to use ordinary care, and no higher degree of care; that is, he is bound to use reasonable care, in view of all the circumstances of the case, including his previous knowledge of the condition of the walk."

In the case at bar the plaintiff says that she knew that the crossing in question was obstructed by a pile of snow, and that this obstruction made the crossing dangerous; but it does not appear that the danger was so apparent that she ought not to have undertaken the passage. On the contrary, she had already passed safely over the obstructed crossing in

going to the drug store, and the evidence shows that many other persons had not hesitated to make their way over such obstruction; showing that the danger was not regarded as so apparent that one ought not to encounter it.

In support of the contention of the defendant that the plaintiff was guilty of negligence per se in attempting to pass over the crossing in question, the recent case of *City of Winchester v. Carroll* (Va.) 40 S. E. 37, is relied on. The principles laid down in that case are not in conflict with those herein announced. To invoke that decision in support of the defendant's contention is to ignore the facts on which it is predicated. In that case there was a sidewalk 212 feet in length, about 12 feet wide, with a maximum elevation of 3 feet 3 inches above the level of the street, and held in position by a perpendicular retaining wall, and without barriers or guard rails to protect it. It appeared from photographs that these physical conditions were manifest and obvious to the most casual observer. It further appeared that the plaintiff was well acquainted with these physical conditions, having repeatedly walked over this sidewalk and driven along the street below. The plaintiff's own testimony is that, after she came from the Valley Female Seminary upon this elevated sidewalk, she concluded that a better way to get home would be to go out into the street; that, not thinking of danger, she deliberately turned and walked over the wall into the street below. Reasonably fair-minded men could hardly differ as to the necessary consequence of such an act. The danger was imminent, was known to the plaintiff, and the injury sustained was the inevitable consequence of the negligent act. Under these circumstances, the court held the plaintiff guilty of negligence per se. Not, as contended, alone because the plaintiff had knowledge of the danger she encountered, but because, in addition to that knowledge, the danger was imminent,—so apparent that reasonably fair-minded men could not differ with respect to the injurious consequences that would inevitably flow from any one, however careful, encountering such danger.

The court is further of opinion that it was not error to refuse to allow counsel for the defendant, while arguing the case before the jury, to read to the jury authorities.

It appears from the bill of exceptions embodying this assignment of error that defendant's counsel offered to read to the jury a definition of what is "a reasonable time," from a case reported in the *American & English Railway Cases*. The court refused to allow the authority to be read, and called the attention of the counsel to the fact that no instruction defining "reasonable time" had been asked for; that the court had fully instructed on all points requested, and was willing to instruct on what was "a reasonable time," but counsel did not avail himself of the offer. It further appears that counsel, while arguing the case, offered to read to the jury from the case of *City of Richmond v. Courtney*, 32 Grat. 792, upon

the question of what constitutes contributory negligence. The court declined to permit the authority to be read, but allowed counsel latitude in discussing what constitutes contributory negligence, and further permitted counsel to state the circumstances of the Courtney Case and the conclusion of the court.

In this jurisdiction the rule is well settled that it is for the court to expound the law, and for the jury to pass upon the facts. In *Delaplane v. Crenshaw*, 15 Grat. 457, where the action of the lower court in arresting the counsel, and prohibiting him from arguing before the jury against the instruction of the court, was under consideration, Judge Lee, speaking for this court, says: "It is a duty which the court owes to its own self-respect, as well as to the speedy administration of justice, not to allow counsel to discuss before the jury the same matter which has already been decided by it. * * * Whatever may be the true interpretation of the maxim that 'the jury are the judges of both law and fact,' as applied to criminal cases, it is for the court to expound the law, and for the jury to pass upon the facts." In the case of *Brown v. Com.*, 86 Va. 466, 10 S. E. 745, the prisoner asked for an instruction, which was refused, that the jury were the judges of the law as well as the facts. The court, through Judge Lewis, after reviewing the authorities, reaches the conclusion that the instruction was rightly refused. In reaching this conclusion, the learned judge quotes with approval, as eminently sound, the following from an opinion of Mr. Justice Story: "My opinion is that the jury are no more judges of the law in a capital or other criminal case, upon the plea of not guilty, than they are in every civil case tried upon the general issue. In each of these cases their verdict, when general, is necessarily compounded of law and fact, and includes both. In each they must necessarily determine the law as well as the fact. In each they have the physical power to disregard the law, as laid down to them by the court. But I deny that in any case, civil or criminal, they have the moral right to decide the law according to their own notions or pleasure. On the contrary, it is the duty of the court to instruct the jury as to the law, and it is the duty of the jury to follow the law as it is laid down by the court."

In *Taylor v. Mallory*, 96 Va. 18, 30 S. E. 472, where the right of counsel, in his closing argument before the jury, to refer to the result of a former trial of the case, and make other remarks not thought to be justified, was called in question, this court said: "It is the duty of counsel in argument to confine themselves to the case at bar, the evidence properly before the jury, and the law as laid down by the court in its instructions; and an unwarranted departure from this duty might make it necessary to set the verdict aside."

In *Thomp. Trials*, § 941, the learned author says that in no

civil case, "except, according to some early conceptions, in actions for damages for slander or libel, are the jury, in any sense, judges of the law. In such cases the jury must take the law from the court, and not from the counsel. The latter ought not to be allowed to argue questions of law to the jury, or to read them in argument from books of the law." In section 951 the author says: "In those jurisdictions where the charge of the court precedes the argument of counsel, the counsel should be confined in their argument from legal premises to the propositions of law embodied in the court's instructions, and the practice of reading books of the law to the jury ought not to be tolerated."

It being the settled rule in Virginia that it is the duty of the court to instruct the jury as to the law, and the duty of the jury to follow the law as laid down by the court, and it being, further, the prevailing and proper practice for the court to give its instructions in writing, in advance of the argument, it would seem to follow as a necessary consequence that counsel should be confined, in their argument from legal premises, to the propositions of law embodied in the court's instructions. To allow authorities to be read to the jury from the books would be calculated to confuse and mislead them, and cause them to disregard the court's instructions, and deduce from the books their own idea of the law, which they are not permitted to do. It is often difficult to interpret the language of the books, and a matter of perplexity and doubt to apply to principles involved, or to determine whether the ruling in a given case has any application to the case under trial. These doubts and difficulties are supposed to have been solved by the court, and the law applicable to the particular case deduced from the books, and given to the jury in the form of written instructions. Whatever may be avowed by counsel as the purpose for which authorities are read, that does not obviate the evil effect that would almost certainly flow from permitting them to be read. The due and speedy administration of justice, to say nothing of the duty which the court owes to its own self-respect, demands that counsel should be confined in their argument before a jury, from legal premises, to the propositions of law embodied in the court's instructions, and should not be permitted to read authorities from the books.

As opposed to this view, counsel for plaintiff in error rely upon the cases of *Railroad Co. v. Harman's Adm'r*, 83 Va. 553, 8 S. E. 251, and *Blankenship v. Railroad Co.*, 94 Va. 459, 27 S. E. 20. In the case last mentioned the court expressly stated that the question was not properly before it, and declined to pass upon it. In the case of *Railroad Co. v. Harman's Adm'r*, the subject is discussed, and a contrary view taken. Without, however, prolonging this opinion to review that case, or to determine whether or not the question was there involved and called for a decision, it must suffice to

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say that, in so far as it is in conflict with the views herein expressed, it is overruled.

The court is further of opinion that the circuit court did not err in refusing to set aside the verdict of the jury because it was excessive, or upon the ground that it was contrary to the law and the evidence.

The jury found a verdict for \$2,500 as compensation for a broken leg and much consequent suffering, and there is nothing in the record to suggest that in doing so they were acting under the impulse of any improper motive, gross error, or misconception of the subject. Under these circumstances, there being no legal measure of damages, the verdict of the jury will not be disturbed. *Railroad Co. v. Shott*, 92 Va. 34, 22 S. E. 811.

The case was fairly submitted to the jury under proper instructions. The determination of the question of fact, involving the negligence of the defendant company, and the contributory negligence of the plaintiff, rested with the jury. Under these circumstances, the verdict cannot be disturbed unless plainly in violation of the law, or without evidence to support it.

For these reasons, the judgment complained of must be affirmed.

Affirmed.

FELTON v. ANDERSON.

(*Court of Appeals of Kentucky, Jan. 17, 1902.*)

[66 S. W. Rep. 182.]

Railroads—Killing of Horses by Train—Presumption of Negligence Overcome.*

In an action to recover damages for the negligent killing of horses struck by a train, it appearing from the uncontradicted and unimpeached testimony of defendant's servants in charge of the train that the presence of the horses on the track was not discovered, and could not by the exercise of ordinary care have been discovered, in time to prevent the injury, defendant was entitled to a peremptory instruction; the presumption of negligence being overcome.

Appeal from circuit court, Lincoln county.

"Not to be officially reported."

Action by Hall Anderson against S. M. Felton, receiver, to recover damages for the negligent killing of live stock, and for negligently setting fire to fencing and grass by sparks from locomotives. Judgment for plaintiff, and defendant appeals. Reversed.

*As to the presumption of negligence arising from mere proof of injury to stock on track, see *Mire v. Yazoo & M. V. R. Co.* (La.), 21 Am. & Eng. R. Cas., N. S., 761, and foot-note.

As to the credibility of railroad employees as witnesses, see *Brunswick & W. R. Co. v. Wiggins* (Ga.), 22 Am. & Eng. R. Cas., N. S., 588, and foot-note.

Henderson v. United Traction Co

Simrall & Galvin and J. W. Alcorn, for appellant.
W. G. Welch and Hill & McRoberts, for appellee.

O'REAR, J. This action was for the negligent killing of two horses by the railway trains operated by appellant, and for damages for negligently setting fire to fencing and grass by sparks from appellant's locomotives. The evidence upon the question of damages for the destruction of the fencing and grass is conflicting, and that question seems to have been fairly submitted to the jury. But in the matter of the damages claimed for the killing of the horses the evidence of the engineers and trainmen in charge, whose duty it was to be, and who were, on the lookout, shows that the stock was struck by passenger trains running at a high rate of speed in the nighttime; trains making, possibly, 60 miles or more an hour, and being heavy passenger trains, of some eight or nine cars. These witnesses further testified that it was impossible, although the train was thoroughly equipped with proper appliances, to have stopped the train within the distance when the horses could first have been seen, or were seen, before they were struck. Upon this point their testimony was not contradicted. The jury was not authorized to disbelieve these witnesses, without their being contradicted or impeached. Their testimony was sufficient to overcome the prima facie case of negligence made under the statute by the fact of the killing of the horses; and upon that state of the record the motion of appellant for a peremptory instruction as to the claim for the horses should have been sustained, and that much of the case withdrawn from the jury.

For this error, the judgment is reversed, and cause remanded for a new trial consistent with this opinion.

HENDERSON v. UNITED TRACTION CO.

(*Supreme Court of Pennsylvania.*)

[51 Atl. Rep. 1027.]

Street Railroads—Accident at Street Crossing—Pedestrians—Sufficiency of Evidence.

In an action against a street railway company for negligent killing of a pedestrian at a crossing, three witnesses for plaintiff testified that the car was running from 12 to 20 miles an hour, and that no bell was sounded; and two other witnesses testified to the excessive speed of the car. Three witnesses for defendant testified that a bell was sounded, and two that they heard none. It also appeared that when deceased left the curbing she looked towards the car, then about 200 feet away, and when struck she was almost across the track, and that the car ran 180 feet before it stopped, after striking deceased: *held*, that the evidence was sufficient to sustain a judgment for plaintiff.

Appeal from court of common pleas, Allegheny county.

Action by Robert Henderson against the United Traction

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Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Knox & Reed and J. H. Beal, for appellant.

Frank A. Ammon, Samuel A. Ammon, and Rody P. Marshall, for appellee.

McCOLLUM, C. J. While crossing Fifth avenue, in McKeesport, Mrs. Margaret Henderson was struck by a car of the United Traction Company and killed. Her husband brought this suit for the recovery of damages incurred in the casualty referred to. The extraordinary speed of the car was noticed by the plaintiff's witnesses, and neither of them heard the ringing of a bell or gong. James McGarey testified that he saw Mrs. Henderson when she stepped from the curbstone, and looked in the direction that the car was coming. He testified that when she stepped from the curb the car was between two and three hundred feet away. He also said that the car was running at a high rate of speed, and, in his opinion, from 15 to 18 miles an hour. Max Fingold testified that Mrs. Henderson was near the second rail when the car struck her. Joseph Kline said that she was nearly across the track when she was struck by the car, and that he did not hear any gong rung on that car. It ran in the neighborhood of 200 feet after it hit her. It stopped in front of the Henderson Block. In his estimation, it was running 12 or 14 miles an hour. "It was running faster than other cars were usually run." Joseph Morissey testified that he had been a locomotive engineer for 16 years, and that his house was on Fifth avenue, in McKeesport, directly opposite the Henderson Block. He said that he saw Mrs. Henderson when she was between the curb and the first rail, and that he noticed the car somewhere between the middle of the block, about 200 or 220 feet away from Mrs. Henderson; that, in his opinion, the car was running between 18 or 20 miles an hour; and that another step would have taken her across the track. He also said that he did not hear any bell ring. According to Shaw's testimony, the car was running at a high rate of speed. Davis was also of the opinion that the car was running at the rate of 18 miles an hour. The witnesses testifying for the defendant were McNamara, Mrs. Rusha, Mrs. Murray, Bush, and Richpeter. McNamara and Bush did not see Mrs. Henderson struck by the car, and neither of them heard the bell ring. The other witnesses testified that they were passengers on the car at the time of the occurrence, and three of them said they heard the bell ring. It is evident, however, that the alleged ringing of the bell or gong was in close proximity to the casualty which resulted in Mrs. Henderson's death. It should also be stated in this connection that Hallam, the civil engineer, was aware that Mrs. Henderson was struck at the Wiley Way crossing, and that the car was not checked by the motorman until it had run 181 feet from the place where she was struck.

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The charge of the court was carefully and fully presented for the consideration of the jury. Every phase of the case was presented by the court to the jury, and no one can justly say that the learned judge failed to bring to the attention of the jury all matters affecting the suit. The care that was exercised in presenting the evidence that was relied on by the jury showed the discretion of the judge, and his fairness in passing upon all matters in dispute. No just cause appears for charging him with error, when it was plain enough that there was nothing in the charge which would warrant a reversal of the judgment. It was the province of the jury to pass upon the evidence, and render a verdict in accordance with it. This they have done, and there is no reason to complain of it. The case at bar is exactly in line with *McGovern v. Traction Co.*, 192 Pa. 344, 43 Atl. 949, and it is not necessary to enter upon a discussion of either.

Judgment affirmed.

KELLEGHER v. FORTY-SECOND ST., M. & ST. N. AVE. R. Co.

(*Court of Appeals of New York, May 27, 1902.*)

[63 N. E. Rep. 1096.]

Street Car—Injury to Passenger—Instructions.*

In an action to recover for injuries received in attempting to board a street car, an instruction that, if the jury believed the evidence of the witnesses for plaintiff, the act of the conductor in starting the car was negligent, and constituted a cause of action in favor of plaintiff against defendant, was reversible error, because submitting only the question of the credibility of plaintiff's witnesses, and withdrawing the question of defendant's negligence and of plaintiff's contributory negligence, both of which questions should have been submitted, even though the evidence of plaintiff's witnesses was believed.

Appeal from supreme court, appellate division, First department.

Action by Eliza M. Kellegher against the Forty-Second Street, Manhattanville & St. Nicholas Avenue Railroad Company. From a judgment of the appellate division (67 N. Y. Supp. 767) affirming the judgment for plaintiff, defendant appeals. Reversed.

Charles Stewart Davison, Charles F. Brown, Henry Melville, and Henry A. Robinson, for appellant.

George Murray Brooks, for respondent.

MARTIN, J. This action was to recover for personal injuries alleged to have been caused by the negligence of the defendant. The accident from which the injuries resulted occurred on April 25, 1897, at the corner of Seventy-Ninth street and Amsterdam avenue, in the city of New York. There

*As to the duty of carriers in taking on and setting down passengers, see note to *Phillips v. St. Charles, etc., R. Co.* (La.), 1 R. R. R. 902, 24 Am. & Eng. R. Cas., N. S., 902.

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was a conflict in the evidence as to the circumstances attending it. So far as essential to the question involved on this appeal, the facts claimed to be established by the plaintiff and her witnesses may be briefly stated. At the place mentioned the plaintiff attempted to board an open horse car running upon the defendant's street railway, and under its control. At least three cars had passed which were crowded, so that the plaintiff and a friend accompanying her did not attempt to board them. When the car in question approached, which was an open horse car, the plaintiff nodded to the conductor to stop. The car was stopped, two ladies alighted, and the plaintiff and her friend intended to take the places upon the car thus left vacant. The former took hold of the stanchion with her left hand, stepped upon the side step or running board, raised her foot to step between the seats, when, at a signal by the conductor, the car started with a jerk, and she was thrown to the ground, and received the injuries complained of. Her friend made no attempt to board the car. The evidence upon the part of the defendant was essentially different, and such as would have justified a verdict for the defendant if believed by the jury.

The only question presented upon this appeal relates to the charge of the trial court. It charged: "In this particular case the circumstances testified to by the various witnesses are of such a character that I may safely say to you that, if you believe the witnesses called by the plaintiff, who have testified to the circumstances under which the accident happened, it must be said that the act of the conductor was a negligent act, and such an act as may warrant a cause of action on behalf of the plaintiff." To this portion of the charge the defendant excepted. The court, after stating the position of the defendant and the circumstances under which its witnesses testified that the accident occurred, then charged that if that was the way the plaintiff got off from the car, and the way in which the accident happened, she could not recover. It then charged that the burden of proof as to the defendant's negligence and as to her freedom from contributory negligence was upon the plaintiff. It is doubtless true that it is the duty of carriers of passengers to allow persons entering their car a reasonable time within which to enter, and, if it is prematurely started with such unusual or unnecessary violence as to do the passenger injury while entering, a jury may be justified in finding the defendant guilty of negligence. *Keating v. Railroad Co.*, 49 N. Y. 673, affirming 3 Lans. 469; *Sauter v. Same*, 66 N. Y. 50, 23 Am. Rep. 18; *Milliman v. Same*, 66 N. Y. 642; *Taber v. Railroad Co.*, 71 N. Y. 489; *Bartholomew v. Railroad Co.*, 102 N. Y. 716, 7 N. E. 623, 27 Am. & Eng. R. Cas. 154; *Mulhado v. Railroad Co.*, 30 N. Y. 370; *Nichols v. Railroad Co.*, 38 N. Y. 131, 97 Am. Dec. 780; *Poulin v. Railroad Co.*, 61 N. Y. 621. If the charge in this case had been to that effect, and the court had

submitted the question to the jury as one of fact, there would have been no error. But such was not the charge. The instruction to the jury was that, if it believed the plaintiff's witnesses, the defendant's conductor was negligent, and the plaintiff had a cause of action. Thus, instead of submitting the evidence to the jury to find the facts necessary to constitute a cause of action in favor of the plaintiff, the court submitted to it only the question of the credibility of the witnesses, followed by the instruction that, if the plaintiff's witnesses were to be believed, a cause of action was established. This charge was not justified. The questions whether the defendant had exercised proper care in the management of its car; if not, whether such omission caused the injuries complained of; and whether the plaintiff was free from any negligence contributing to her injury,—were questions to be determined by the triors of fact, and not by the court. There was no such proof by the plaintiff as justified the court in determining these questions as matter of law, or in determining that the conductor was negligent, even if the facts were as testified to by the plaintiff. The inferences and conclusions to be drawn from that evidence were for the jury alone. The plaintiff's testimony did not show conclusively that the starting of the car was unusual, that any unnecessary jerk occurred, or that the conductor neglected any particular act that it was his duty to perform. Besides, the jury might have found that the plaintiff was negligent in the manner in which she undertook to board the car. It is only in rare cases that a court is justified in holding that the acts of parties are negligent per se. The questions of negligence and contributory negligence are usually questions of fact to be determined as such. This is necessarily so, as there is seldom any arbitrary or absolute standard which can be applied to the facts of a particular case. As in this case there was no absolute standard fixed by law as to the care required of the plaintiff, except that she was bound to exercise ordinary care and prudence, it was for the jury, and not for the court, to determine what care she exercised, and whether it reached the standard required. In the solution of that question the jury was to determine not only what, under the circumstances, would constitute ordinary care on the part of the plaintiff, but also whether her conduct was such as to fulfill that requirement. The standard by which the defendant's acts were to be judged was also largely a question of fact, and whether the acts proved came up to or were below that standard was peculiarly a question for the jury. We are of the opinion that the court erred in charging that, if the jury believed the witnesses called by the plaintiff, the act of the conductor was negligent, and constituted a cause of action in favor of the plaintiff, and that the court should have submitted the questions of the defendant's negligence and the plaintiff's freedom from contributory negligence to the jury as questions of fact,

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even if the evidence given by the plaintiff was to be believed. *Mulhado v. Railroad Co.*, 30 N. Y. 370; *Keating v. Railroad Co.*, 49 N. Y. 673; *Eppendorf v. Railroad Co.*, 69 N. Y. 195, 25 Am. Rep. 171; *Black v. Railroad Co.*, 108 N. Y. 640, 15 N. E. 389; *Morrison v. Railroad Co.*, 130 N. Y. 166, 29 N. E. 105; *Akersloot v. Railroad Co.*, 131 N. Y. 599, 30 N. E. 195, 15 L. R. A. 489; *Distler v. Railroad Co.*, 151 N. Y. 424, 45 N. E. 937, 35 L. R. A. 762; *Dochtermann v. Railroad Co.*, 32 App. Div. 13, 52 N. Y. Supp. 1051, affirmed, 164 N. Y. 586, 58 N. E. 1087. The portion of the charge excepted to practically withdrew from the consideration of the jury any question except the truthfulness of the plaintiff's evidence, and tended to withdraw from it the determination of the facts established by the proof and the inferences to be drawn therefrom. Such an instruction was improper. *Dolan v. President, etc.*, 71 N. Y. 285. Moreover, unless the only possible inferences deducible from the plaintiff's testimony were that the defendant was guilty of negligence, and that she was free from contributory negligence, the court could not properly instruct the jury that, as a matter of law, the defendant was liable, and the plaintiff was entitled to recover. *Kain v. Smith*, 89 N. Y. 375, 384; *Bank v. Sloan*, 135 N. Y. 371, 32 N. E. 231.

It follows that for the error pointed out the judgment should be reversed, and a new trial ordered, with costs to abide the event.

PARKER, C. J., and BARTLETT, HAIGHT, VANN, CULLEN, and WERNER, JJ., concur.

Judgment reversed, etc.

PITTSBURGH, C., C. & ST. L. RY. CO. v. GRAY.

(*Appellate Court of Indiana, April 4, 1902.*)

[64 N. E. Rep. 39.]

Assisting Passengers to Alight—Scope of Employment—Pleadings.*

The complaint in an action against a railroad for personal injuries alleged that the brakeman advised and assisted the passenger to alight from a moving train, and that it was the duty of the brakeman to assist passengers in safely alighting: *held*, that the complaint sufficiently alleged that the brakeman was acting within the scope of his employment.

Who Are Passengers.*

A passenger started to get off a train as soon as it stopped at his destination, but before he could alight the train started up again. He stepped from the platform while the train was in motion, and was injured: *held*, that he was still a passenger at the time he stepped from the platform.

Contributory Negligence—Stepping from Moving Train.

The fact that a passenger attempted to alight from a slowly moving

*As to the duty of carriers in taking on and setting down passengers, see note to *Phillips v. St. Charles, etc., R. Co. (La.)*, 1 R. R. R. 902, 24 Am. & Eng. R. Cas., N. S., 902.

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train, and received injuries in so doing, did not necessarily render him guilty of contributory negligence.

Finding of Fact—General Verdict—Conclusions.

In an action to recover for injuries received in getting off a moving train, it was specially found that plaintiff, although an old man, was acquainted with the train and a frequent traveler. When the train stopped at his destination he started to get off, but at the door met an incoming passenger, with whom he talked until the train started. The train was started by the conductor after all the passengers had apparently gotten off, and he was not aware that plaintiff had not alighted. The brakeman asked him if he intended to get off, and said, "You will have to be quick about it; step off with the train." Plaintiff stepped off, the brakeman steadying him with his hand, and fell after he stepped from the platform. The jury, upon these facts, found as a conclusion that the brakeman had requested plaintiff to alight while the train was in motion, and returned a general verdict for him: *held* that, as the conclusion and the findings of fact were at variance, the conclusion should have been disregarded; and, the general verdict for plaintiff being contrary to the findings of fact, defendant's motion for judgment non obstante veredicto should have been sustained.

Contributory Negligence—Alighting from Moving Train.*

A passenger who had been carried to his destination, and had been given ample time to alight, stayed on the train to talk with some one he met. When the train started up he attempted to get off, and was advised by the brakeman to be quick, and step off with the train. The movement of the train was suddenly accelerated, and the passenger was injured when he stepped from the platform. He stepped off voluntarily: *held*, that he was guilty of contributory negligence.

Robinson, J., dissenting.

Appeal from circuit court, Cass county; Dudley H. Chase, Judge.

Action by Samuel Gray against the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company. From a judgment for plaintiff and the overruling of defendant's motion for judgment non obstante veredicto, defendant appeals. Reversed.

John L. Rupe and G. E. Ross, for appellant.

Blackledge, Shirley & Wolf, Nelson & Myers, and Joseph P. Gray, for appellee.

WILEY, J. Appellee was injured while alighting from one of appellant's passenger trains, and prosecuted an action against it for damages. His complaint was in three paragraphs. The first paragraph avers that appellee took passage on one of appellant's trains at Logansport, to go to Galveston, and paid the regular fare to said last-named station; that when the train stopped at Galveston he arose from his seat, and passed out of the car, where he was riding, onto the platform, for the purpose of getting off; that when he was about to descend the car steps appellant's agent in charge of the train negligently caused the same to start suddenly, and that one of the brakemen in charge negligently ordered and directed the plaintiff to leave the train while in motion, and took hold of his arm, led him across the platform and down the steps, and encouraged, advised, directed, and commanded

*See *La Pointe v. Boston & M. R. R.* (Mass.), 23 Am. & Eng. R. Cas., N. S., 105, and foot-note.

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him to get off; that appellee was about 70 years old; that he was somewhat confused by the sudden starting of the train and the conduct of the brakeman, as described; that he relied upon the brakeman's directions, and stepped from the train while it was in motion. It is also charged that one of the duties of the brakeman was to look after the safe debarkation of passengers; that appellee knew that the train was moving slightly, but that on account of his age, his imperfect eyesight, and his confusion caused by the sudden starting of the train, and the brakeman's conduct, and being unfamiliar with the movement of trains, and unable to estimate the speed, he believed that the motion of the train was not so great as to make his debarkation dangerous; that the train stopped a very brief time, wholly insufficient, in view of appellee's age, to enable him to alight safely; that the brakeman saw him in the act of leaving the train when the same was put in motion, and might have stopped it by pulling the bell cord, before it had acquired any considerable motion, but that he negligently failed and refused to do so, or in any manner signal the engineer to hold the train until appellee could alight; that when he had descended the steps, and was in the act of stepping from the same, in obedience to the brakeman's order, and when he advanced too far to retreat, the speed was suddenly very much accelerated, whereby in alighting, and while in the exercise of due care, he was thrown upon the platform and seriously injured. The complaint further avers that said injury was caused without any fault or negligence on his part, but wholly on account of the negligence and fault of appellant. The second and fourth paragraphs of complaint contain all the material averments of the first, differing therefrom only that they do not charge that the train did not stop a sufficient length of time for appellee to debark. Demurrers to each of these paragraphs of complaint were overruled. The cause was put at issue by an answer in denial. Trial by jury resulting in a general verdict for appellee. With the general verdict the jury found specially by way of answers to interrogatories. Appellant moved for a new trial, for judgment on the answers to interrogatories, and in arrest of judgment.

By the assignment of errors, all the rulings of the trial court to which reference is made are brought in review.

As against the sufficiency of the complaint, it is urged that the facts pleaded do not show that the brakeman was at the time acting within the line of his duty and scope of his employment. We do not think this position can be successfully maintained. Summarized, the acts of negligence charged against appellant are that the brakeman advised, commanded, directed, ordered, and assisted appellee to alight while the train was in motion, and at a time when he must have known it was dangerous, and suddenly starting and increasing the speed of the train when appellee was in the act of debarking. In addition to this, in the first paragraph, the further act of

negligence is charged that the train did not stop a sufficient length of time for appellee, on account of his age, to alight. It is charged that one of the duties of the brakeman was to assist passengers in safely alighting from the train. This is an averment of an issuable fact, and it necessarily follows, as a matter of pleading, that when the brakeman was directing, assisting, commanding, and advising appellee to alight he was acting within the line of his duty and scope of his employment. This conclusion is in harmony with the rule declared in *Railway Co. v. Savage*, 110 Ind. 156, 9 N. E. 85.

It is also urged that at the time appellee attempted to alight from the train the relation of carrier and passenger did not exist between him and appellant, and hence appellant did not owe to him the duty of a carrier to a passenger. This position is not tenable. Up to the time appellee reached the station where he desired to debark he certainly was a passenger. He rightfully entered the train, paid his fare, and had done nothing to sever the relation of carrier and passenger. So far as the complaint shows, he had made every reasonable effort to alight before the train started. If he had not left his seat in the car, and the train had proceeded on its way, he would still have been a passenger, and by paying his fare to the next station, or any station, appellant would have been required to carry him safely. Ordinarily, where a person becomes a passenger on a train, pays his fare, and conducts himself in an orderly and proper manner, he remains a passenger until he safely debarks therefrom. In this case, as shown by the complaint, appellant recognized appellee as a passenger; for its servant, as shown by the complaint, advised, directed, assisted, and commanded him to alight. The relation of carrier and passenger exists where the passenger, carelessly or inadvertently, takes the wrong train, or where a person enters a car to assist a member of his family or some one in his charge. *Railroad Co. v. Athon*, 6 Ind. App. 297, 33 N. E. 469, 51 Am. St. Rep. 303; *Railroad Co. v. Mushrush*, 11 Ind. App. 192, 37 N. E. 954, 38 N. E. 871; *Railroad Co. v. Carper*, 112 Ind. 26, 13 N. E. 122, 14 N. E. 352, 2 Am. St. Rep. 144; *Railroad Co. v. Crunk*, 119 Ind. 542, 21 N. E. 31, 12 Am. St. Rep. 443. In the *Costello Case*, 9 Ind. App. 462, 36 N. E. 299, the train stopped three minutes, and other passengers got on and off. *Costello* was a passenger, and the train had stopped a sufficient length of time to enable him to alight, and while he was alighting the train was started and he was injured. It was held that he could not recover, for it was shown that he had sufficient time to alight, and that the company's servant did not know he was attempting to alight when they started the train. In the case we are now considering, the complaint does not show how long the train stopped at Galveston, but it does show that as soon as it did stop appellee started to alight. Under these facts, he was

still a passenger, and appellant owed to him the duties of a passenger.

It is further urged that the complaint is bad because it shows that appellee was guilty of negligence in attempting to alight from the train when it was in motion. It does not necessarily follow because a passenger attempts to alight from a slowly moving train that he is guilty of contributory negligence, for such act is not negligence per se. This rule is declared in many cases. *Railroad Co. v. Crunk*, supra; *Railroad Co. v. Carper*, supra; *Pennsylvania Co. v. Marion*, 123 Ind. 415, 23 N. E. 973, 7 L. R. A. 687, 18 Am. St. Rep. 330; *Railroad Co. v. Bean*, 9 Ind. App. 240, 36 N. E. 443. The demurrers to the several paragraphs of complaint were properly overruled.

We proceed next to consider the overruling of appellant's motion for judgment on the answers to interrogatories non obstante veredicto. A correct determination of the question thus raised depends upon the facts specially found. The facts upon which the ruling must be measured are as follows: Appellee was 67 years old. The day he was injured was clear and pleasant. He was in full possession of his sight and hearing. He lived at Galveston, and was acquainted with the trains passing there, and was a frequent traveler thereon. When the train reached Galveston, it stopped to let passengers off and on, and appellee knew that it had so stopped. The train stopped long enough to allow all passengers desiring to do so to get on and off. The train stopped as long as usual. Several passengers got on and off the train before it started, without difficulty. The train was started upon a signal from the conductor after all baggage and express matter had been disposed of, and after all passengers, apparently to the conductor and brakeman, had gotten off. When the conductor started the train he did not know that appellee had not alighted therefrom. When the train stopped appellee arose from his seat, and walked to the rear door of the smoking car, where he met a Mr. Tyner, a passenger who came on board at Galveston, and talked with him till the train started, and about the time he came to the door he met the brakeman. At or about the time appellee came to the car door the brakeman asked him if he intended to get off, to which he replied, "Of course," or "Certainly." That the brakeman said, "You will have to be quick about it; step off with the train." That the appellee passed by the brakeman, and stepped off, the latter steadying him with his hand, and appellee fell after he stepped upon the platform. That appellee knew the train was in motion when he came out of the car on the platform. That he fell and received his injury by reason of his stepping on the depot platform while the train was in motion. That there was nothing to impede or hinder appellee from promptly and safely leaving the train while it was standing at the station platform, except his voluntarily stopping to talk to Mr. Tyner.

That the reason appellee did not get off the train when it stopped was because he stopped to talk to Mr. Tyner. That if appellee had remained on the train after it started, instead of attempting to get off, he would not have been in any peril. Interrogatory 20 and answer are as follows: "No. 20. Was there any other reason for plaintiff getting off the train after it started to leave the station of Galveston than that he resided there, and did not wish to be carried to the next station? Answer. Yes; by request of brakeman." It is also found that the conductor did not give any order to the brakeman to advise appellee or to order or direct him to leave the train while it was in motion. Interrogatory 23 and answer are as follows: "No. 23. Did the plaintiff say anything to the defendant's brakeman, or the brakeman to him, except that brakeman asked plaintiff if he intended to get off there, or if he wanted to get off there, and upon his replying, 'Yes,' or 'Certainly,' the brakeman replied, 'You will have to be quick about it; step with the train,'—were these all the words that passed between them? Answer. Yes." By the answer to the twenty-fourth interrogatory it is found that all the brakeman did toward the appellee, as he attempted to get off, was to put his hand upon him as he passed down the steps, to steady and assist him to get off safely. It is quite clear to our minds that the answers to interrogatories, or, more correctly speaking, the facts specially found, make a case sharply distinguished from the case made by the complaint. By holding the complaint good against the assault of a demurrer, we necessarily held that the complaint stated facts showing actionable negligence on the part of appellant, and a freedom of contributory negligence on the part of appellee. In the first paragraph the alleged negligence of appellant consisted in not stopping the train long enough for appellee to leave it in safety; also the conduct of appellant's brakeman in directing, commanding, advising, and assisting appellee to leave the train when it was in motion, and suddenly increasing the speed of the train when he was in the act of leaving. The other two paragraphs charge the same acts of negligence, omitting to charge that the train did not stop long enough to enable him to leave it in safety. All the evidence and the answers to interrogatories show that it was the purpose of appellee to leave the train at Galveston. He started out of the car with that intention. When he met the brakeman on the platform he told him he was going to get off there. The brakeman did not command him to get off, nor advise him that he could get off in safety. He was acting on his own judgment and carrying out his own plans, deliberately formed.

All that passed between appellee and the brakeman, as the former was leaving the train, is fairly stated in interrogatory 23 and the answer thereto, which are above set out in full. In brief, this is what occurred between them: The brakeman, when he met appellee, asked him if he was going to get

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off at Galveston. The latter said, "Yes," or "Certainly." The brakeman replied that he would have to be quick about it, and that he should step with the train. We are unable to construe anything that was said by the brakeman to appellee as a command or direction for him to leave the train. From what appellee told the brakeman, and his conduct, the latter was fully informed that the former intended to leave the train at that point. He did not even request the brakeman to stop the train. He was acting upon his own judgment, and was intent in carrying out that judgment. When the brakeman saw that he was determined to leave the train, he merely directed him how to get off in safety. It appears from the answers to interrogatories that appellee was familiar with the trains and a frequent traveler thereon. It is clear that he did not seek any advice from the brakeman, nor was he in any way influenced by what the brakeman said, for he simply did that which he was intending all the time to do. It follows from this and from all that was said and done that the answer of the jury to interrogatory 20, that appellee got off at the request of the brakeman, is a mere conclusion. All that the brakeman said to the appellee cannot be construed as a command or order, but as advice or direction as to the best manner of his getting off. The most liberal construction that can be given to the statement is that he attempted to observe the direction of the brakeman in the manner of his getting off, and not that he got off because he advised or directed him to do so. In this case the appellee's account of what was said and done between him and the brakeman will be found to be in exact harmony with interrogatory 23 and the answer thereto. There is no substantial difference between the appellee and the brakeman as to what was said between them. In the account given by each of them, there was nothing like a request or command from the brakeman.

So we have had a special finding of the exact facts as disclosed by the evidence and a statement of a conclusion drawn by the jury in answer to interrogatory 20 which are at variance; that is, the conclusion of the jury is at variance with the facts found. In such case the conclusion must be disregarded, for it is without force or controlling influence. *Geddes v. Blackmore*, 132 Ind. 551, 32 N. E. 567.

The advice given to appellee by the brakeman, in view of the surrounding facts and circumstances, related wholly to the manner of his getting off the train, and was timely and manifestly right. Appellee was not without fault. Appellant had carried him, according to its undertaking, to his place of destination, and had given him ample time, as found by the jury, to alight. He did not take advantage of his opportunity to leave the train, but stopped in the car to talk to some one he met. The train stopped as long at the station as it usually did, and all passengers who desired had gotten off and on. The conductor who had charge of the train did not know

that appellee had not left the train. Appellee was as fully advised of the movement of the train as the brakeman. The brakeman had no more reason to anticipate that the movement of the train would be suddenly accelerated when the appellee was in the act of getting off than he did, for the brakeman had no control whatever of that matter. It is perfectly clear that appellee did not rely upon the advice of the brakeman, except to the manner of his getting off, and this advice was good, and was to the effect of diminishing, rather than increasing, the danger. Under the facts specially found, he was not compelled to the act of jumping off the train while it was in motion, and he therefore did it voluntarily. He could have remained on the car, and thus avoided injury. In the case of *Railroad Co. v. Swift*, 26 Ind. 459, it was held that where a passenger voluntarily leaves a train of cars while in motion, simply to avoid being carried beyond the station where he desires to stop, and he is thereby injured, his own negligence is the proximate cause of the injury, and that he cannot recover. In that case the passenger, when contemplating getting off the train at a station, and seeing that the train was not going to stop, remarked to the conductor that he could not take that risk, the conductor responding, "You could if you would," or "You might if you would." The court held that, notwithstanding what the conductor said to him, he assumed the risk, and it was such negligence in his making the attempt that he was chargeable with negligence contributing to his own injury. That was a much stronger case against the railroad than this, for there is no pretense here that the brakeman even intimated that appellee could alight in safety. The *Swift Case* is cited and approved in *Railroad Co. v. Carper*, 112 Ind., at pages 30, 36, 13 N. E. 122, 14 N. E. 352, 2 Am. St. Rep. 144; *Wolery v. Railway Co.*, 107 Ind., at page 387, 8 N. E. 226, 57 Am. Rep. 114, 27 Am. & Eng. R. Cas. 210; and in *Railroad Co. v. Peters*, 80 Ind. 175. In *Railroad Co. v. Carper*, 112 Ind. 26, 13 N. E. 122, 14 N. E. 352, 2 Am. St. Rep. 144, it is said: "There is an essential difference between a direction in the nature of a requirement and a direction in the nature of advice or information. * * * It is clear to our minds that, upon principle, a railroad company is not responsible for directions in the nature of information or advice given to a passenger." In *Vimont v. Railroad Co.*, 32 N. W. 100, it was held by the supreme court of Iowa that where the conductor of a train said to a passenger, as the train was leaving a station, "Jump off quick, if you are going to," was not a command to leave the train, but must be considered as "advice, and good advice at that." In the case of *Lindsey v. Railroad Co.* (Iowa) 20 N. W. 737, the words spoken to a passenger "to get off quickly" were construed in the same manner. In the *Swift Case*, supra, referring to the words spoken to the passenger by the conductor, and which elsewhere appear in this opinion, the court

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said: "He did not tell him to leap, and the words used could scarcely, by a fair construction, be understood as advising him to leap, much less a command to do so." In this case the movement of the train was the sole cause of danger to appellee. He was a man of mature years and judgment, and was accustomed to traveling on trains. The day was clear, and his eyesight was unimpaired. He was familiar with the surroundings and conditions which confronted him, and it is manifest that the danger was as apparent to him as it was to appellant's brakeman. Notwithstanding the situation with which he was confronted, and the apparent danger that attended his undertaking, he was determined to get off. He simply carried out his intention and determination to leave the train, and all the brakeman did was to advise him the safest and best manner of doing so. Even then he admits that he did not follow the advice of the brakeman to step off with the train, but stepped "squarely off." It is a rule firmly established that a passenger is as much bound to use reasonable care to avoid injury as the carrier is to use the greatest degree of skill and care to save the passenger from harm. *Railroad Co. v. Rutherford*, 29 Ind. 85, 92 Am. Dec. 336. In *Wood, Ry. Law*, p. 1152, it is said: "A passenger would not, under any circumstances, in yielding to such advice when the train is moving at a high rate of speed, nor would a person who is lame, or laboring under any serious physical disability, resulting from age, disease, or other cause, be justified in getting off the train when it is moving at all. In these cases the passenger must think before he acts, and he is bound to think and act as a person of ordinary prudence under the same circumstances." The author cites many authorities, to which reference is made. We are led to the conclusion that the facts specially found show that appellee was guilty of contributory negligence, and hence are in irreconcilable conflict with the general verdict. In such case the general verdict must yield.

Judgment reversed, and the court below is directed to sustain appellant's motion for judgment on the answers to interrogatories.

COMSTOCK, C. J., and BLACK, HENLEY, and ROBY, JJ., concur. ROBINSON, J., dissents.

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(*Supreme Court of Washington, May 13, 1902.*)

[68 Pac. Rep. 1037.]

Street Railways—Injury to Passenger—Negligence—Evidence.*

In an action by a passenger against a street railway for personal injuries, evidence examined, and held to sufficiently show that she was

*See note to *Phillips v. St. Charles, etc., R. Co.* (La.), 1 R. R. R. 902, 24 Am. & Eng. R. Cas., N. S., 902.

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injured while attempting to alight from the car while it was in motion, and without the knowledge of the car employees that she desired to get off, and that, therefore, they were not guilty of negligence in increasing the speed of the car.

Appeal from superior court, King county; G. Meade Emory, Judge.

Action for personal injuries by Nettie Blakney against the Seattle Electric Company. Judgment for plaintiff, and defendant appeals. Reversed.

Struve, Allen, Hughes & McMicken, for appellant.
Remsberg & Simmonds, for respondent.

FULLERTON, J. The appellant operates an electric street car line in the city of Seattle. The respondent brought this action against it to recover for personal injuries received by her while a passenger upon one of its cars. The respondent testifies that she entered the car at Fremont, intending to ride from thence to the intersection of Third and Pike streets; that the car did not stop at Third and Pike streets, and she was carried on further towards the business portion of the city. She says that as the car approached the intersection of Spring and Second streets she looked for the conductor, and saw him in the front part of the car, collecting fares, but, as there were people standing in the aisle, she was unable to attract his attention; that she then determined to ride to the next street,—Madison,—where she knew the car always stopped because of the intersection of another railway line; that as the car continued to approach Spring street it was slowed down, and, thinking it was going to stop, she left her seat, and went to the rear platform, intending to alight when the car came to a full stop; that after she reached the platform the car started with a jerk, and that is all she remembers until she felt some one picking her up from the pavement in the street. She admits that she did not notify the conductor of her place of destination, and that she gave him no notice that she desired to alight at Spring street. While she denies that she was in the act of leaving the car at the time the car jerked, she admits that a man got off the car just ahead of her, and that she was preparing to alight, but does not remember the particular part of the platform on which she was standing at the time she fell, nor does she know at what place in the street she fell. To prove the manner in which the car was operated at the time, she called the motorman, who, at some time previous to the trial, had left the employment of the appellant company. He testified that as the car approached Spring street he threw off the current, applied the brakes, and slowed down the car, so as to be able to stop at Spring street in case he received a bell so to do; that, as he got well across, but while yet in the street, and receiving no bell to stop, he loosed the brakes, and allowed the car to roll towards the next street, where he was required to stop. He

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says further that there was no considerable grade at that place, that there was no increase in the speed of the car, and that it was going at the rate of about three miles an hour. Another witness called by the respondent, who was standing on the platform at the time she fell, says, in his direct examination, that the car had pretty nearly stopped when the respondent reached the platform. Being asked to state what then happened, he answered, "Well, the car started up, and she fell off; that is all." On cross-examination he said she had reached the step of the car, and was stepping off to the ground, when the accident happened. Still another witness called by her says he was standing on the front platform at the time of the accident; that the car, as it approached Spring street, was slowed down to about three miles an hour; that there was but little grade between Spring and Madison streets, and that there was no jerk or increase in the speed of the car between those places. He also says he saw the respondent as she was getting up from the pavement where she had fallen, and that this was in front of a certain store, which is conceded to be midway between Spring and Madison streets. It was in evidence also that the car was a large one, some 40 feet in length, and was carrying at the time about 80 passengers, many of whom were standing, occupying not only the aisle of the car, but the front and the rear platforms as well. This is, in substance, all of the evidence of the respondent, except as to injuries and damages suffered. On the part of the appellant it was shown, and it stands in the record uncontradicted and unquestioned, that the appellant did not fall at the crossing of Spring street, but at a point near the middle of the next block, at least 120 feet distant from Spring street. All of the appellant's witnesses who testify on the question support the statement of the motorman and the other witness of the respondent to the effect that there was no jerk, or sudden starting, or increase of the speed of the car after it entered Spring street until it stopped at Madison; one saying that it went on easily,—not faster than a good walk. Four of these witnesses, who were in a position to see the accident, also support the statement of respondent's witness to the effect that she was in the act of getting off the car when she fell, saying that she did not step off the car properly, falling on stepping to the ground. A witness who got off the car just in front of her, and another who followed immediately after her, both say that she stepped directly out from the car on getting off, and fell over in the direction the car was going. This also agrees with her own statement to the effect that she fell on her side in the direction the car was going. At the conclusion of all the testimony the appellant challenged the sufficiency of the evidence to entitle the respondent to recover, and moved the court to withdraw the case from the jury, and enter judgment for the appellant. The challenge and motion were overruled by the court, whereupon the cause was sub-

mitted to the jury, which returned a verdict for the respondent. The ruling of the court in this behalf is assigned as error.

In order for the respondent to recover of the appellant for her injuries, it was incumbent upon her to allege and prove some act of negligence on its part, and that such act of negligence was the proximate cause of her injuries. In her complaint she alleges this act of negligence to be the sudden starting of the car upon which she was riding, throwing her from a position thereon where she had a right to be to the ground. Laying aside the respondent's own statement, it is plain that there is nothing in the evidence which even remotely tends to support this allegation. The witness whose language we quote from does not do so. Taken altogether, his statement is that the car increased its speed while the respondent was in the act of stepping from the car step to the ground, and that these acts, combined, were the cause of her fall; not that she was thrown from the platform of the car, or from the car step, because of the accelerated motion of the car. It need not, of course, be argued that a woman of mature years and discretion cannot recover from a street car company for injuries received by her while attempting of her own volition to alight from one of its cars while the same is in motion; nor need it be argued that it is not negligence per se to increase the speed of a car, nor that it is not negligence to do so when a passenger is in the act of alighting therefrom unless the car company knows, or could, by the exercise of reasonable diligence, have known, of that circumstance; and this latter was neither within the issues nor the proofs of this case. There is, therefore, no evidence of negligence on the part of the street car company, unless effect is to be given to the inference which might be drawn from the respondent's own statement. She says that when she reached the rear platform of the car the car started with a sudden jerk, and that she remembers nothing more until she was being picked up from the pavement. From this, as we say, an inference might be drawn that she was thrown from the rear platform by a sudden jerk of the car. But there is here no room to draw such an inference. It was shown, not only by her own witnesses, but by the unquestioned proofs of the whole case, that the accident did not happen in that way. The proofs are that she was attempting to alight from the car while it was in motion, and was thrown while making attempt. An inference of fact—that is to say, that a certain fact followed from other facts proven—has the weight of positive evidence only when the inference sought to be drawn is the natural and necessary result of the other facts shown, and when to deny the inference is to deny the facts from which it is deduced. When it is only the probable result of the facts shown, and the plaintiff shows by his own testimony that the fact that might be inferred from the other facts did not occur, recovery must

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be had, if recovery be had at all, upon the facts shown. It cannot be had upon inferences of fact contrary thereto. We have not overlooked the statement of the respondent to the effect that she did not intend to get off the car while it was in motion. The proofs, however, are not aided by this statement. It must be remembered that she was testifying concerning her intentions between the time she left her seat and the time the car jerked. She does not say that she did not afterwards intend differently, nor could she consistently do so, for the period of time between the jerk of the car and the time she was picked up from the pavement is covered by her lapse of memory. We say "lapse of memory," because it is not shown, nor even contended, that she did not at all times have the full possession of her faculties. We conclude, therefore, that there was no evidence of negligence entitling the respondent to recover.

The judgment is reversed, and the cause remanded, with instruction to grant the motion.

REAVIS, C. J., and HADLEY, DUNBAR, ANDERS. MOUNT, and WHITE, JJ., concur.

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(*Supreme Court of Appeals of West Virginia, April 5, 1902.*)

[41 S. E. Rep. 148.]

Carriers of Passengers—Maintenance of Depots and Platforms.*

It is the duty of a railroad company to keep its depots and platforms in safe condition, and free from dangerous defects, for the safety of its passengers.

Same—Same—Care Required of Passenger.

A person going to a depot to become a passenger has the right to presume that the company has discharged such duty, and is not bound to keep a lookout for defects occasioned by the company's negligence, other than such as ordinary prudence might require for self-protection.

Same—Same—Same—Hole in Platform.

If a passenger, while trying to get her children onto the platform of a railroad station, unconsciously steps back into a hole in the platform, of which she had no previous knowledge, she is not guilty of contributory negligence, although if she had been walking face forwards, in the direction of such hole, she could have easily seen the same. Her walking backwards, or failure to look backwards, is not negligence, when there is nothing to warn her of the company's negligence; and it is not her duty to presume it or look for it.

Same—Gross Negligence and Contributory Negligence.

A railroad company cannot be excused from gross negligence on its part, although the act of the injured person contributed thereto, unless it be shown in evidence that such person was guilty of legal negligence; that is, some act of negligence that an ordinarily prudent person would not have been guilty of under the same circumstances.

Same—Damages—Evidence—Number of Plaintiff's Children.

It is not reversible error to admit in evidence the fact that the plain-

*See note to *Muhlhouse v. Monongahela, etc., R. Co. (Pa.)*, 2 R. R. R. 131, 25 Am. & Eng. R. Cas., N. S., 131.

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tiff's two children, who were with her at the time of her injury, were still living.

Personal Injuries.

It is not reversible error to permit a physician to give his opinion as to the cause of a diseased condition of the human body.
(Syllabus by the Court.)

Error to circuit court, Mason county; F. A. Guthrie, Judge.

Action by Myrtle L. Barker against the Ohio River Railroad Company. Judgment for plaintiff. Defendant brings error. Affirmed.

W. R. Gunn, C. E. Hogg, and Sommerville & Sommerville, for appellant.

H. P. Camden and Rankin Wiley, for appellee.

DENT, P. The Ohio River Railroad Company complains of a judgment of the circuit court of Mason county rendered against it on the 21st day of May, 1900, for the sum of \$6,500, in favor of Myrtle L. Barker, plaintiff. The facts necessary to a determination of this controversy are as follows: On the 2d day of July, 1898, the plaintiff, in the daytime, went to the depot at Clifton of the defendant, for the purpose of taking a southbound train. She had with her two children; one a nursing babe in a baby carriage; the other, four years old, was following behind her. She stepped upon the rear platform of the depot, and she and her sister lifted the baby carriage up. She called her other child, with the intention of lifting him upon the platform, took a step backwards, and fell into a hole 12 inches wide, and extending clear across the platform in front of the entrance door; it being occasioned by plank becoming loose and having been washed out by the March flood. The station agent's attention had been especially called to it, but no pretense had been made to repair it. The company's negligence, under the circumstances, was as gross as it possibly could be, and the only possible avenue of escape is the customary dernier ressort of alleged contributory negligence, and yet numerous errors are assigned for the consideration of the court. They are classified under the following four classes by defendant's attorneys: (1) Does the declaration aver, and does the evidence prove, that the defendant was a common carrier of passengers, so as to charge it with the high duty imposed by the common law upon common carriers of passengers? (2) Was the plaintiff guilty of contributory negligence? (3) Did the court err in refusing to enter judgment for defendant on the special findings of the jury? (4) Did the court err in refusing to grant a new trial?

It is useless to dwell on the first. The objection is that the declaration does not allege in express terms that the defendant is a common carrier. It does allege that it is a railroad corporation operating a railroad from the city of Wheeling to the town of Kenova. All railroads in this state are common carriers. Section 9, art. 11, Const.; *Laurel Fork & Sand Hill R. Co. v. West Virginia Transp. Co.*, 25 W. Va. 324.

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On the question of contributory negligence the facts are undisputed, and it depends entirely on the degree of care required of passengers entering upon a railroad platform or depot. Are they in duty bound to keep a lookout for pitfalls or deathtraps, or have they a right to assume that the depot is in safe repair, and, without knowledge of a defect, are they only required to use such ordinary care as is required of a person in case such depot is in safe repair? If the defect is apparent, and they carelessly walk into it, they are guilty of contributory negligence, on the theory that he who is aware of another's negligence must avoid it if possible. The plaintiff had the right to assume that the platform was reasonably safe for travel, and she was not in duty bound to keep a lookout for defects. The portion on which she had momentarily entered was safe, and nothing had suggested to her that any portion was unsafe. She was busily engaged in getting her children onto the platform when she stepped backward into the hole. Had she looked, she could have seen it, yet she did not know it, and there was nothing other than the fact it was there to call her attention to it. In *Elliott, Roads & S.* § 638, it is said that "where the plaintiff, assuming that a sidewalk was safe, and knowing nothing to the contrary, permitted her attention to be momentarily attracted to some children playing in the street, and fell into a hole in the sidewalk from which the cover had been removed, she was held not guilty of contributory negligence." In the case of *Barry v. Ferkildsen*, 72 Cal. 256, 13 Pac. 658, 1 Am. St. Rep. 55, the court says: "The fact that her attention was momentarily attracted in another direction—a thing of the most common occurrence to travelers along a street—falls far short of that contributory negligence which in law defeats an action of damages." In the case of *Jennings v. Van Schaick*, 108 N. Y. 531, 15 N. E. 424, 2 Am. St. Rep. 459, the court says in speaking of a plaintiff who fell in a coal hole in the sidewalk: "She had the right to assume the safety of the sidewalk, and so was not called upon to give attention to her steps until in some manner warned of danger." In the case of *Lighting Co. v. Kelley*, 126 Ind. 221, 25 N. E. 812, 10 L. R. A. 250, the court, in approving the quotation above from *Elliott on Roads and Streets*, says: "She had the right to presume that the sidewalk was free from obstructions until her attention was in some way called thereto, and to act upon such presumption." And further on: "We can imagine many circumstances whereby the attention of the pedestrian might be attracted from the sidewalk, which would be sufficient to divert the attention of any reasonable person." *Improvement Co. v. Loehr*, 124 Ind. 79, 24 N. E. 579. Plaintiff had the right to assume that the platform was in a safe condition, and act on such assumption, until her attention was in some way called to the defect; and her attention to her children was such as any reasonable person might be expected to give. In fact,

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there was no imprudence on her part. If before she stepped backward she had looked, she would have seen the hole; but she was resting under the justifiable assumption that no such hole existed, and therefore there was nothing calling upon her to look backward. She had the right to assume that the company had discharged its duty, and that she could give the necessary attention to her children without danger of injury from its culpable negligence. In short, she acted as any other prudent person would have done under the same circumstances and with the same knowledge. 1 Fet. Carr. 130. Because she innocently confided in the company's faithful discharge of its duties towards its passengers, she cannot be held guilty of contributory negligence. Trust and confidence is not contributory negligence, although it may be unworthily bestowed. She will not be so confiding hereafter. Her knowledge and experience have increased, but her confidence is shattered and her health destroyed. It is impossible to say that she acted differently under the circumstances from what any other person of ordinary caution and prudence would have acted. Of course, there are persons naturally highly cautious, and others who have had large experience with the manner in which railroad stations and depots are usually managed, and who are continually on the alert for such defects. Such persons cannot be classed with the ordinarily prudent. The law requires an engineer to keep a lookout for helpless trespassers on the track, qualified by consistency with the proper discharge of his other duties. So any lookout for open defects the law may require of passengers must be qualified not only by consistency with the discharge of other duties to other persons, but also with the just assumption of duty discharged on the part of the company. A mother who goes to a depot to take a train with her helpless children cannot be required to neglect proper attention to such children, and keep an active lookout for dangerous pitfalls in her way by the negligence of the company, for she has the right to assume there are none until she is in some manner warned of their existence. Her first warning and knowledge of the company's negligence came to her when she fell backwards therein, and was too late for her to avoid it. If greater prudence is required of passengers than was exercised by her on this occasion, railroad companies should be required to put up a general warning to the traveling public not to go to their depots, except at personal risk, and thus avoid being guilty of contributory negligence in case of accident. A little care and a few nails at the proper time and place would save an immense amount of trouble. "The plaintiff, as a passenger of the appellant, was entitled to demand that the station's approaches and accessories used by it should be kept in a safe condition." *Railway Co. v. Lucas*, 119 Ind. 589, 21 N. E. 968, 6 L. R. A. 193. "Though the conduct of the passenger has contributed to the injury sustained, yet if such conduct has not been, in a

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legal sense, imprudent or negligent, he may recover, provided the carrier is in fault." 5 Am. & Eng. Enc. Law (12th Ed.) 645. "To exonerate defendant from liability for its negligence, which also caused plaintiff's injury, it is not sufficient that plaintiff by his act contributed thereto, but it must further appear that in doing that act he was at fault, and guilty of what the law calls negligence." *Railroad Co. v. Ball*, 53 N. J. Law, 289, 21 Atl. 1052. The only alleged act of negligence that defendant can find in plaintiff's conduct was that she was not on the lookout for and did not discover defendant's negligence in time to avoid it. This is not legal negligence, for she had the right to confide in plaintiff to some extent. Contributory confidence is not contributory negligence. A person guilty of negligence should not be permitted to escape the results thereof by setting up misplaced confidence as contributory negligence. Facts sufficient to establish contributory negligence not appearing determine the various other questions presented in favor of the plaintiff.

Defendant insists that the court erred in giving the following instruction: "The court instructs the jury that if they believe from the evidence that the plaintiff, Myrtle L. Barker, went to the defendant's depot in the town of Clifton on the 2d day of July, 1898, with the intention and for the purpose of becoming a passenger on one of the defendant's passenger trains; and if they further believe from the evidence that the said Myrtle L. Barker, after reaching the platform of the said depot, and while on the said platform, still intending so to become a passenger, not being at the time guilty of contributory negligence on her part, fell into a hole in the said platform, whereby she was injured, as in her declaration is alleged; and if they further believe from the evidence that the hole in the said platform was there in consequence of the negligence of the defendant,—then the jury should find for the plaintiff, and assess her damages at such an amount as the jury, under all the evidence in the case, believe her entitled to recover, not exceeding, however, the sum of \$10,000." The objection to this instruction is that it leaves out the question of contributory negligence. A bare reading of the instruction shows this contention is unfounded.

Defendant also objects to the following instruction: "The jury are further instructed that if they believe from the evidence that there was a hole in the platform of the defendant's depot, into which the plaintiff fell and was injured, and that she was there, at the time of her injury, intending to become a passenger on one of the defendant's passenger trains, and that the hole was there by reason of the defendant's negligence, then the court further instructs the jury that, before the defendant can avoid the consequences of such negligence on its part, it has the burden of proof upon it to show the contributory negligence of the plaintiff, and that such contributory negligence was the proximate, and not the remote, cause of

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the plaintiff's injury. And the court here instructs the jury that contributory negligence is the absence of that degree of care which an ordinarily prudent person of similar intelligence, and of the same class, would exercise under like circumstances." This instruction is not open to serious objection in this case. While it puts the burden of proof on the defendant to prove contributory negligence, yet it does not deny the right of defendant to show such negligence by the plaintiff's evidence, but is only to the effect that contributory negligence cannot be sustained except by a preponderance of the evidence. "Similar intelligence," used in this instruction, means ordinary intelligence; and "the same class" is a distinction between passengers and employees, trespassers and licensees. Employees are charged with a much higher degree of care to avoid accidents than passengers, and such an accident as this to an employee would be completely covered over with the flexible and expanding blanket of fellow servancy. The defendant was not injured by this instruction.

Defendant objects to the following instruction: "The court further instructs the jury that the defendant, as a carrier of passengers, owes to those approaching or leaving its trains the duty of keeping its stations, and platforms thereof, in a reasonably safe condition for convenient use; and therefore the court instructs the jury that if they believe from the evidence that the plaintiff, Myrtle L. Barker, went to the defendant's depot in the town of Clifton on the 2d day of July, 1898, with the intention and for the purpose of becoming a passenger on one of defendant's passenger trains, she had the right, upon reaching the platform of said depot, to assume, in the absence of information to the contrary, that such platform was then in a reasonably safe condition for her convenient use as such intended passenger, and, relying upon this assumption, she could neglect precautions that are ordinarily imposed upon persons, under such circumstances, not holding the relation to each other of that of passenger and carrier." This is simply no more than saying that the defendant owed her a higher degree of care than if she were not a passenger, and that therefore she was not required to take the same precautions as a trespasser, licensee, or employee. Because defendant succeeded in getting instructions in terms stronger than it was entitled to does not justify the reversal of the judgment, although such instructions apparently conflict with defendant's instructions. Defendant, in its management of this case, by instructions and otherwise, was endeavoring to show that it was the duty of the plaintiff not to confide in its discharge of duty, but to keep a lookout for its negligence, so as to avoid the same. If the plaintiff acted prudently, that was all she was required to do. There is no act of imprudence charged to her, except that the defendant would make the fact that she did not keep a lookout for its negligence an act of imprudence. This may be true in fact, but it is not in law.

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The defendant objects to the following instruction: "The court instructs the jury that to become a passenger, and entitled to protection as such, it is not necessary that a person shall have entered a train or paid his fare; but he is a passenger as soon as he comes within the control of the carrier at the station, through any of the usual approaches, with the intent to become a passenger. And the court therefore further instructs the jury that if they believe from the evidence that the plaintiff, Myrtle L. Barker, on the 2d day of July, 1898, went to the defendant's depot at the town of Clifton, by one of the usual routes thereto, for the purpose and with the intention of taking the next train, and stepped upon the platform of said depot with the intention and purpose of becoming such passenger, the plaintiff then became, in contemplation of law, a passenger of the defendant, provided she came to said depot and platform within a reasonable time before the time for the departure of said train, whether or not she had purchased a ticket from the defendant or its agent." It states the law correctly, as the plaintiff was entitled to the rights and protection of a passenger even before she purchased her ticket. 5 Am. & Eng. Enc. Law (2d Ed.) 489.

Defendant insists the court should have given the following instruction: "The court instructs the jury that a person who uses a platform of a railroad station, which his observation, exercised with an ordinary degree of care, would have informed him was dangerous, takes the risk of injury from such open and apparent defects therein that such ordinary observation would have detected. Therefore, if the jury believe from the evidence that the defect in the platform complained of as the cause of the injury in this case was at the time of the alleged injury open and apparent to ordinary observation; and if they further believe from the evidence that such observation, exercised with an ordinary degree of care, would have informed the plaintiff that the platform was dangerous; and if the jury further believe from the evidence that the plaintiff, under these circumstances, attempted to use the platform,—then the court instructs the jury that she took upon herself the risk of all injuries resulting to her from such open and apparent defect, and that she cannot recover for injuries resulting therefrom." This instruction destroys the right of a passenger to assume that the company has done its duty, and requires him to keep a lookout for the company's negligence. If a passenger knows of, or is in any manner put on his guard against, the company's negligence, he is bound to avoid it; but he is not bound to be in continual fear thereof, or keep up a ceaseless observation to detect the same.

Defendant insists that the following instruction should have been given: "The court instructs the jury that there is no situation which will excuse a person from exercising that ordinary degree of care that would be exercised by an ordinarily prudent person under the same circumstances, and the court

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therefore instructs the jury that the plaintiff cannot excuse herself for failure to exercise such ordinary degree of care by showing that her attention was diverted from her own footsteps by solicitude for her child." This instruction wrongfully assumes that plaintiff did not exercise an ordinary degree of care under the circumstances, and tried to excuse herself therefrom by showing that solicitude for her children diverted her attention. This is a false assumption. Her children, however, were a part of the circumstances; and, in determining the degree of care she must use under the circumstances, they must be taken into consideration. For a person with the care of children on her hands is not as free to devote her attention to her own safety as she would otherwise be. She owed the duty of protection to them as well as to herself. If they had been injured, the company would have been very anxious to impute her negligence to them.

Defendant also insists the following instructions should have been given: "The court instructs the jury that if they believe from the evidence that there was a hole in the platform of defendant's depot, and that the plaintiff, in approaching and getting on the platform, could, by exercising ordinary care, have seen the said hole, and could by so seeing it have avoided the injuries complained of, then her failure to exercise such ordinary care to discover such hole is contributory negligence, and the jury must find for the defendant." This casts on the plaintiff the duty of keeping a lookout for the defendant's negligence, instead of having the right of assuming its faithful discharge of its duties.

Defendant excepts to the evidence that the plaintiff had children living. This evidence is not objectionable, although it may be immaterial and irrelevant. It is shown she had two children with her at the time of the accident. The additional evidence only showed they were still living. Defendant asked no instruction in relation thereto, and its objection appears to be purely technical. *Moore v. City of Huntington*, 31 W. Va. 842, 8 S. E. 512; *Johns v. Railroad Co.*, 39 S. C. 162, 17 S. E. 698, 20 L. R. A. 520, 39 Am. St. Rep. 709; *Alberti v. Railroad Co.*, 43 Hun, 421.

Defendant excepts to the physician's evidence, because he was permitted to give his opinion that the plaintiff's condition might have been caused by a shock, a fall, or anything that produces a shock to the spinal column. By other evidence this condition was connected with the accident. It is expert evidence, and not objectionable. 12 Am. & Eng. Enc. Law (2d Ed.) 447; *Bowen v. City of Huntington*, 35 W. Va. 682, 14 S. E. 217; *Turner v. City of Newburg*, 109 N. Y. 301, 16 N. E. 344, 4 Am. St. Rep. 453; *Keane v. Village of Waterford*, 130 N. Y. 188, 29 N. E. 130.

Defendant excepts because of evidence admitted showing what a competent nurse would have cost, she having been nursed by her mother and sister. The evidence was it would

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cost from \$5 to \$6 per week. She was in bed three months. A nurse at this rate would have cost less than \$100,—being beneath the jurisdiction of the court,—and could only affect the verdict to this extent, if at all. Some authorities hold that such evidence is incompetent if the services were gratuitously given to her. *Goodhart v. Railroad Co.*, 177 Pa. 1, 35 Atl. 191, 55 Am. St. Rep. 705. In that case it is said, "Such services involve no liability on the part of the plaintiff, and therefore afford no basis for a claim against the defendant as for expenses incurred." The services referred to were those of wife and children to husband and father. In such a case no legal responsibility could accrue. For neither could a wife charge a husband for such services; nor a child, in the absence of a contract, its father. Their services are provided for in the other damages allowed for the injury. A different rule prevails where the services are rendered by one who has the legal right to charge for them. For such a one donates them to the injured party, and not to the injurer. *Pennsylvania Co. v. Marion*, 104 Ind. 239, 3 N. E. 874; *Klein v. Thompson*, 19 Ohio St. 569. In the latter case it was held that although the plaintiff was under no legal obligation to pay for services gratuitously rendered, or paid for by others out of charity, yet he was entitled to be placed in a position to pay for such services voluntarily, if in good conscience he should see proper to do so. The plaintiff in this case is a widowed woman, compelled to rely on her own efforts for support. She was nursed and taken care of by her mother and sister, who were under no legal obligation to do so, and who have the right to charge her for such services, if she is able to pay them or return them in kind. It is not shown in the evidence whether such services were rendered gratuitously or not. Certainly they were not rendered gratuitously to the defendant, but, in so far as defendant is concerned, they may reasonably have expected to be compensated. At least, the plaintiff should be put in a condition to compensate them. This is a matter of love and affection between themselves, and is not a matter of contributory negligence, that should diminish the amount of damages occasioned by the defendant's negligence. They have the right to say to her: "If you recover for our services from the defendant, we will expect you to pay us; otherwise we give them to you freely, through love and affection, and expect only a return in kind." In view of what has been said, it is unnecessary to copy herein, and comment on, the special findings of the jury. They amount to this: that if the plaintiff had been in position to do so, and had been looking toward the hole, she could have seen it, but that the necessary attention to her children prevented her from looking in the direction of the hole. All the rest of the platform was in good order, so that the portion that plaintiff did see and occupy led her to believe that the residue thereof was in a like condition; and when she

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raised her baby buggy upon the platform, with her back to the hole, there was nothing to indicate to her, within the range of her then vision, that the platform behind her was not in like condition as the portion on which she was then standing; and assuming it was, under the circumstances, it was not negligence in her to step backwards without looking, as, not knowing, she could not foresee that the company would permit such a dangerous trap in the platform. It might well be held that the company, in permitting this dangerous trap in its platform for three months, was guilty of such wanton and willful recklessness and disregard of the limbs and lives of its passengers as to make it liable for criminal negligence, and for punitive or vindictive damages. Gross negligence warrants punitive damages whenever there is such want of care as raises the presumption of a conscious indifference on the part of the company to the safety of its passengers. 5 Am. & Eng. Enc. Law (2d Ed.) 711. To leave a dangerous trap, such as is shown in this case, in front of a depot door, undoubtedly shows on the part of the company a conscious indifference to the safety of those invited to take passage on its trains. *Railroad Co. v. Arnold*, 80 Ala. 600, 2 South. 337; *Railroad Co. v. Arms*, 91 U. S. 489, 23 L. Ed. 374. This question, however, is not raised in this case.

There is no error that will justify the setting aside the verdict and granting new trial. Already two trials have been had, resulting in substantially the same verdict. Under the law as propounded, a new trial might be more disastrous to the defendant. Sometimes Providence takes care of railroad companies as well as infants. The judgment is affirmed.

GREAT NORTHERN RY. CO. v. BRUYERE.

(*Circuit Court of Appeals, Eighth Circuit, March 24, 1902.*)

[114 Fed. Rep. 540.]

Railroads—Removal of Trespassers*—Personal Injuries.

Plaintiff boarded a caboose on defendant's freight train to make inquiries from the conductor concerning his wife, having expected her on that train, and while he was still in the caboose, and waiting for the conductor, the train started. When the conductor came, he demanded that the plaintiff pay his fare or get off, but refused to stop the train. Plaintiff stepped out onto the platform, and the conductor locked the door, leaving him outside, and he was thrown from the train by the

*See generally, *Leonard v. Boston & A. R. R.* (Mass.), 13 Am. & Eng. R. Cas., N. S., 825, and note appended.

As to liability of company to trespassers upon its cars, see *McCann v. Sixth Ave. R. Co.*, 117 N. Y. 505, 43 Am. & Eng. R. Cas. 297; *Chic. B. & Q. R. Co. v. Mehlsack*, 131 Ill. 61, 41 Am. & Eng. R. Cas. 60; *Missouri Pac. R. Co. v. Evans*, 71 Tex. 361, 37 Am. & Eng. R. Cas. 144. See also, note, 39 Am. & Eng. R. Cas. 422; note, 31 Am. & Eng. R. Cas. 376; note, 2 Am. & Eng. R. Cas. 8; note, 28 Am. & Eng. R. Cas. 594.

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sudden lurching of the caboose, after having attempted to re-enter: *held* wrongful conduct on the part of the conductor, for which the company was liable if it was the proximate cause of the injury.

Same—Proximate Cause of Injury—Question for Jury.

The question whether the wrongful conduct of the conductor was the proximate cause of the injury was for the jury.

Sanborn, Circuit Judge, dissenting.

In Error to the Circuit Court of the United States for the District of North Dakota.

W. E. Dodge (C. Wellington and C. J. Murphy, on the brief), for plaintiff in error.

James H. Bosard (R. H. Bosard, on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge, delivered the opinion of the court.

This is a suit for personal injuries brought by Richard N. Bruyere, the defendant in error and the plaintiff below, against the Great Northern Railway Company, the plaintiff in error. The plaintiff below gave evidence tending to show the following facts, which, in view of the verdict below, must be regarded by this court as having been established to the satisfaction of the jury: That he resided about six miles from Larimore in North Dakota; that on the evening of August 8, 1898, he went to the station of the defendant company, in Larimore, with a view of meeting his wife, who had been at Grand Forks, and was expecting to return on defendant's freight train No. 15; that before that train arrived he heard that it had been taken possession of by a crowd of rioters, whom he termed "hoboes," at an intermediate station; that when the train arrived at Larimore he was on the platform of the station, expecting his wife, and that considerable excitement ensued, upon the arrival of the train, which attended the arrest of the rioters; that his wife did not get off the train, and, as he did not see the conductor, he went to the rear end of the train and boarded the caboose, with a view of interviewing the conductor and obtaining information concerning his wife; that, as the conductor was not in the caboose, he supposed that he was out making his report to the superintendent, and would return shortly, and that he accordingly remained in the caboose awaiting his return, and that while he was waiting the train started unexpectedly.

The plaintiff below further testified that when the train started he supposed it would stop very shortly at the coal shed to coal up, and that in the meantime he could see the conductor and inquire about his wife; that when the train reached the coal shed, which was not far from the station, it was going faster, and did not stop, and that the conductor came in about that time; that he explained to him why he was on the train, told him that he expected his wife was

coming on that train, and that he was looking after her, and that he also inquired of the conductor if she had started from Grand Forks on the train; that the conductor told him that no lady had started on the train with him that night from Grand Forks, and then told the plaintiff that he must get off of the train; that at that time the train was going pretty fast, and that he told the conductor it was going too fast to get off with safety; that the conductor then said he must pay his fare; that he told the conductor there was no place he wanted to go to, and that he asked him to slack up; that the conductor replied that he would not do so, and told him he must get off; that he, the plaintiff, thereupon stepped outside of the door, to the rear platform, whereupon the conductor followed him and immediately closed the door and fastened it; that he first went to the left-hand side of the train and looked along the side thereof and could see the train bending as though going round a curve; that he then went back to the door and tried it and shook it, but that it was fastened, so that he could not get in; that he thereupon went to the right-hand side of the platform, and was going to sit down there, when the caboose lurched and threw him to the ground, injuring him seriously, where he lay unconscious until near daylight, when he was revived by a shower and managed to get to a house which was about half a mile distant from the track. The plaintiff testified further, and in substance, on his cross-examination, that when the train started unexpectedly he intended to get off at the coal shed, where he supposed that the train would stop; that he didn't want to go anywhere as a passenger, his purpose being simply to see the conductor and obtain information about his wife; that the coal sheds were about half a mile from the station, and that when the train reached that point it was going pretty fast; that he wanted to get off there; that when the conductor demanded his fare he refused to pay it, telling him he didn't want to go anywhere; that he, in fact, wanted the conductor to stop the train; that when he went out on the platform he went there "to show the conductor that the train was going too fast for any man to get off safely"; and that the conductor followed him to the door, and, immediately after he had passed through it onto the platform, closed it and fastened it.

The trial court instructed the jury, in substance, that the plaintiff below was wrongfully upon the train, even though he boarded it for the purpose above stated; that he had no right to ride upon the train for the purpose of meeting the conductor and making inquiries about his wife; that he had no right to insist that the train should be stopped, after it had started, to let him off; and that it was his duty to have paid his fare when it was demanded and to have ridden until the train reached a regular station where he could get off. No exception could well be taken to this part of the charge by the defendant company, and none was taken. But the court proceeded to say:

"The plaintiff being wrongfully upon the train, the conductor had a perfect right, under the law, to remove him from the train, but in the exercise of that right he was charged with the duty not to unnecessarily expose the plaintiff to danger. The fact that the plaintiff was wrongfully upon the train would give the conductor no right either to injure him or expose him to danger. He, therefore, had no right to insist upon the plaintiff's leaving the train while it was in motion. His duty was either to stop the train and put the plaintiff off, if he decided that the plaintiff must leave the train, or to carry the plaintiff to the nearest station. This brings us to the issue of fact in the case upon which there is a conflict of evidence. Plaintiff says, in substance, that the conductor ordered him to leave the train, and that he stepped to the door for the purpose of pointing out that the train was going so fast that he could not leave it, and that the conductor shut the door, and locked it, thus fastening him out upon the platform. If you believe that is a true statement of the occurrence, the conduct of the conductor was wrongful, and if that wrongful conduct was the proximate cause of the plaintiff's injuries he is entitled to recover, unless he himself was guilty of contributory negligence, which I will presently explain to you more fully. Shutting the plaintiff out on the platform, if you find that he was shut out upon the platform, would be the proximate cause of plaintiff's injuries, if those injuries were the natural and probable result of that act, and such as a reasonable and prudent man would have foreseen as likely to result therefrom."

It is urged that error inheres in this portion of the charge, and the exception thereto raises the only question to be determined, namely, whether the act of the conductor in locking the door and compelling the plaintiff to ride on the platform, instead of on the inside of the caboose, was a wrongful act, for which the defendant company can be held liable, assuming, as the lower court held, that the plaintiff was wrongfully on the train, and not entitled to the rights of a passenger.

In view of all the circumstances of the case, we entertain no doubt that the question last stated should be answered in the affirmative. It was obviously more dangerous to ride on the platform, where one standing or sitting was liable to be thrown off by the lurching of the car, than to ride on the inside. We may well take judicial notice of the fact that the platform of a car is not as safe a place to ride as the inside, because it is a common practice of railroad companies to place notices on the doors of their cars warning people not to ride on the platform because of the enhanced danger. Nor do we find any evidence in this record which furnishes a reasonable excuse for the conduct of the conductor in locking the plaintiff out on the platform and compelling him to ride there and incur the unnecessary risk of being thrown off. He had boarded the train for a laudable purpose, and it had started

unexpectedly, and had not stopped at the coal sheds, where he supposed it would stop, according to the usual custom. Moreover, the car, on the inside, does not seem to have been overcrowded, and the plaintiff was making no unseemly noise or disturbance to annoy other passengers in the caboose, if there were any. The fact, therefore, that he refused to pay his fare, did not warrant the conductor in locking him out on the platform, when the train was going at such speed that the plaintiff did not dare to jump off. The conductor's action in that matter must be pronounced wrongful and wanton, in that, without any sufficient cause or excuse, he willfully exposed the plaintiff to unnecessary danger.

The charge of the lower court is further criticised because it permitted the jury to determine, as a question of fact, where the wrongful act of the conductor in locking the plaintiff out on the platform was the proximate cause of the injury, but in view of the plaintiff's own testimony, showing his attempt to get on the inside of the car after the locking of the door, and how he happened to be thrown off by the lurching of the car, we do not well see how the lower court could have acted differently. The question of proximate cause is usually one for the jury, as it certainly was in this case. *Railway Co. v. Yeargin*, 48 C. C. A. 497, 109 Fed. 436, 439; *Railway Co. v. Kellogg*, 94 U. S. 469, 474, 24 L. Ed. 256.

The question whether the plaintiff, after he was locked out on the platform, conducted himself as a prudent man should have done in his situation, or contributed to his own hurt by a want of ordinary care, was also submitted to the jury under proper instructions, and was decided adversely to the defendant company.

We find no error in the record, and the judgment below is accordingly affirmed.

SANBORN, Circuit Judge. I dissent in this case, because, in my opinion, the closing and locking of the door of a moving car against a trespasser upon the platform is not, as a matter of law, conclusive evidence of a willful or reckless intent to injure him, and this was the legal effect of the charge of the court below. It charged the jury that the act of the conductor in closing and fastening the door was a wrongful act, and that if this act was the proximate cause of the injury the company was liable for it. This charge took from the jury the question whether or not this act evidenced a willful or reckless intent to injure the plaintiff, and prevented their consideration of this question. The plaintiff was a trespasser upon the train. The only duty of the company or of the conductor of the train to him was to abstain from wanton or reckless injury to him. *Purple v. Railroad Co.* (C. C. A.) 114 Fed. 123; *Condran v. Railroad Co.*, 67 Fed. 522, 523, 14 C. C. A. 506, 508; *McVeety v. Railway Co.*, 45 Minn. 269, 47 N. W. 809, 11 L. R. A. 174, 22 Am. St. Rep. 728, 47 Am. &

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Eng. R. Cas. 471; Way v. Railroad Co., 64 Iowa 48, 19 N. W. 828, 52 Am. Rep. 431. In Trumbull v. Erickson, 97 Fed. 891, 893, 38 C. C. A. 536, 538, this court held that it was not, as a matter of law, conclusive evidence of even ordinary negligence for a passenger to ride upon the platform of a moving car when he could have occupied standing room within the car. If it is not conclusive evidence of ordinary negligence for one to ride upon the platform of a moving car, it cannot be conclusive evidence of a willful or reckless intent to injure a tramp or a trespasser to close the doors of the car against him when he is riding upon its platform. It may be that such an act under some circumstances would be evidence from which a jury might infer a malicious or reckless intent to injure, but I cannot persuade myself that it is conclusive evidence of such an intent, because it does not seem to me doubtful that all reasonable men would not agree that such an act indicates any willful or reckless intent on the part of the conductor who closes the door to injure the trespasser, and this is the test by which the question should be answered. Speer v. Board, 88 Fed. 749, 754, 32 C. C. A. 101, 107; Railroad Co. v. Jarvi, 53 Fed. 65, 70, 3 C. C. A. 433, 438. For this reason I think the judgment below should be reversed, and a new trial should be granted.

TOLER v. YAZOO & M. V. R. CO.

(*Supreme Court of Mississippi, April 14, 1902.*)

[31 So. Rep. 788.]

Carriers—Stopping Train for Passengers to Alight*—Negligence.

Plaintiff's testimony that she went immediately to the steps of the car when the station was announced, and, it being dark, and she thinking the train had stopped, got off, and was injured, the train being in motion, and testimony that thereafter the train was again stopped, by the ringing of the bell, to let off other passengers, presents a case for the jury as to negligence in stopping too short a time.

Appeal from circuit court, Sunflower county; F. E. Larkin, Judge.

"Not to be officially reported."

Action by Mrs. Willie Toler against the Yazoo & Mississippi Valley Railroad Company. Judgment for defendant, and plaintiff appeals. Reversed.

*See Illinois Cent. R. Co. v. O'Keefe (Ill.), 9 Am. & Eng. R. Cas., N. S., 611; Schaefer v. St. Louis & S. R. Co. (Mo.), 2 Am. & Eng. R. Cas., N. S., 224; Omaha St. R. Co. v. Martin, 48 Neb. 65, 4 Am. & Eng. R. Cas., N. S., 1; Cicero, etc., R. Co. v. Meixner, 160 Ill. 320, 4 Am. & Eng. R. Cas., N. S., 246; Finkeldey v. Omnibus Cable Co., 114 Cal. 28, 5 Am. & Eng. R. Cas., N. S., 393; notes, 3 Am. & Eng. R. Cas., N. S., 431; 47 Am. & Eng. R. Cas. 541; 52 Am. & Eng. R. Cas. 284; 2 Rap. & Mack's Dig. 453. See also, extensive note, 1 R. R. R. 904, 24 Am. & Eng. R. Cas., N. S., 904.

Appellant brought this suit in the circuit court of Sunflower county against the appellee to recover of it damages for personal injuries alleged to have been sustained by her by reason of the carelessness and negligence of appellee in not stopping its train a sufficient length of time to allow her to alight therefrom safely, and suddenly starting and moving its train, on which she was a passenger, while she was attempting to get off of said train at Inverness, a station on appellee's road, thereby causing her to be violently thrown from said train to the ground and into a ditch, from which fall she sustained serious injuries. The defendant interposed a plea of the general issue, and gave notice under this plea that it would prove contributory negligence on the part of plaintiff. Plaintiff testified at the trial of the case that she was returning from Greenville to Inverness on defendant's train, and arrived at Inverness after night; that the night was dark, and that it was raining; that there were no lights at the depot; that when the station was announced she got up immediately, and went out on the steps, and stepped on the bottom step, and held to the railing, and, thinking that the train had stopped, she jumped off, and was thrown into a ditch, and was injured; that she realized, after she stepped off the train, that it was going fast; that the train was going south, and that the regular stopping place for the train was north of the depot, but that this train went past the regular stopping place, and stopped south of the depot; that passengers usually got off on the west side, but that the west side of the platform of the train was crowded with men, and she got off on the east side; that she did not hear the station announced, and that, if the train came to a standstill, she did not know it; that when she stepped off she did not know the train was moving; that it was just starting, and that, from the fall she received, it must have been going pretty fast. Other witnesses for plaintiff testified that the train stopped a very short time at Inverness; that, after plaintiff got off the train, it was again stopped by the ringing of the bell, and one or two more passengers got off at a point further south; that again the train was stopped by the ringing of the bell at a point still further south, and other passengers got off. After all the evidence for plaintiff had been introduced, a motion was made by defendant to exclude same. This motion was sustained, and a peremptory instruction was given for defendant, and verdict and judgment were given accordingly, and plaintiff appeals.

Johnson, Chapman & Neill and W. S. Chapman, for appellant.

Mayes & Harris, for appellee.

WHITFIELD, C. J. After much consideration, we all agree that this case should have been submitted to the jury. Reversed and remanded.

ERWIN *v.* KANSAS, FT. S. & M. RY. CO.*(Court of Appeals of St. Louis, Mo., April 29, 1902.)*

[68 S. W. Rep. 88.]

Carrying Passengers on Freight Train—Degree of Care.*

A railroad company is required to use the same degree of care in the operation of a freight train conveying passengers as in the operation of an exclusively passenger train.

Same—Assumption of Risks.

A passenger on a freight train accepts his passage with knowledge of its inconveniences, and that it is not equipped with all the safeguards provided for passenger trains, and assumes the risk ordinarily incident to its operation.

Same—Injury Caused by Jolting—Negligence.

More or less jerking and jolting being incident to the operation of a freight train, negligence cannot be inferred from the mere fact that a passenger thereon was injured from a jar occasioned by the sudden stopping of the train.

Same—Same—Same.

A passenger on a freight train was lying in the caboose on a seat running lengthwise of the car with his head towards the engine, and near the iron framework of the seat, and was hurt by the sudden stopping of the train. He testified that he did not know whether he was asleep or not; that when the stop was made his head struck the end of the iron frame of the seat, and he was thrown to the floor, and his head turned in the direction that his feet were when he laid down; that the conductor rushed out of the caboose, swearing at the engineer for making so sudden a stop, etc. In an affidavit made by him at the time of a medical examination the passenger testified that he was asleep at the time. The trainmen testified that the stop was not an unusual one, or made with unusual violence, etc. : *held* error not to sustain a demurrer to the evidence.

Appeal from circuit court, Howell county.

Action by D. P. Erwin against the Kansas, Ft. Scott & Memphis Railway Company. Judgment for plaintiff, and defendant appeals. Reversed.

W. J. Orr, for appellant.

A. H. Livingston, for respondent.

BLAND, P. J. The material averments of the petition are that plaintiff was a passenger on one of defendant's freight trains, and that, "while lying on the seat in the caboose of said train, below Marked Tree, in the state of Arkansas, the defendant, by its agents, servants, and employees in charge thereof, so carelessly, negligently, and unskillfully managed said train that it was stopped very suddenly, throwing plaintiff with great force, his head striking an iron brace on the seat on which he was lying, thereby fracturing plaintiff's skull," and that he was severely and permanently injured. The answer was: First, a general denial; second, that the stopping of the train was not unusual, and that jolting was incident to the stopping of that kind of a train; and, third, that, if plain-

*See note to West Chicago, etc., R. Co. *v.* Tuerk (Ill.), 1 R. R. R. 1, 24 Am. & Eng. R. Cas., N. S., 1.

tiff was injured, it was the result of his failure to use ordinary care. The facts are that J. R. Pinner, J. W. Stone, and plaintiff were residents of the state of Tennessee, and all men of families. Being desirous of removing to Howell county, Mo., they all appeared at Memphis, Tenn., on March 9, 1901, and jointly chartered a box freight car of the defendant, into which they loaded their household goods, chickens, and dogs, and four work animals, to be hauled by defendant to Willow Springs, in Howell county, Mo., a station on defendant's road. The freight contract entitled one of the shippers to transportation on the train hauling the car for the purpose of looking after the live stock of the shippers. The plaintiff was selected for this purpose, and at 8 o'clock p. m. on the 9th of March took passage at Memphis on a through freight train made up of the chartered car and 39 other freight cars, the engine, and caboose. After proceeding west about 36 miles, the engineer in charge of the train, at about 10:30 p. m., was signaled to stop. He slowed down his train until he reached the flagman, who boarded the engine while still in motion, and informed the engineer that there was a slide in the track a short distance ahead. The engineer pulled up slowly until within a few car lengths of the slide, when the train was stopped, and was held until the next morning, and until the track was repaired by the section men so that the train could pass in safety. Plaintiff testified that when the stop was made he was lying in the caboose on a seat running lengthwise of the car, with his head towards the engine, and near the iron framework at the end of the seat; that he did not know whether he was asleep or not; that when the stop was made his head struck the end of the iron frame of the seat, and he was thrown to the floor, and his head was turned in the direction that his feet were when he laid down; that the conductor was in the caboose, and rushed out of the door when the stop was made, uttering blasphemous epithets against the engineer for making so sudden a stop. In respect to his injuries the plaintiff testified that when he got up from the floor of the caboose his head hurt him; that he felt of it, and found a lump on the left side near the top of his head, and that his neck and back hurt him; that he was a farmer, and that he was unable to do scarcely any labor at all on the farm in the season of 1900, and suffered from pains in his head, back, and neck, and from nervousness; that he had improved some, but was still unable to perform much labor, and still suffered from pains in his head, back, and neck; that he made no complaint to the trainmen about being hurt while in the car, said nothing to any one about it until he had arrived at his destination; that after the lump went away there was a depression in his skull; that in May, 1901, he went to the defendant's local surgeon at Willow Springs, who examined his head, and wanted him to go to Kansas City to be examined and treated by defendant's chief surgeon, but he refused to do

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so, because he had no one to leave with his family. At the time this examination was made plaintiff made an affidavit in respect to the manner of his injury, the material parts of which are as follows: "I rode in the caboose. After we had gone some distance, I lay down on the seat in the caboose to get some sleep. This seat had a cushion, but whether it was upholstered with leather or rough cloth I do not remember. I think it was black. There was another passenger on the caboose besides me. He got on at Memphis, and left the train at Jonesboro, Ark. He was a middle-aged man, commonly dressed. I think he was a railroad man looking for a job; at least that is what he told me. This man also lay down in the caboose on the opposite side from me. When I laid down I laid with my head toward the engine. The other passenger laid with his feet toward the engine. This was the way we laid when I went to sleep. I do not know how long I slept, but I was awakened by a jolt on the head. This jolt was caused by my head coming into collision with the iron framework on the seat. I think the sudden stopping of the train caused it. I fell off of the seat onto the floor of the caboose. I got up right away, my head hurting badly. The other passenger was sitting on the seat where he had been lying down. I do not know whether he was hurt any or not. I sat down on the seat, and held my head, which was still painning me. Afterwards I lay down again. I went to sleep again after a while. It was day when I woke up, and the train was standing still. My head was still hurting me. I did not leave the train until we got to Willow Springs, about 11 o'clock at night, March 10, 1900. My head was hurting me then, and has been hurting me ever since. I think it was more than a week before I went to see a doctor about it. Maybe it was two weeks. I first went to see Dr. Johnson, of Willow Springs. He told me I had a depression in the head. I next went to see Dr. H. J. Rowe, of Willow Springs. He would not make an examination because he was the railroad doctor here. I next went to Dr. Hollenbeck, but he refused because he was connected with the railroad company. Mr. Wilkinson, my attorney, was with me, and heard Dr. Hollenbeck refuse. I next went to Dr. Meacham. He examined me. He found a depression in my head. He said I might have to have a piece of my skull removed. I was afterwards examined by Dr. Hollenbeck and Dr. Rowe. I think the railroad company requested that examination. They also found a depression in my head. The place is on the left side and on top of my head. They told me that the company might want me to go to Kansas City for treatment. I told them I did not want to go. The reason I refused was because I had nobody here to stay with my family. Since the injury the pain has been getting less, but the depression remains, and it feels as if something is laying on my head. Previous to this I have never had an injury to my head. I never have noticed the depres-

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sion before. One of the horses in the box car belonging to Mr. Pinner was knocked down and bruised and gashed by the same jolt that hurt me. The horse died a week afterward. Another horse and two mules were also scratched up a little. Some tin buckets and coffee pots among the household goods were mashed and jammed up. The other passenger on the train told me that the train had been flagged by a section foreman to keep the train from running into a washout of some kind, or bad piece of track. Mr. Pinner lives about three miles east of Willow Springs, and Mr. Jones about eight miles southwest of Willow Springs. I made no complaint of this injury to the conductor or any one of the trainmen." Dr. Meacham, a witness for plaintiff, said that he had examined the plaintiff, and found a slight depression on the side and near the top of his head, which, in his opinion, had been caused by a blow; that it might have been caused by a fall; and that he believed from plaintiff's appearance that he had at some time in life received an injury on his head. Plaintiff's Tennessee acquaintances testified that prior to his removal to Missouri he had been an able-bodied man; that in the summer of 1900 he was unable to do hardly any work at all on his farm; and that, while he had improved some, he had not regained his former strength. The engineer, conductor, and brakeman in charge of the train all testified that the stopping of the train was not an unusual one, or made with unusual violence; that the cars in the train were coupled together by drawheads and pins, and that there was from three to five inches slack between each car, and that when the engine stopped the cars naturally took up this slack, and that by the time the caboose was reached, which was in the rear of the train, there would be five or six feet of slack to be taken up, which would make a considerable jar, and that this was unavoidable. Two physicians, who had examined plaintiff's head, testified on behalf of the defendant that, in their opinion, the depression in plaintiff's skull, spoken of by him, and claimed by him to have been made by an injury while he was on the car, was congenital; that a corresponding depression, not quite so deep, was found on the opposite side of the head. Plaintiff testified that when he got up, another man, who was in the caboose, and who had been lying on the seat on the opposite side of the car, was sitting up, but that he made no complaint of having been injured. One of the brakemen, who was on the top of a box car 15 or 20 car lengths from the engine when the stop was made, testified that he was not disturbed by the stop. No one besides the plaintiff was thrown or injured on account of the stopping, or was in the least disturbed thereby, so far as the evidence shows. At the close of plaintiff's evidence, and again at the close of all the evidence, defendant offered instructions in the nature of demurrers to the evidence, which the court refused, and this ruling is assigned as error.

The degree of care required to be exercised by a common

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carrier of passengers is not measured by the nature of the vehicle or the appliances (assuming them to be reasonably safe) it selects for the purpose, but by the degree of care he exercises in the use of these vehicles while transporting his passengers, and the same degree of care is required in the operation of a freight train carrying passengers as in the operation of an exclusively passenger train. *McGee v. Railway Co.*, 92 Mo. 208, 4 S. W. 739, 1 Am. St. Rep. 706; *Wagner v. Same*, 97 Mo. 512, 10 S. W. 486, 3 L. R. A. 156; *Whitehead v. Railway Co.*, 99 Mo. 263, 11 S. W. 751, 6 L. R. A. 409, 39 Am. & Eng. R. Cas. 410; *Guffey v. Railway Co.*, 53 Mo. App. 462; *Wait v. Railroad Co. (Mo.)* 65 S. W. 1028. But a passenger who takes passage on a freight train must be presumed to do so with a knowledge of their inconveniences, and that they are not equipped with all the safeguards provided for trains devoted to passenger service, and should be held to have accepted the accommodations usually provided by such a train, and assumed the risk and hazards ordinarily incident to their operation. *Railway Co. v. Arnol (Ill.)* 33 N. E. 204, 19 L. R. A. 313; *Olds v. Railroad Co.*, 172 Mass. 73, 51 N. E. 450. When the fact that there is more or less jerking and jolting incident to the operation of a freight train (a matter of common knowledge,—*Guffey v. Railway Co.*, supra) is taken into view, negligence cannot be inferred from the mere fact that the plaintiff was injured from a jar occasioned by the stopping of the train. *Carvin v. City of St. Louis*, 151 Mo. 334, 52 S. W. 210; *Wait v. Railroad Co.*, supra. The rule of *res ipsa loquitur* can only be applied where there is something, which, if unexplained, tends to show that some negligence or omission of duty was the proximate cause of the injury. *Gallagher v. Illuminating Co.*, 72 Mo. App. 576. The plaintiff, by his own evidence shows that he placed himself in a position in the car where it was probable that he would be bumped against the framework of the seat, or thrown off the seat, or both, by the usual violent jolting incident to the stopping and starting of a long and heavy freight train. In his affidavit plaintiff stated that he was asleep when he was injured. In his testimony he was not sure whether he was asleep or awake. His statement in his affidavit the law presumes to be true, because it was an admission against his interest. *Feary v. Railway Co.*, 162 Mo. 105, 62 S. W. 452. If asleep, then he did not know and could not know whether his injury was occasioned by being bumped against the iron frame of the seat or by the fall on the floor of the caboose. In *Wait v. Railroad Co.*, supra, it was held by the supreme court of this state that the plaintiff, who had boarded a caboose as a passenger on a freight train, and who, while in the act of taking off his overcoat standing in the aisle between the seats, had been so violently thrown, by the stopping of the train, onto the seats, as to break them down, and fracture some of his ribs, and to loosen others from his spinal column,

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could not recover, in the absence of any showing that the engineer stopped the train with unusual violence; and that the lower court correctly sustained a demurrer to plaintiff's evidence. We think the Wait Case a much stronger case than the one in hand, and for the reasons stated in that case and stated in this opinion we think the court erred in overruling defendant's demurrer to the evidence, wherefore the judgment is reversed.

BARCLAY and GOODE, JJ., concur.

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(*Supreme Court of Pennsylvania, April 21, 1902.*)

[51 Atl. Rep. 885.]

Carriers—Injury to Passenger in Alighting—Negligence—Evidence.*

Negligence of a carrier is not shown by testimony of a passenger that as he went to get off the car his foot caught in the step, and that he pulled to get it loose, and when he did get it loose he fell.

Appeal from court of common pleas, Philadelphia county.

Action by George W. Howell against the Union Traction Company for injury received in getting off a car. There was a judgment of nonsuit, which the court refused to take off, and plaintiff appeals. Affirmed.

Plaintiff testified in regard to the accident for which he sued as follows: "Q. Will you go on, and in your own way state just what occurred? A. It was on a Morris and Tasker street car. I took the car at 22d and Lombard, and I went to 5th and Tasker, and there I wanted to alight, and as I went to go out my foot caught in the step of the car, and I was violently thrown, and injured the kneecap, so that I have to wear, at the present time, and have to wear it always, a rubber stocking. Q. Tell us a little more fully how that foot was caught and what you did. A. I had one foot on the ground, and as I went to pull the other from the car that was what threw me. Q. Which foot was on the ground? A. The left. Q. And the right was on the step? A. The right was on the step. Q. How much of it was on the step? A. Two-thirds of it was on the step. Q. In what position was your foot on the step? A. The foot was flat. Q. What caught? A. The heel. Q. What efforts did you make to free yourself? A. Well, the foot being on the ground, I made a sudden effort to get the foot loose, and the first time I didn't get it loose, but the second time it came loose. Q. How did you take the foot off,—in what way? A. The foot came off flat, you know. Q. Did you lift your foot, or did you slide it? A. Why, I lifted it or tried to lift it. Q. And the last time you lifted it? A. It came loose

*See note to *Phillips v. St. Charles, etc., R. Co. (La.)*, 1 R. R. R. 902, 24 Am. & Eng. R. Cas., N. S., 902.

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and I fell. Q. What effort did you make to get this foot loose? A. I had to make a second effort,—a second pull. Q. Was there any force required? A. Yes, sir; it was the force that threw me. Q. It didn't loosen itself readily? A. No. Q. And you tell the court and jury, then, that you stepped down on the ground with one foot; with the other on the car step, and you gave one pull with your leg, and you couldn't get it loose, and you gave a harder pull and down you went? A. Yes."

George J. Edwards, Jr., for appellant.

Dallas Sanders and Thomas Leaming, for appellee.

PER CURIAM. The evidence in this case having failed to disclose any negligence on the part of the defendant company, the judgment of nonsuit was properly entered by the court below.

Judgment affirmed.

HERRMAN v. GREAT NORTHERN RY. CO.

(Supreme Court of Washington, March 4, 1902.)

[68 Pac. Rep. 82.]

Injury to Passenger—Unsafe Approaches to Union Depot—Liability—Burden of Proof.*

Where a carrier uses a depot operated by a union depot company having charge of the sale of tickets over the carrier's road, an instruction, in an action for injuries sustained in falling on an approach to such depot after procuring a ticket, that a railway ticket may be lawfully sold by any one with whom the company places it, and it will not be necessarily required to keep the premises where such person may sell the tickets in repair, is erroneous, as placing the burden on the purchaser to ascertain whether he was dealing with a broker or an agent of the carrier before assuming that the carrier was obligated to furnish a safe approach to its depot.

Same—Same—Same.

Where a carrier uses a union depot for receiving and discharging passengers, it is liable for the injuries occasioned by a negligent failure to keep the approaches thereto in safe condition, though the premises are under the control of a receiver of the depot company; for if the receiver neglected to maintain safe premises, his negligence was that of the carrier, whose duty it was to maintain them.

Appeal from superior court, Spokane county; Leander H. Prather, Judge.

Action by John Herrman against the Great Northern Railway Company. From a judgment in favor of defendant, plaintiff appeals. Reversed.

Mount & Merritt and Hand, Taylor & Graves, for appellant.
Will H. Thompson and M. J. Gordon, for respondent.

HADLEY, J. This is an action for damages brought by appellant against respondent. The complaint alleges that the

*See note to *Muhlhouse v. Monongahela, etc., R. Co.* (Pa.), 2 R. R. R. 131, 25 Am. & Eng. R. Cas., N. S., 131.

respondent is in the possession of a certain depot and depot grounds within the city of Spokane, which it operates and controls, on the line of its railroad passing through said city; that the respondent, for its own convenience, and for the convenience of its passengers, did, on the 13th day of December, 1898, maintain a sidewalk upon its said line of road, and in front of said depot; that on said date the respondent negligently and carelessly permitted snow and ice to accumulate and remain upon said walk, and in front of said depot, and carelessly and negligently permitted its engines to exhaust steam upon said snow and ice, and thereby caused said sidewalk to become slippery and icy on top of the snow, and dangerous to the public and persons having business with respondent at that place; and at about the hour of 6 o'clock in the evening of said day appellant, desiring to travel upon respondent's regular passenger train going east, went to said depot for the purpose of purchasing a ticket for passage upon said train, and that upon inquiry he was informed by the agent in charge of the depot that the train would not leave until the next morning, and thereupon he purchased a ticket for passage over respondent's road from Spokane to Milan, Wash., and at once left the depot for the purpose of going to his lodging in the city of Spokane; that while walking upon said sidewalk on the depot grounds in a careful manner, being compelled to walk upon the snow and ice which had accumulated as aforesaid, he, without any fault of his own, slipped upon the snow and ice, and was violently thrown to the ground, falling in such a manner as to sprain and bruise the ankle of his left leg and break the bones thereof, by reason whereof he was unable to stand upon his feet, and it became necessary that he should be taken from said place to the hospital in Spokane for treatment, which was done; that the said injuries were and are permanent, and by reason thereof appellant will be permanently crippled for life; that he was confined to his room in the hospital for about 35 days, and has suffered, and now suffers, great physical and mental pain by reason of said injuries, and is thereby permanently disfigured and deprived of the power he would have had but for said injuries to engage in profitable employment during the remainder of his life; wherefore he asks recovery in damages. The answer of respondent denies the allegations of the complaint, and further affirmatively pleads contributory negligence on the part of appellant, and alleges that appellant was a trespasser upon the property described in the complaint, and had no right to be thereon at the time mentioned in the complaint; that he was not invited by the respondent to pass along the place where he claims to have been injured, and that respondent owed him no duty whatever in respect to any of the matters alleged in the complaint; that whatever risk there may have been or which attended his passing along the premises described in the complaint, was a risk which the

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plaintiff well knew, and could have, by the exercise of ordinary care and caution, avoided. The cause was tried before a jury, resulting in a verdict for respondent. Appellant moved for a new trial, which was denied, and judgment was thereupon entered that appellant shall take nothing by his said action, and that respondent shall recover its costs. From said judgment this appeal was taken.

(Question of appellate practice omitted.)

The assignments of error are based upon the court's instructions, and upon its refusal to instruct as requested by appellant. Counsel differ materially as to the law applicable to the facts in issue in this case. The testimony discloses that the appellant is a farmer, who resides in the country, 17 miles distant from Spokane. On the day he received his injuries he drove a team of horses from his home to Spokane, expecting to attend to some business there, attend a lodge in Spokane that night, and the next day drive with his team from Spokane to Milan, Wash., where he desired to attend to some business. On the way to Spokane one of his horses became lame, and upon reaching there he took his team to a stable and decided to leave them there and go to Milan the next day by the respondent's railroad. He inquired of persons at the stable at what time the train would leave for Milan, but they were unable to inform him. He then went to the depot to ascertain the time the train would leave. He inquired of the agent in charge at the depot, who informed him that the train would leave about 8 o'clock the next morning. He then asked the agent for a ticket to Milan, and purchased from him at that time a round-trip ticket from Spokane to Milan. He immediately passed out of the depot building, and was returning by way of the sidewalk before mentioned when he received the injuries aforesaid. The evidence also disclosed that the depot and grounds thereto attached did not belong to the respondent company, but did belong to a corporation known as the "Union Depot Company of Spokane Falls." The property of the Union Depot Company consisted of the depot, with platform and walks, and some tracks and side tracks. At the time appellant received his injuries the property of the Union Depot Company was in charge of a receiver acting under direction of the United States circuit court. By arrangement between the respondent company and said receiver, the passenger trains of respondent arrived and departed from said depot, and the passengers, baggage, and express matter of said trains at Spokane were received and discharged at said depot. The agent in charge, and who sold appellant his ticket, was employed by the receiver, and sold tickets for passage over respondent's line, and also over other lines using the same depot, as well as over all other railway lines in the country. No other agent was stationed at said depot to sell tickets over respondent's line. The evidence is conflicting as to the condition of the sidewalk at the

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time. Respondent's witnesses testified that it was kept clear of snow and ice, while appellant's testimony is supported by that of other witnesses. We will not inquire into this conflict of testimony, but will leave that to the jury, since it belongs to them to determine that matter. The verdict should not be disturbed unless it appears that the court has submitted the case to the jury under instructions which embody an erroneous view of the law.

It is the contention of respondent that it was not in possession or control of the depot premises at the time; that the ownership of the premises was in another company, and the possession and control thereof were in a receiver of that company, who was operating it as an independent property, distinct from the management and operation of respondent's railroad; that the respondent had no agent in charge, and had no connection with the premises other than to receive and discharge at that place its passengers, baggage, and express matter; that respondent's duties and relations to the public and its patrons at that place were confined to the times of the arrival and departure of its trains, and that, since appellant did not go there with the purpose of taking the train at that time, but only to ascertain the time the train would leave, and to purchase a ticket from the agent of the depot company, his business was therefore entirely with the depot company, and no negligence can be attributed to respondent for the condition of the premises at that time. It is further urged that respondent was under no obligation to sell its own railroad tickets, but had the right to place such tickets in the hands of any person or corporation, and that such person or corporation undertaking the sale of such tickets must assume the duty of providing safe premises for the sale of the same, and under such circumstances respondent is under no duty to a ticket purchaser upon which negligence as to the condition of the premises where tickets are sold can be founded. This view seems to have been adopted by the trial court. The court gave the following instructions: "Any person or corporation selling or offering to sell to the general public any article, such as a railroad ticket, assumes the duty of providing, during reasonable business hours, reasonably safe premises upon which to transact such business, and, if necessary, reasonably safe ways to and from said place of business." "I charge you, however, that the defendant did not necessarily have to sell its own railroad tickets, but had the right to place its said tickets for sale in the hands of any person or corporation who, under such circumstances, would assume the duty of providing safe premises for the sale of same. If you should find from the evidence that at the time plaintiff was injured, if he was injured, his only business at said depot was to buy a railroad ticket for a trip on defendant's road, and you should further find from the evidence that said tickets were then and there being sold by some other person or corporation, then and

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in that case the plaintiff cannot recover from the defendant, and you should find for the defendant." "A railway ticket is property which may be lawfully sold by any one in whose hands it is placed by the railway company with authority to dispose of the same, and the railway company will not necessarily be required to keep the premises where such persons may conclude to sell such tickets, or the approaches to such places, in repair. I instruct you that the mere fact, if it is a fact, that the defendant railway company allowed a receiver of the United States court, by himself or by his agent, to have possession of the defendant company's tickets, and to sell them to persons desiring to take passage upon its railway line, would not of itself necessarily make it a duty of the defendant railway company to keep the premises occupied by the receiver in the sale of such tickets, or the walks or approaches to the place where such tickets were so sold by such receiver or his agents, in repair." The foregoing instructions would undoubtedly be correct as applied to a mere ticket broker, and to one purchasing from him who had knowledge that he was only such broker. It will be observed that the instructions are wanting in any requirement that the purchaser shall have knowledge that he is dealing with a broker only. One dealing with a broker, knowing him to be such broker only, and as selling tickets upon his own account, could certainly not charge respondent with negligence for not providing safe premises at the place where he applies to purchase a ticket. Here is a case, however, where a railroad company uses a depot, the walks around it, and the approaches thereto. It stops its trains, unloads and receives its passengers, baggage, and express there, and its tickets are there kept on sale. Under such circumstances the person at the ticket window, and who has charge of the sale of tickets, may be an agent, or he may be a mere broker, but knowledge that he is a mere broker should be brought home to the purchaser. It is a matter of common knowledge that it is the ordinary rule for a railroad company to maintain depots where its tickets are kept on sale at a ticket window, and one desiring to purchase a ticket for passage over respondent's line, seeing some person at the ticket window in the depot where respondent's trains are accommodated, would naturally suppose that such person was the agent of the company whose tickets he was selling, and would not suppose, without actual knowledge, that such person was a mere broker, and not the agent of respondent. The above instructions, therefore, place the burden upon the ticket purchaser and patron of respondent to first ascertain whether he is dealing with a broker or an agent of respondent, before he may assume that respondent is obligated to furnish a safe approach to and from its depot over which he must travel when he wishes to purchase a ticket. Such a rule we do not think is just or reasonable, and we, therefore, think the instructions erroneous in the particular

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mentioned. In *Turner v. Railway Co.*, 15 Wash. 213, 46 Pac. 243, 55 Am. St. Rep. 883, 5 Am. & Eng. R. Cas., N. S., 238, it was held that a ticket seller in a union depot, whose business it is to sell tickets over various lines of railway whose trains enter and depart therefrom, is such an agent of any company furnishing tickets to be sold there which are accepted by the conductors of its trains as its tickets, that the company is bound by any of the declarations of such ticket seller as to the running of its trains.

The evidence shows, and respondent so concedes in its brief, that appellant went to the depot for the purpose of ascertaining at what time the train would leave, and also to purchase a ticket. He had made inquiry uptown as to the train time, but, not getting the desired information, what was more reasonable than that he should go to the depot from which the train would start, in the expectation that some one representing the respondent company would there give him authoritative information? Again, from whom could he expect more accurate information upon that subject than the person at the ticket window? He sought the information from that person, received it, and then purchased his ticket. It is certainly reasonable that some one should be stationed at the place where respondent's trains arrive and depart to give information to the public upon as important a matter as the time of the arrival and departure of trains. If the ticket agent was in no sense the agent of respondent, but only the agent of the receiver of the depot company, then from whom could appellant have procured authoritative information upon so important a subject? Certainly the relations of respondent to the public must be such that some one in charge is authorized to speak, and who can more properly do so than the person who sells the tickets and receives the money which is the consideration for the patron's passage over the line? Appellant sought authoritative information, which could only be had from some one having authority to speak for respondent, and such a one he might reasonably expect he would find at the depot. To that extent, at least, it would seem that his business at the depot was with respondent company, and not with the depot company, or its agent, as a ticket broker. The real question is, is the respondent liable to its patrons for the negligence of the Union Depot Company to keep the premises used by respondent reasonably safe where the depot company has control of the premises, but which by common consent are used as a depot for passenger, express, and baggage business by the respondent company? As bearing upon this subject the court further instructed the jury as follows: "You are instructed that if you find from the evidence in this case that the sidewalk or platform upon which plaintiff fell and was injured, if you find that he did fall and was injured, was at that time in the exclusive possession and control of the receiver of the United States court, then your

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verdict must be for the defendant. You are instructed that the gist of this action is negligence; that is to say, the plaintiff charges that the defendant carelessly and negligently permitted snow and ice to accumulate upon a sidewalk, platform, or approach to its depot in the city of Spokane, and I charge you that unless you find from the evidence that the defendant was at that time in the possession and control of such sidewalk, platform, or approach, then your verdict must be for the defendant. You are instructed that, to entitle the plaintiff to recover in this action, it is not enough that you should believe from the evidence that the plaintiff, at or about the time alleged in the complaint, fell upon the sidewalk, platform, or approach mentioned in the complaint in this action, and was injured thereby, unless you further find that the plaintiff was at that time exercising ordinary and reasonable care for his own safety, and also that his fall was a result of the snow and ice upon the platform or approach at the place where the plaintiff sustained such fall; and also that such sidewalk, platform, or approach was, at the time plaintiff fell, within the possession or under the control of the defendant." Thus it will be seen that the court left the jury to find for the respondent if they found that the premises were under the control of another, without regard to whether respondent used the premises for its depot purposes. This, we think, was error. In *Cogswell v. Railway Co.*, 5 Wash. 46, 31 Pac. 411, 52 Am. & Eng. R. Cas. 500, this court, at page 51, 5 Wash., and page 412, 31 Pac., said: "It is a well-established principle of the law governing common carriers, which obtain certain rights or franchises from the public by either special or general legislation on the part of the state or municipal corporations, and upon whom in return therefor are cast the burden of certain duties, that they cannot, by means of any lease or other contract for the operation of their means of transportation or the management and control of their tracks and right of way, relieve themselves from liability for violations of contracts or the public law, or for torts committed by their lessees or the parties with whom they specially contract." Again, on pages 52, 53, 5 Wash., and page 413, 31 Pac., the court further said: "Out of a great number of cases which were cited to our attention by both sides, we find but two which are directly pertinent upon this point. The first is *Cunningham v. Railroad Co.*, 51 Tex. 503, 32 Am. Rep. 632. In that case a passenger was carried by a construction train operated by independent contractors for the building of the road, without the knowledge of the railroad company, and against its express prohibition, and it was held that the railroad company was not liable. The other case is that of *Lakin v. Railroad Co.*, 13 Or. 436, 11 Pac. 68, 57 Am. Rep. 25, 34 Am. & Eng. R. Cas. 500, which is a case on all fours with this one, with the exception that there the railroad was an ordinary steam railroad. The court said: 'The defendant may con-

tract for the construction of its road, but it cannot escape liability for injuries to passengers caused by the negligence of another which it permits or allows to use its road for the purposes of traffic. In such case, as regards the public, those who operate the road must be regarded as the agents of the corporation. This doctrine is in accordance with sound public policy; for it would certainly be against the public interest to allow corporations, invested by the state with important franchises and privileges, and incorporated to discharge a public duty as well as to subserve a private benefit, to shirk their responsibilities or shift their duties and liabilities to other, perhaps, irresponsible parties. Except as authorized by statute, they cannot relieve themselves from responsibility for the exercise of their corporate powers and franchises.' The two cases referred to, it seems to us, express the correct principle applicable in such instances, and under that principle there was no error on the part of the court as to the point under discussion." The defense in the above case was that of negligence of a construction company employed to equip the road with electric appliances, but passengers were being carried upon the same car that carried the construction material, and it was held that the company could not be relieved from liability because the negligence was primarily that of the construction company. Culling from the first quotation the statement of a general principle which seems particularly applicable here, we have the following: "They cannot by means * * * of any * * * contract for the operation of their means of transportation * * * relieve themselves from liability for violations of contracts or the public law, or for torts committed by * * * the parties with whom they specially contract." Respondent had a contract or arrangement with the depot company by which its "means of transportation" were to be operated upon the depot premises. To those premises the traveling public were invited and induced by respondent to come and take passage upon its cars. Whether it kept one it called its own agent to sell tickets there or not, yet the fact remains that the public were invited and induced to come there. The tickets were there to be sold, and the ordinary traveler would expect to buy his ticket upon those premises, and without knowledge to the contrary would suppose that in so doing he was dealing directly with respondent through its duly authorized agent. For all the purposes of operating its means of transportation upon those premises and of dealing with the public as is usual at a railroad depot, the respondent was the occupant of the premises, whatever may have been its contract or arrangement with the depot company. In the case of *Bennett v. Railroad Co.*, 102 U. S. 577, 580, 26 L. Ed. 235, 236, 1 Am. & Eng. R. Cas. 71, the court said: "The facts disclosed by the pleadings, and by the demurrer conceded to exist, seem to bring this case within the rule—founded in justice and ne-

cessity, and illustrated in many adjudged cases in the American courts—that the owner or occupant of land who, by invitation, express or implied, induces or leads others to come upon his premises for any lawful purpose, is liable in damages to such persons, they using due care, for injuries occasioned by the unsafe condition of the land or its approaches, if such condition was known to him and not to them, and was negligently suffered to exist, without timely notice to the public, or to those who were likely to act upon such invitation." There a railroad company and a steamboat company used the same premises for depot and landing purposes. A passenger in going to take a steamboat at night was injured by reason of negligently kept premises. The premises belonged to the railroad company, but the passenger's business at that particular time was not with the railroad company, but with the steamboat company upon whose steamer he then sought passage. The railroad company was held liable, within the principle above stated, that by invitation, express or implied, it induced the public to come upon the premises. Likewise did the respondent in this case, by its relations to the depot premises as an occupant for traffic purposes, invite and induce its patrons to come upon those premises; and it therefore came within the above rule. The same principle would doubtless have been applied to the steamboat company in the case cited as an occupant and user of the premises for traffic purposes, although not the owner; but the relief seems to have been sought against the railroad company alone.

Respondent is not relieved from liability on account of unsafe premises because the premises may at the time have been under the control of a receiver of the depot company. Respondent used the premises voluntarily, and it became its duty to provide a reasonably safe place for its patrons. If the receiver neglected to maintain safe premises, his negligence became the negligence of the respondent, because in law he was the agent of respondent, whose duty it was to maintain safe walks upon its depot grounds. In *Railroad Co. v. Roy*, 102 U. S. 451, 26 L. Ed. 141, a passenger purchased from a railroad company a ticket over its line, and at the same time from a palace car company a ticket entitling him to a berth in one of its sleeping cars constituting a part of the train of the railroad company. In the course of transportation he was injured by the falling of a berth in the sleeping car in which he was at the time riding. It was held that, for the purposes of the contract with the railroad company for transportation, and in view of its obligation to use only cars that were adequate for safe conveyance, the palace car company, its conductor and porter, were in law the servants and employees of the railroad company, and that the negligence of either of them as to any matters involving the safety or security of passengers was that of the railroad company. In *Railroad Co. v. Brown*, 17 Wall. 445, 21 L. Ed. 675, where a railroad com-

pany was being operated jointly by a receiver of a part of it and by a lessee as to the remaining part, the railroad company was held liable for injuries committed by a servant of the parties working it upon the person of a passenger whom such servant improperly expelled from a car into which the passenger had entered, the railroad corporation having allowed tickets to be issued in its own name in the same form as it had done before the road was leased, and the passenger, for aught that appeared, not knowing that the railroad corporation was not itself managing the road. In *Pennsylvania Co. v. Ellett*, 132 Ill. 654, 24 N. E. 559, 42 Am. & Eng. R. Cas. 64, it was held that, where a railway company allows another company to use and operate its road, no other negligence than that of the corporation using the track need be alleged or proved in order to fix the liability of the owner company. The negligence of the lessee company is treated the same as its own. In *Railway Co. v. Thompson*, 77 Ala. 448, 54 Am. Rep. 72, it was held that all the property of a railroad company, including its depots and adjacent yards and grounds, is its private property, on which no one is invited or can claim the right to enter except those persons who have business with the railroad, which class embraces, not only passengers, but protectors and friends attendant upon their departure or awaiting their arrival; that to the class of persons thus having business the railroad company is under obligation to keep in safe condition all parts of its platforms, with the approaches thereto, to which the public do or would naturally resort, and of the portions of the station grounds reasonably near to the platform where passengers would be likely to go, and to provide safe waiting rooms, and to keep the depot and platform well lighted at night. A building in the city of Montgomery, known as the "Union Depot, with the yards or grounds annexed, was the property of the two railroad companies known as the South & North Alabama and the Louisville & Nashville, but the Montgomery & Eufaula Railway Company, having acquired by lease the right to use the property in common with the others for the arrival and departure of its trains, with the use of its waiting rooms, ticket office, baggage room, etc., was held to be liable to passengers and the public generally in relation to the property as if it were the owner in fee. It is true it was held that the plaintiff in that case could not recover because of his contributory negligence, but the principle announced by the court is particularly pertinent to the discussion here. It thus seems clear that, as between respondent and its patrons and those having business with it at said depot, the duty rested upon respondent to see that the depot premises were safe as fully as though the premises had been owned by respondent. That such is the duty of a railroad company owning and using the premises there can be no doubt. "A railroad corporation is bound to make the approaches to their own depots and premises safe

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and convenient for passengers, and the public having business at such premises; and is bound to keep the same, and their landing places, in a reasonably safe condition for the convenient use of all who use their cars as a means of conveyance, and others who have a rightful occasion to resort there." 1 Ror. R. R. 476. Numerous cases are cited by the author. See, also: *Buenemann v. Railway Co.* (Minn.) 20 N. W. 379, 18 Am. & Eng. R. Cas. 153; *Collins v. Railroad Co.* (Mich.) 45 N. W. 178; *Cross v. Railway Co.* (Mich.) 37 N. W. 361, 13 Am. St. Rep. 399, 35 Am. & Eng. R. Cas. 476; *Railway Co. v. Reich* (Tex. Civ. App.) 32 S. W. 817.

We therefore think the instructions of the court heretofore set out were erroneous in the particulars herein discussed. The jury should have been instructed to the effect that respondent is not relieved from liability by the mere fact that another may have owned and controlled the depot premises; that if the respondent used and occupied the premises for depot purposes the duty rested upon it to see that such premises were safe.

The judgment is therefore reversed, and the cause remanded, with instructions to the court below to grant the motion for a new trial, with costs taxed against respondent.

REAVIS, C. J., and FULLERTON, DUNBAR, ANDERS, and WHITE, JJ., concur.

ACKERSTADT v. CHICAGO CITY RY. CO.

(*Supreme Court of Illinois, Feb. 21, 1902.*)

[62 N. E. Rep. 884.]

Injury to Passenger—Alighting from Street Car—Evidence.

Where plaintiff in an action for injuries sustained while attempting to alight from a street car at a certain street testified on direct examination that the car stopped on both sides of the street to let off passengers long enough for him to have alighted, and testified on cross-examination that he gave no signal to the conductor in charge of the car that he wanted to get off, and that the conductor, as far as he knew, did not know of his intentions, it was not error to refuse to allow him to state on redirect examination his recollection as to how long the car stopped at the crossing.

Same—Same—Negligence—Sufficiency of Evidence.*

Plaintiff, while attempting to alight from a north-bound street car at a street crossing, fell, and was injured by a south-bound car. The north-bound car stopped at both crossings of the street to let off passengers a sufficient length of time to have enabled plaintiff to have alighted. He gave no signal to the conductor of his intention to alight, and there was nothing to shew that the conductor knew of his intention. After the car had started up after the second stop, he fell from the footboard where he was standing while the car crossed the street. There was no evidence that the car's motion after leaving the street was increased by any sudden or violent jerk: *held*, that the evidence, though considered most favorably for the plaintiff, was insufficient to shew that the car

*See note to *Phillips v. St. Charles, etc., R. Co.* (La.), 1 R. R. R. 902, 24 Am. & Eng. R. Cas., N. S., 902.

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from which he fell was operated in a negligent manner, and hence it was not error for the trial court to direct a verdict for defendant.

Same—Same—Sufficiency of Evidence of Negligence of Motorman of Passing Car.

Plaintiff, while attempting to alight from a north-bound street car at a street-car crossing, fell and was injured by a south-bound car on the adjoining track. The north-bound car stopped at both crossings of a street where plaintiff intended to alight, and then started up again, when plaintiff, while attempting to alight, fell from the footboard where he had been standing while the car was crossing the street, and was struck by the south-bound car. The south-bound car was traveling at the rate of about 12 miles an hour when passing the north-bound car, which had then attained about half its usual speed. The rules of the company required car operators, when passing a car which is stopped or running slowly, to slacken speed and be able to stop the car immediately: *held*, that the evidence was insufficient to show that the south-bound car was operated negligently; its motorman rightly presuming that all passengers intending to alight from the north-bound car had done so at the crossing at which it stopped.

Error to appellate court, First district.

Action by Arthur Ackerstadt against the Chicago City Railway Company. Judgment for defendant affirmed by appellate court (94 Ill. App. 130) and plaintiff brings error. Affirmed.

Smiley & Clark and James S. Handy, for plaintiff in error.

Wm. J. Hynes and Watson J. Ferry (Mason B. Starring, of counsel), for defendant in error.

WILKIN, C. J. This is a writ of error to the branch appellate court for the First district. The case was heard there on appeal from the circuit court of Cook county. The action was by plaintiff in error against defendant in error for the loss of his right hand, alleged to have been caused through the negligence of employees of the defendant. The plea was the general issue. Upon the trial, at the conclusion of all the evidence, the jury, in obedience to an instruction in writing by the court, returned a verdict for the defendant. A motion by the plaintiff for a new trial was overruled, and judgment entered upon the verdict. The appellate court has affirmed that judgment. The same grounds of reversal urged in that court are insisted upon here: First, that the trial court erred in excluding evidence offered on behalf of the plaintiff; and, second, in withdrawing the case from the jury.

There is no merit in the first point. The complaint is that the court refused to allow the plaintiff to state on redirect examination his recollection as to how long the car stopped at the crossing. He had testified on his examination in chief that it stopped on both sides of Fifty-Seventh street, and that seven or eight passengers got off,—some on the south side, and others on the north. On cross-examination he was asked: "Q. Did it stop long enough for you to have gotten off while it was standing still? A. It did; yes, sir. Q. You didn't give the conductor or anybody in charge of the car any signal you wanted to get off at Fifty-Seventh street, did you?"

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A. No, sir. Q. So far as you know, they had no idea that you wanted to get off at Fifty-Seventh street, did they? A. No, sir." Then his own counsel asked him: "Q. Now, do you remember the length of time the car stopped on the north crossing? A. Yes, sir. Q. About how long was it that it stopped there? (Objected to, and objection sustained; the court stating, 'I think we have been over that.')" There was no error in this ruling of the court. It was not proper redirect examination.

In determining whether there was error in instructing the jury to find for the defendant, the rule is that we will look into the testimony only for the purpose of determining whether there is any competent evidence in the record fairly tending to prove the plaintiff's case as made in his declaration. *Offutt v. Exposition*, 175 Ill. 472, 51 N. E. 651; *Railroad Co. v. Harris*, 184 Ill. 57, 56 N. E. 316, 48 L. R. A. 175; *Edison Co. v. Moren*, 185 Ill. 571, 57 N. E. 773; *Landgraf v. Kuh*, 188 Ill. 484, 59 N. E. 501. On this branch of the case we concur in the reasoning and conclusion of the opinion of the appellate court as expressed in the opinion of Sheppard, J., as follows:

"There is no question but appellant was a passenger of appellee at the time he was hurt. Was there, then, under the declaration and evidence, any neglect by appellee of the high degree of care and skill which it was in duty bound to use to carry him safely? The declaration consisted of but one count, which charged, in effect, that appellee was a common carrier of passengers along and upon its tracks in Wentworth avenue, in Chicago, and that appellant was a passenger in a car running north thereon at or near Fifty-Seventh street, at which street he desired to alight, and that it was the duty of appellant to give him reasonable opportunity to alight then and there. The declaration then proceeds, as set out in the abstract: 'Yet the said defendant, well knowing, or having reasonable and proper notice and opportunity to learn and know, that said plaintiff desired to leave said car at said Fifty-Seventh street, and while said plaintiff, with ordinary care and speed, was about to step off said car at said crossing at said time; the said car being then not in motion, and the said defendant knowing, or having reasonable and proper notice and opportunity to learn and know, that plaintiff was about to step off said car on the west side of said car; there being no barrier, and passengers being permitted by said defendant to get off and on said car from either side thereof,—then and there, negligently, carelessly, and without proper regard for plaintiff's safety, started said car; and while said plaintiff was standing upon the step or runboard along the west side of said car, and, with due and proper care, was trying to step up therefrom and to regain his seat in said car after said car had started as aforesaid, the said defendant negligently, carelessly, and improperly caused said car to be given a sudden and vio-

lent jerk forward, and at the same time negligently, carelessly, and improperly caused another of said street cars of said defendant to be run south along said avenue upon said defendant's adjacent west track at a high and dangerous rate of speed, and without a proper lookout being kept for the safety of said plaintiff and others who were then and there passengers on said north-bound car, whereby and by means whereof said plaintiff lost his balance and hold upon the side of said north-bound car, and was whirled off onto the said west track upon which said south-bound car was approaching, and before plaintiff could regain his balance and get off from said west track said south-bound car violently and with great force struck him and knocked him down in front of said last-mentioned car, and shoved or dragged him along in front or partly underneath said car a long distance, to wit, thirty feet, whereby said plaintiff was seriously and permanently hurt, wounded, and injured, and the flesh of his right hand and arm torn and lacerated, and the bones thereof crushed and broken, whereby, to save plaintiff's life from great danger, his said right arm had to be, and was, amputated and lost,' etc.

"As we understand the count, the negligence that is charged is that appellee, having notice and opportunity to know that appellant desired to get off the north-bound car on which he was riding, at Fifty-Seventh street, and was about to step off, the car being then not in motion, appellee started the car, and while appellant was standing upon the footboard, and was trying to step back therefrom and to regain his seat in the car after it had started, the car was improperly caused to move suddenly forward with a violent jerk, whereby he lost his hold and balance and was whirled off onto the west track at a moment when a south-bound train was approaching on said west track at a high and dangerous rate of speed, and before appellee could recover himself he was run upon by the south-bound car and was injured, etc. The evidence tended to show that the north-bound car stopped on both sides of Fifty-Seventh street, and that passengers had alighted therefrom on both crossings, and that then it had started and begun to move forward. There was evidence that the car stopped a sufficient length of time for passengers to alight, and that everybody who had given any indication of a desire to do so had alighted in safety before the car started. Undoubtedly appellant wished and intended to leave the car at one or the other of the street crossings, but there was no evidence that he in any manner indicated such desire or intention to any person in charge of the car. The appellant himself testified on cross-examination, that he did not give the conductor or anybody in charge of the car any signal that he wanted to get off, and that, so far as he knew, 'they had no idea' that he wanted to get off the car at Fifty-Seventh street. Appellant's home was at Fifty-Third street, whither he was bound,—about half a mile beyond Fifty-Seventh street. The reason

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given by him for wishing to get off at Fifty-Seventh street was because some fellow passengers living contiguous to Fifty-Seventh street invited him and his wife to go home with them. He was sitting with them toward the rear of the car, and his wife was seated in a seat two or three rows in advance. As the car approached Fifty-Seventh street, and as the passengers with whom he intended to go arose from their seats to alight, appellant left his seat, and stepped along on the footboard to where his wife was sitting, to see if she would get off and go along with him. She declined to accompany him, and he handed her the keys to their home. At that time, when he gave his wife the keys, his companions whom he intended to visit had left the car at the south side of Fifty-Seventh street, and were walking home. During the time after he left his seat, and while he was talking with his wife, the car had left the south crossing of Fifty-Seventh street and proceeded across the street to the north crossing, where passengers alighted, also, and had started up again, and was moving along at probably about half its usual speed. It was then that, in his own language, he 'intended to step off.' It was just after appellant handed the keys to his wife that he fell. There was evidence by appellant's witnesses tending to show that he jumped, but we have taken only his own testimony and such other testimony as was most favorable to him, as we are bound, under the law, to do, in considering the question that is primarily before us under the present record. We observe no evidence anywhere in the record that tends to support the charge of the declaration that, after the car started up, its motion was increased by a sudden and violent jerk. The inference is, on the other hand, quite strongly against such having been the case, from the fact that some of the witnesses were in doubt as to whether the car had even started from the crossing at all, although it is plain from appellant's own testimony, as well as from what was done in stopping the car and its position after appellant fell, that it had started and was moving when the accident occurred. We are wholly unable to discover, either in the proof or its inferences, any negligence whatever in the operation of the car from which appellant fell.

"The claimed error by the court in refusing to permit the appellant to answer his counsel's question as to the length of stop at the north crossing after he had positively testified that the stop was long enough for him to have gotten off cannot be allowed. Other testimony showed that the stop was a very short one, though long enough for other passengers to get off.

"Coming now to the question as to whether there was negligence in the operation of the south-bound train, it is less plain. It is not clear wherein the negligence alleged by the declaration in that regard consists, but assuming that the negligence charged in that respect consists in running the south-

bound train past the north-bound car at too high a rate of speed while the north-bound car was standing at the north crossing, or had just departed therefrom, what was the evidence concerning it? Certain of the rules and regulations of the appellee governing the conduct of the operators of cars were introduced and read in evidence, as follows: 'When crossing prominent streets, or passing a car or train of cars which is stopped or running slow, drivers and gripmen will slacken speed, and be sure that the car or train can be stopped immediately, if necessary; and conductors will keep a sharp lookout, to help with hand brakes in case of disabled brake connection.' 'Avoid running into pedestrians and vehicles, especially at corners and cross streets.' We think there can be no doubt from the evidence but that appellant was picked up after the accident north of Fifty-Seventh street, but the exact distance north is uncertain. Some witnesses place the distance at about ten feet; another, at a car length or so; and others, at varying distances—from one to five feet. But perhaps the location of appellant at the time he was picked up does not aid very much in determining the rate of speed at which the south-bound car was moving, because he was carried along by the car,—one or more witnesses testifying they saw him rolling along under the car,—and it not being certain how far the car was north of Fifty-Seventh street when he first fell. The direct evidence as to the rate of speed at which the south-bound car was traveling varied; also depending, probably, very much upon the point from which the witnesses viewed it. One witness, who observed it at about the middle of the block between Fifty-Sixth and Fifty-Seventh streets, testified it was then moving at a rapid rate of speed,—'about twenty-five miles an hour.' Another witness, who observed it at the same place, testified it was going at the usual speed,—'about sixteen or eighteen miles an hour.' Another witness, who was on the car that appellant fell from, testified that the south-bound car seemed to be running at the usual speed of 'about twelve miles an hour,'—presumably meaning at the time of the accident. We observe no other direct evidence of the rate of speed at which the south-bound car was traveling. The inference, however, is that it was moving rapidly, from the fact, testified to by all, that appellant was struck almost instantly after leaving his car, although the motorman had time to apply his brake and ring the gong after seeing appellant fall. Now, if the north-bound car had been standing at the time when it was being nearly approached by the south-bound car, we should feel bound to hold that the question as to whether the speed of the latter, as so shown by the evidence, was negligently rapid or not, was one of fact, that the jury should have passed upon; but the evidence showing unmistakably that the north-bound car had left the crossing while the south-bound car, going at the speed shown, was a considerable distance off, and had gotten under way and

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attained half its usual speed before the cars came abreast of each other, we think the question of whether the rate of speed of the south-bound car was negligent, or not, ceased to be one of fact for the jury to decide. It being easily visible by the motorman of the south-bound car that the north-bound car had started from the crossing and was getting under way, he had the right to presume that all passengers intending to alight there had done so, and that the road was clear for him to go ahead. The rules of the appellee cannot be reasonably construed to apply to approaching cars between street crossings, where it is manifest, by the exercise of reasonable observation, that the car that has been standing still at a crossing is resuming its travel, and has already reached half its customary rate of speed before the trains meet. Nor can it be said that, as a matter of law, irrespective of appellee's rules, one car approaching another between street crossings must slacken speed because of the possibility that some passenger on one car or the other may fall from his car in front of the other, when there is no reason to anticipate such an occurrence. Of the vast number of cases cited by appellant, we have examined enough to satisfy us that none of them hold a doctrine opposed to what we have said.

"In our discussion of the case we have purposely eliminated the question of contributory negligence by the appellant, which the trial court had before it. The case as made by the appellant, giving to him the benefit of all inferences in his favor, does not tend to show negligence by the appellee in any aspect of the declaration, and therefore we need not stop to inquire whether appellant was in the exercise of due care for his own safety or not. It would have been the clear duty of the circuit court to have set aside a verdict for the appellant if one had been returned in his favor, and therefore, under the authorities referred to supra, the judgment appealed from will be affirmed."

Judgment affirmed.

KNAUSS v. LAKE ERIE & W. R. CO.

(*Appellate Court of Indiana, Division No. 1, May 27, 1902.*)

[64 N. E. Rep. 95.]

Carrier of Passengers*—Degree of Care—Contributory Negligence.

A carrier must exercise the highest degree of care in the management of its trains for the safety of its passengers, and is liable for any injury resulting from its negligence, unless the passenger is guilty of contributory negligence.

Same—Contributory Negligence—Protruding Head from Window.†

A passenger, though a boy only 10 years of age, sustaining injuries

*See note to *West Chicago, etc., R. Co. v. Tuerk* (Ill.), 1 R. R. R. 1, 24 Am. & Eng. R. Cas., N. S., 1.

†See *Chicago, etc., Ry. Co. v. Hoover* (Ind. Ter.), 23 Am. & Eng. R. Cas., N. S., 73, and foot-note.

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resulting in his death by protruding his head out of the car window and coming in contact with a car standing on a side track, alleged to have been negligently placed too near the track, is chargeable with contributory negligence, precluding a recovery against the carrier.

Appeal from circuit court, Clinton county; J. V. Kent, Judge.

Action by John E. Knauss against the Lake Erie & Western Railroad Company. There was a judgment in favor of defendant, and plaintiff appeals. Affirmed.

Brumbaugh & Combs, for appellant.

John B. Cockrum and Gunther & Clark, for appellee.

HENLEY, P. J. This was an action for damages growing out of the death of the appellant's infant son by the alleged wrongful act of appellee. The material averments of the complaint pertinent to the question herein involved are as follows: That appellee was on the 30th day of September, 1899, a carrier of passengers for hire, and run and operated the Lake Erie & Western Railroad; that on said day the appellee, in consideration of a railroad ticket having been purchased from it by the appellant, and the railroad fare in the sum of —dollars having been first paid by the appellant, for himself, his wife, daughter, and said infant son, undertook to safely transport and carry the appellant's said son as a passenger, in company with appellant and his family, upon one of its regular passenger trains over and upon its railroad, westward bound, on his way home through the state of Indiana, and the counties of Tipton and Clinton, to the city of Frankfort, Ind.; that the appellant's said son took passage upon, and was riding as a passenger in, one of the appellee's regular passenger cars, forming and composing a part of one of appellee's regular passenger trains, on his way westward to the city of Frankfort, Ind.; that at a point on said railroad about 1½ miles west of the city of Tipton, Ind., the appellee, prior to and on said day, owned, had, and operated a number of switch tracks connected with the main line of said railroad at a point and extending and diverging from said point to the northeast; that prior to and on said date the appellee had carelessly and negligently placed, and caused and permitted to remain standing, upon one of said switch tracks, a number of railroad cars, near the point where said switch tracks connected with said main line, and at a point so near the twitch track next to and located immediately south of the switch track upon which said cars had been placed and were then standing, that a passenger car or a train of passenger cars could not be run along or pass along the switch track next south of said standing cars without striking against and colliding with said standing cars; that upon such day, as the passenger train upon which appellant's son was riding arrived at the point of the railroad where the switch tracks were located, the appellee knowingly, negligently, and carelessly run and backed said

passenger train upon which appellant's son was riding as a passenger, in and upon the switch track next to and immediately south of the standing cars, thereby running the passenger train against the standing cars, and causing a collision between the passenger train and the standing cars; that the collision caused a loud and unusual noise, jarred and jostled the passenger cars upon which the appellant's son, in company with the appellant's family, was riding as a passenger, and thereby greatly excited, disturbed, and frightened him, and caused fright and commotion and excitement among the passengers in the passenger car, including appellant's son; that appellant's son was of young and tender years, to wit, 10 years of age; that he had no experience in traveling upon a railroad train, and was entirely unacquainted therewith; that he was ignorant of the fact that the cars were standing on the switch track, and that the appellee was backing the passenger train in upon the switch track next to said standing cars; that he was ignorant of any danger incident to putting his head out of the car window of the car upon which he was riding; that the appellant's son was greatly excited, disturbed, and frightened by the collision, and the unusual and frightful noises made thereby, and the commotion, disturbance, and excitement of his fellow passengers, and the jarring and jostling of the car upon which he was riding; that while he was in this disturbed, excited, and frightened condition, and acting under the sudden impulse of fear and excitement, and the apprehension of danger, he undertook to and did put his head out of the passenger car window next to him; that as he did so a corner or projection or other portion of said standing cars, to the plaintiff unknown, struck and caught the top of his head in the window, and pressed and crushed it against the side of the passenger car window through which he had protruded his head, and then and thereby and by reason of said carelessness and negligence of the appellee he was instantly killed. The remaining allegations of the complaint are only as to the relationship existing between the appellant and the person killed, and averments as to the damage sustained. The trial court sustained appellee's demurrer to the complaint, and the correctness of this ruling is the only question presented by this appeal.

The trial court properly sustained appellee's demurrer to the complaint. To actions of this character contributory negligence is made a defense by statute in this state. Acts 1899, p. 58. It is settled law, and applicable to the facts averred in appellant's complaint, that a railway company, acting as a carrier of passengers for hire, must exercise the highest degree of care in all things pertaining to the conduct and management of its trains, with a view to the safety of its passengers. The railway company will be held liable for any injury to a passenger resulting from its negligence or carelessness, unless such passenger be guilty of contributory negligence. Rail-

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way Co. v. Snyder, 117 Ind. 435, 20 N. E. 284, 3 L. R. A. 434, 10 Am. St. Rep. 60; Railway Co. v. Spyzchalski, 17 Ind. App. 7, 46 N. E. 47; Pennsylvania Co. v. Marion, 123 Ind. 415, 23 N. E. 973, 7 L. R. A. 687, 18 Am. St. Rep. 330; Railway Co. v. Lucas, 119 Ind. 583, 21 N. E. 968, 6 L. R. A. 193; Prothero v. Railway Co., 134 Ind. 431, 33 N. E. 765. It has been often held that where a complaint states facts constituting a cause of action, but also states facts which constitute a defense, it will be held bad on demurrer. *Behrley v. Behrley*, 93 Ind. 255; *Kammerling v. Grover*, 9 Ind. App. 632, 36 N. E. 922; *Sutton v. Todd*, 24 Ind. App. 519, 55 N. E. 980; *Calvo v. Davies*, 73 N. Y. 211, 29 Am. Rep. 130; *Bowlus v. Insurance Co.*, 133 Ind. 110, 32 N. E. 319, 20 L. R. A. 400. It necessarily follows that, if the complaint shows that the decedent was guilty of negligence which contributed to his injury, it must be held not to state a cause of action. It seems to have been universally held by the courts in this country that, if a passenger on a railway train protrude any part of his body through a window of the car, it is negligence per se. The case of *Railroad Co. v. Rutherford*, 29 Ind. 82, 92 Am. Dec. 336, early established this doctrine in Indiana. It was there said: "Nothing is better settled than in such a case, if the plaintiff's negligence has directly contributed to the injury, he cannot recover. A passenger is as much bound to use reasonable care to avoid injury as the carrier is to use the greatest degree of skill and care to save the passenger from harm. Nor does the duty of the carrier extend to the imprisonment of the passenger, so as to prevent the latter, by recklessness or folly, from voluntarily exposing himself to needless peril. Though a passenger, he is nevertheless a free-man. Railway coaches are provided with windows to promote the health of passengers, by affording light and ventilation, and that the tedium of a journey may be relieved in some degree, and its pleasure enhanced, by viewing the objects along the route. The place for a passenger is inside, not outside, of the coach, and this is known to everybody who ever saw a railway coach." In the case of *Railroad Co. v. McClurg*, 56 Pa. 294, where the person injured was riding with his arm protruding from the car window, and came in contact with a car standing on an adjoining side track, *Thompson, C. J.*, delivering the opinion of the court, said: "A passenger, on entering a railroad car, is presumed to know the use of a seat and the use of a window; that the former is to sit in, and the latter is to admit light and air. Each has its separate use. The seat he may occupy in any way most comfortable to himself. The window he has a right to enjoy, but not to occupy. Its use is for the benefit of all, not for the comfort alone of him who has by accident got nearest to it. If, therefore, he sit with his elbow in it, he does so without authority; and if he allow it to protrude out, and is injured, is this due care on his part? He was not

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put there by the carrier, nor invited to go there, nor misled in regard to the fact that it is not a part of his seat, nor that its purpose was not exclusively to admit light and air for the benefit of all. His position is, therefore, without authority. His negligence consists in putting his limbs where they ought not to be, and liable to be broken, without his ability to know whether there is danger or not approaching. In a case, therefore, where the injury stands confessed, or is proved to have resulted from the position voluntarily or thoughtlessly taken in a window, by contact with outside obstacles or forces, it cannot be otherwise characterized than as negligence, and so to be pronounced by the court." In the case of *Dun v. Railroad Co.*, 78 Va. 645, 49 Am. Rep. 388, 16 Am. & Eng. R. Cas. 363, a passenger was riding with his arm out of the window about two inches, when it came in contact with some cordwood piled beside the track. There the court said: "It seems to be the better rule, both upon authority and upon reason, that, the passenger being endowed with intelligence which enables him to foresee and to avoid danger, the exercise of at least ordinary prudence is required on his part to escape it, and if, by his failure to exercise these faculties for his own preservation, a misfortune befall him, though the carrier may have been in fault, it will be attributed to his own carelessness and inattention, and the responsibilities will not be thrown on the carrier." To the same effect are the well-considered cases of *Favre v. Railroad Co.*, 91 Ky. 541, 16 S. W. 370, 47 Am. & Eng. R. Cas. 594; *Railway Co. v. Underwood*, 90 Ala. 49, 8 South. 116, 24 Am. St. Rep. 756; *Todd v. Railroad Co.*, 3 Allen, 18, 80 Am. Dec. 49; *Carrico v. Railway Co.*, 35 W. Va. 389, 14 S. E. 12; *Railroad Co. v. Jones*, 95 U. S. 439, 24 L. Ed. 506.

The showing in the complaint that decedent was only 10 years of age is not of itself sufficient to prevent the application of the rule of contributory negligence. The complaint contains no allegation of incapacity, other than age. A great many authorities on this proposition are collected and reviewed in the case of *Wolfe v. Pierce*, 24 Ind. App. 680, 57 N. E. 555. If we concede that the complaint charges negligence on the part of appellee, it is plain that it also states a complete defense to the action which would arise therefrom, and does not state facts which would void such defense. We find no error.

Judgment affirmed.

ST. LOUIS S. W. RY. CO. OF TEXAS v. JOHNSON.

(*Court of Civil Appeals of Texas, April 9, 1902.*)

[68 S. W. Rep. 58.]

Assault on Passenger by Conductor—Provocation.

The fact that a passenger on a railroad train has been drinking and is boisterous, though it may warrant his expulsion from the train, if his

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conduct is calculated to disturb other passengers, does not authorize an assault on the passenger by the conductor.

Same.*

A railroad company is liable to a passenger on its train for an unwarranted assault on him by the conductor.

Same—Liability—Instruction—Harmless Error.

A railroad company cannot complain, in an action against it by a passenger for an assault by the conductor, of an erroneous instruction that the verdict should be for the plaintiff if the jury found such facts as would constitute an assault, and that they constituted negligence, as the error is in favor of the company, it being liable without regard to negligence.

Same—Same—Same.

A railroad cannot complain, in an action by a passenger for an assault by the conductor, of an erroneous instruction that plaintiff cannot recover if the conductor attempted to get the passenger to keep quiet, and any wrongful conduct on the part of the latter brought on the fight or difficulty between himself and the conductor.

Appeal from district court, Upshur county; J. G. Russell, Judge.

Action by J. L. Johnson against the St. Louis Southwestern Railway Company of Texas. From a judgment for plaintiff, defendant appeals. Affirmed.

E. B. Perkins and Marsh, McIlwaine & Fitzgerald, for appellant.

Briggs & Briggs and A. S. Johnson, for appellee.

NEILL, J. This suit was brought by appellee against appellant to recover damages occasioned by an assault and battery, accompanied by profane and abusive language, committed by the conductor of one of appellant's trains upon him while he was a passenger thereon. The appellee recovered a judgment for \$2,800, from which the railway company has appealed.

It is uncontroverted that the appellee, while a passenger upon one of appellant's trains, standing on the platform of a car, was set upon by the conductor in charge, beaten over the nose and face with his ticket punch, and then over the head with a six-shooter; the conductor using profane and abusive language towards him, in the presence of passengers, during the assault. The only question is whether or not the assault and battery was justifiable. Appellant attempted to justify it upon the ground that it was done in self-defense, and upon the further ground that appellee, while standing on the platform, was hallooing in such a manner as to disturb the passengers in the car, and, upon being admonished by the conductor to keep quiet, continued the noise, and that the assault was committed in an effort to quiet him, and get him into the smoking car. We have carefully examined the statement of facts, and find no evidence that tends to justify the conductor in making the assault and battery. The appellee may have been drinking, and a little boisterous, but such conduct, while,

*See note to Birmingham Ry. & Electric Co. v. Baird (Ala.), 22 Am. & Eng. R. Cas., N. S., 909.

if it was reasonably calculated to disturb other passengers, would have justified the conductor in expelling him from the train, furnishes no justification whatever for the assault. It is the duty of a common carrier to safely and securely carry persons who bear to it the relation of passengers, and to use the utmost care and diligence to safely carry the passenger to the end of his route, and protect him against assault and other ill treatment by those employed by it and under its control, and to exercise the utmost vigilance and care in guarding the passenger against violence, from whatever source arising, which might reasonably be anticipated, or naturally expected to occur. *Dillingham v. Russell*, 73 Tex. 47, 11 S. W. 139, 3 L. R. A. 634, 15 Am. St. Rep. 753; *Railway Co. v. La Prelle*, 65 S. W. 488, 3 Tex. Ct. Rep. 473; *Cooley, Torts*, 644. A common carrier undertakes absolutely to protect its passengers against the misconduct or negligence of its own servants employed in executing the contract of transportation. Its liability rests upon the principle that it had engaged the performance of certain duties, and has selected its own servants for the performance of those duties, and hence an assault by an employee is a breach of the duty of the carrier to its passenger. Either the company or the passengers must take the risk of infirmity of temper, maliciousness, or misconduct of the employee whom the company has placed upon the train, and to whom it has committed the power to discharge its duties, and to look after the safety of its passengers. A passenger has no control over them, and the company alone has the power to select and remove them. It is, therefore, but just to make the company, rather than the passengers, take the risk, and to hold it responsible. 4 *Elliott, R. R.* § 1638; *Haver v. Railroad Co.* (N. J. Err. & App.) 41 Atl. 916, 43 L. R. A. 84, 72 Am. St. Rep. 647. When a *prima facie* case of assault and battery is sought to be justified, it is incumbent upon one who justified it to show that no more force was used than the exigencies of the case called for. The force used must be suitable in kind and degree to the exigencies of the occasion, otherwise the justification fails. *Dillingham v. Russell*, *supra*; *Railway Co. v. La Prelle*, *supra*; *Hanson v. Railway Co.*, 62 Me. 84, 16 Am. Rep. 404; *Railway Co. v. Berger* (Ark.) 44 S. W. 809, 39 L. R. A. 786. All the elements of an assault and battery were submitted to the jury by the court in its charge, and the jury were, in substance, instructed, if they found such facts as would constitute an assault and battery, and that they constituted negligence, to find for plaintiff, if they did not find for defendant on the defensive matters submitted. This part of the charge is complained of upon the ground that it submits an issue not made by the evidence; that the question was one of an assault, and not of negligence, and the charge should have confined the jury to the question of assault, and as to whether it was justifiable. If an unjustifiable assault and battery was made by the conductor upon the appellee, the liability of appellant for his

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injuries in consequence of it attached; for, if negligence, it was negligence per se, and established by the facts constituting the assault and battery; and the submission of the question as to whether the facts constituted negligence was an error in appellant's favor, of which it is in no attitude to complain. Had the verdict been against the appellee, the error would have been one that he might well complain of, for the charge would have authorized the jury to have passed upon the question of negligence arising from facts which in and of themselves constitute liability as a matter of law. It may be doubted whether the evidence in this case was sufficient to authorize the court in submitting the issue as to whether the battery was committed by the conductor in self-defense. But, however this may be, the question of self-defense was fully and fairly submitted to the jury by the court in its charge and in special charges given at appellant's request. When we say "fairly" we mean so far as the appellant is concerned, for we cannot subscribe to the doctrine announced in one of the special charges that, if "the conductor tried to get plaintiff to keep quiet, and if you further believe that plaintiff, by any wrongful conduct on his part, brought on a fight or difficulty between himself and the conductor, then it will be your duty to find for defendant." This is diametrically opposed to the holding of the supreme court in *Dillingham v. Russell* and of the court of appeals of the Third district in *Railway Co. v. La PELLE*, above cited. The error, however, was one decidedly in appellant's favor, and put the appellee at a disadvantage before the jury.

The charge on the measure of damages is not obnoxious to the objections urged to it by appellant; nor is the verdict, when the nature and extent of the injury and the facts and circumstances attending it are considered, excessive. A brutal and atrocious assault, without anything to justify or palliate it, was committed by appellant's servant upon one of its passengers, to whom it owed the duty of exercising the highest degree of care and protection; and it is meet that it should be held responsible in damages for it.

We have considered fully and carefully all of the questions presented by the numerous assignments in this case, and find no error which, in our opinion, would justify us in reversing the judgment in this case. It is therefore affirmed.

WINCHELL v. ST. PAUL CITY RY. CO.

(*Supreme Court of Minnesota, June 20, 1902.*)

[90 N. W. Rep. 1050.]

Injury to Intending Street Railway Passenger—Fall upon Track—Liability.*

Plaintiff signaled the motorman in charge of one of defendant's

*As to nonliability of carriers for purely accidental injuries to pas-

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street cars of his wish to take passage thereon, then started on a moderate run towards the track and the point where the car would come to a stop. When within about six feet of the same, he stumbled by reason of some obstacle in the street, and fell upon the track, and was struck by the car and injured: *held*, that the motorman was not bound to anticipate the possibility that plaintiff might fall upon the track, and was not guilty of negligence in not having his car under such control that he could stop the same in time to avoid such an accident.

Case at Bar.

Evidence examined, and *held* insufficient to support a finding of actionable negligence on the part of defendant.

(Syllabus by the Court.)

Appeal from district court, Ramsey county; Kelley, Judge.

Action by William R. Winchell against the St. Paul City Railway Company. Verdict for plaintiff. From an order denying an alternative motion for judgment notwithstanding the verdict or for new trial, defendant appeals. Reversed.

Munn & Thygeson, for appellant.

John H. Ives, for respondent.

BROWN, J. Action to recover damages for personal injuries alleged to have been caused by the negligence of defendant. Plaintiff had a verdict in the court below, and defendant appeals from a denial of its alternative motion for judgment notwithstanding the verdict or for a new trial. The only question presented for our consideration is whether the evidence is sufficient to sustain the charge of negligence against defendant. The facts are as follows: Plaintiff was injured on the 9th day of January, 1901, at the intersection of Gibbs street and Langford avenue, by being run into by one of defendant's Como-Harriet electric cars. The accident occurred at about midday. A full view of the track and the approaching car was visible to plaintiff. The car was making one of its regular trips from Minneapolis to St. Paul, and plaintiff intended to take passage on it to the latter point, the place of the accident being about midway between the two cities. As the car approached the crossing, and when about 270 feet from the same, plaintiff signaled the motorman of his intention to take passage thereon; and at about the time of doing so started on a run, or, as he expressed it, "on a little trot," towards the street car track and the point at which the car usually stopped to let on passengers. As he neared the track, and when within about six feet of it, he tripped his foot upon some object in the street, or stumbled in some way, falling upon the track, and was run into and injured. It was not necessary for him, nor did he intend, to cross the track; the track on which the car was approaching being on the same

sengers, see note to *West Chicago, etc., R. Co. v. Tuerk* (Ill.), 1 R. R. R. 1, 24 Am. & Eng. R. Cas., N. S., 1.

As to the duty of carriers in taking on and letting off passengers, see note to *Phillips v. St. Charles, etc., R. Co.* (La.), 1 R. R. R. 902, 24 Am. & Eng. R. Cas., N. S., 902.

side of the street on which he was standing when he signaled it. He testified on the trial to all these facts, and further to the fact that, had he not tripped his foot or stumbled, he would not have fallen upon the track, and no injury would have resulted to him. It is claimed in his behalf that the car was running at an excessive rate of speed, and that it was the duty of the motorman to have had his car so under control that he could have stopped it after discovering plaintiff on the track in time to have prevented the accident, and that he failed to exercise proper caution in this respect. This is the only negligence relied upon to support the verdict. There is no claim of willful or wanton negligence on the part of the motorman after discovering plaintiff in a position of danger.

The statement of the case and the facts which we have outlined, which are wholly undisputed, would seem to be sufficient to show an entire absence of actionable negligence on the part of defendant. It is clear to us, conceding that the car was being operated at an excessive rate of speed, that the proximate cause of the accident was plaintiff's own involuntary act in stumbling and falling upon the track. We are not aware of any rule of law making it the absolute duty of a street car company to stop its cars upon the signal of a person wishing to take passage thereon. It is usual and customary, no doubt, to do so, but it cannot be said to be an absolute duty. It is a matter of common knowledge that frequently, where cars are already overloaded with passengers, the motorman takes no notice of persons signaling an intention or desire to take passage, and passes them without any effort to come to a stop. Plaintiff had no right, so far as the record discloses, to rely upon the motorman to bring his car to a stop upon this occasion. The motorman knew from the signal given that he did not intend to cross the track. There was no occasion for him to do so. Nor can it be said that the motorman was bound to guard against the possibility of an accident of this kind, if it be conceded that it was his duty to stop the car at plaintiff's signal. He was not required, in the operation of his car, to anticipate that possibly plaintiff might stumble and fall upon the track, and to have his car so under his control as to avoid a collision in such event. It seems clear to us that plaintiff's injuries were the result of an accident, for which neither party was in any way responsible; and to sustain a recovery would be to establish a precedent which could not possibly be followed in the future. *Fenton v. Railroad Co.* (N. Y.) 26 N. E. 967. Counsel for plaintiff presented his case on the argument so earnestly, and in the belief that his client's case is a just one, that we have reflected with special care before announcing our disagreement with him. But we cannot concur in his contention. The facts all being before the court, and undisputed, and as they show no actionable negligence on the part of defendant, the litigation

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should be brought to an end, and the parties relieved from a further cost or expense in the premises.

The order appealed from is therefore reversed, and the cause remanded to the court below, with directions to enter judgment for defendant, notwithstanding the verdict of the jury. It is so ordered.

O'MALLEY v. GREAT NORTHERN RY. CO.

(Supreme Court of Minnesota, June 13, 1902.)

[90 N. W. Rep. 974.]

Carriers of Live Stock—Limiting Liability.*

A common carrier may, by express contract, just and reasonable in its provisions, limit his common-law liability; and contracts entered into for that purpose, fairly and honestly made as a basis for the carrier's charges and responsibility, and not merely to relieve him from the consequences of his negligence or that of his servants, are valid and enforceable.

Same—Same—Written Contract—Parol Evidence.

A written contract, purporting to have been entered into for that purpose, is not conclusive upon the question whether it was fairly and honestly entered into, but extrinsic evidence is admissible, and may be resorted to in determining that question.

Same—Same—Validity of Contract—Negligence and Contributory Negligence.

Plaintiff delivered to defendant a car load of horses to be transported between certain points on its line of railway. In the written contract for their shipment was a stipulation that the value of the horses did not exceed the sum of \$50 each, that such valuation was made the basis on which the rate of compensation or freight charges of the company was fixed, and that the liability of the company in case of loss or damage to the horses should not exceed that amount. During the transportation one of the horses was killed by the alleged negligence of defendant's servants in the operation of the train, and plaintiff brought this action to recover the actual value of the horse killed, viz., \$125. It is *held* that the question whether the limitation in respect to the liability of the company as to the value of the horses was fairly and honestly made and inserted in the contract as a basis on which defendant's compensation and responsibility was determined was, on the evidence, one of fact for the jury to determine, and that the evidence sustains their verdict. It is also *held* that the evidence is sufficient to sustain their finding that defendant was guilty of negligence causing the death of the horse, and that plaintiff was not guilty of contributory negligence.

(Syllabus by the Court.)

Appeal from district court, Stevens county; S. A. Flaherty, Judge.

Action by Thomas O'Malley against the Great Northern

*As to the validity of contracts exempting carrier from liability for losses not resulting from negligence, see *Montun v. Louisville & N. R. Co.* (Ala.), 20 Am. & Eng. R. Cas., N. S., 673, and extensive note, 681; *Cau v. Texas & P. Ry. Co.* (C. C. A.), 1 R. R. R. 774, 24 Am. & Eng. R. Cas., N. S., 774; *Illinois Cent. R. Co. v. Radford* (Ky.), 23 Am. & Eng. R. Cas., N. S., 124; *Ullman v. Chicago & N. W. Ry. Co.* (Wis.), 23 Am. & Eng. R. Cas., N. S., 782; *Central of Georgia Ry. Co. v. Murphey* (Ga.), 21 Am. & Eng. R. Cas., N. S., 555.

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Railway Company. Verdict for plaintiff. From an order denying a new trial, defendant appeals. Affirmed.

W. E. Dodge and E. L. Sutton, for appellant.

Spooner & Spooner, for respondent.

BROWN, J. Action to recover the value of a horse whose death is alleged to have been caused by the negligence of defendant in transporting the same, with other horses, over its line of railway. Plaintiff had a verdict in the court below, and defendant appeals from an order denying a new trial.

The facts are as follows: Plaintiff delivered to defendant a car load of 20 horses to be transported from Morris, this state, to Foxboro, in the state of Wisconsin. Before reaching the destination, one of the horses was killed, by reason, as plaintiff alleges, of the negligent manner in which the car containing the horses was managed by the servants of defendant. The shipment of the horses was under the terms of a bill of lading or shipping contract in which appears the following stipulation, among others, namely: "This agreement, made and entered into the day above stated between the Great Northern Railway Company of the first part, and Tom O'Malley of the second part, witnesseth: That the said railway company has received from said second party one car load of horses, to be transported from Morris, Minn., station to Foxboro station, at the published tariff rate, the same being a reduced rate, given subject to the regulations printed at the heading of this agreement, and upon the terms and conditions following, which are admitted and accepted by the undersigned shippers as just and reasonable; that is to say, * * *. And it is hereby further agreed that the value of the live stock to be transported under this contract does not exceed the following mentioned sums: Each horse, fifty dollars. Such valuation being that whereon the rate of compensation to the railway company for its services and risk connected with said property is based. The party of the first part does hereby declare that this contract was made and entered into by it relying upon the declaration of the party of the second part that the valuations above given are the just and true values of such live stock, and the party of the second part agrees and declares that such valuations are the just and true values of such live stock, and understands and agrees that the party of the first part entered into the contract relying that such values so given are the just and true values of such live stock." The action was brought to recover the sum of \$125 as the value of the horse, and the defense was: (1) That defendant was not guilty of negligence; (2) that plaintiff's negligence in respect to the manner of loading and caring for the horses during transportation was the cause of the death of the horse in question; and (3) that plaintiff is limited in the amount of his recovery, if entitled to recover at all, to the sum

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stipulated in the contract as the value of the horse, viz., \$50.

It is the generally accepted doctrine of the courts that a common carrier may, by express contract, limit his common-law liability; and contracts entered into for that purpose, when not intended solely as an exemption from negligence of the carrier or his servants, and when otherwise just and reasonable, are very generally sustained. Ray, Neg. Imp. Duties, 34 et seq.; 5 Am. & Eng. Enc. Law, 288. If, however, the purpose of such contracts be merely to place a limit on the amount for which the carrier shall be liable, then as to losses resulting from his negligence such limitation is not deemed just or reasonable, and is not binding; but, on the other hand, if the limitation as to the value of the property be fairly and honestly made as the basis of the carrier's charges and responsibility, it is upheld as a just and reasonable mode of securing a due proportion between what the carrier may be responsible for and the compensation he receives, and to protect himself from extravagant and fanciful valuations, whether subsequent loss occurs through the carrier's negligence or not. The law on this subject is very clearly stated in *Alair v. Railway Co.*, 53 Minn. 160, 54 N. W. 1072, 19 L. R. A. 764, 39 Am. St. Rep. 588, 55 Am. & Eng. R. Cas. 357. The contract involved in the case at bar is very explicit, and clearly comes within the rule laid down in that case. It was prepared by the agent of defendant, and presented to plaintiff for his signature. He signed it, and the agent delivered to him the original, or a duplicate, which he retained. It is claimed from this that plaintiff is conclusively presumed to have assented to the terms and provisions of the contract, and is bound thereby. The cases sustaining contracts of this kind as valid and binding upon the shipper all hold that the contract in respect to limitations as to the value of the property must appear to have been fairly entered into, and as a basis for the carrier's charges and responsibility; and where the shipper shows by competent evidence to the contrary that he was not aware of the provisions of the contract in that respect, and that the contract was not fairly made, and for the purpose of furnishing a basis for the carrier's charges and responsibility, he is not bound thereby. *Rosenfeld v. Railway Co.*, 103 Ind. 121, 2 N. E. 344, 53 Am. Rep. 500; *Coupland v. Railway Co.*, 61 Conn. 531, 23 Atl. 870, 15 L. R. A. 534; *Railway Co. v. Simpson*, 30 Kan. 645, 2 Pac. 821, 46 Am. Rep. 104; *Railway Co. v. Clark*, 48 Kan. 321, 29 Pac. 312. The construction of contracts of this kind, the nature and extent of the obligations created thereby, and what the parties intended by the language employed, must, when clear and unambiguous, be determined from the writing itself; and extrinsic evidence is inadmissible to contradict or vary the same. But the question in the case at bar is not what the contract may be construed to be by its language, for there is, and can be, no controversy on that subject. The language is

clear and free from doubt, and brings the case fairly within the class of contracts the courts sustain. The question involved is, was the contract, as executed and signed by plaintiff, as respects the limitation placed on the value of the horses, assented to by him? Was the limitation placed therein fairly and in good faith, and was the value so purported to have been agreed upon by the parties intended as a basis for determining the freight charges and defendant's responsibility? In determining this question we are not controlled by the language of the contract; and, though it is clear and unambiguous, and *prima facie* what it purports to be, the question whether it was made and entered into understandingly and in good faith for the purposes stated, and so as to constitute a contract at all, must be determined from the facts and circumstances surrounding its execution. For the purpose of showing that plaintiff did not assent or agree to the terms of the contract, extrinsic evidence was admissible, not to contradict or vary its express terms, but to show whether it was fairly and honestly entered into in respect to this particular subject. *Boorman v. Express Co.*, 21 Wis. 162; *King v. Woodbridge*, 34 Vt. 565; *Madam v. Sherard*, 73 N. Y. 329, 29 Am. Rep. 153; *Black v. Railway Co.*, 111 Ill. 352, 53 Am. Rep. 628, 25 Am. & Eng. R. Cas. 388; *Transportation Co. v. Dater*, 91 Ill. 195, 33 Am. Rep. 51; *Despatch Co. v. Leysor*, 89 Ill. 43; *Field v. Railway Co.*, 71 Ill. 458; *Boscowitz v. Express Co.*, 93 Ill. 523, 34 Am. Rep. 191. The learned trial court submitted the case to the jury on this theory of the law, and they found that the stipulation as to the value of the property was not included in the contract as a fair valuation fixed by agreement of the parties as a basis for freight charges, and returned a verdict for plaintiff for the sum claimed in the complaint, namely, \$125. Whether the evidence was sufficient to sustain the verdict of the jury is the serious question in the case. Perhaps a strong case for plaintiff was not made out, but the evidence fairly and reasonably tends to support the verdict of the jury, and is not so clearly and palpably against it as to justify interference by this court. Plaintiff had loaded his horses into the car, and they were ready for shipment, before the contract was presented to him for his signature. A short time before the departure of the train,—about 10 o'clock at night,—plaintiff paid defendant's agent the freight charges, whereupon the agent presented him the contract in question, which he signed without reading or knowing its contents. There were no previous negotiations between the parties in reference to what the contract should contain. No inquiry was made of plaintiff as to the value of the horses, and no representations were made by him in respect thereto. He was not informed that it was necessary that the company know the value in order to enable it to determine the rate of freight to be charged for the transportation of the horses; and it affirmatively appears that their value was inserted in the

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contract by the agent himself, of his own motion, without consultation with plaintiff, and in accordance with his own estimate of the value of horses in general. There is no claim that the freight charges for shipment were in any way based upon this valuation, nor that charges would have been any higher had the value been greater. We are of opinion that the evidence made a case for the jury. *Railway Co. v. Brady*, 32 Md. 333. See, also, cases cited supra. The precise question here presented was not involved in *Hutchinson v. Railway Co.*, 37 Minn. 524, 35 N. W. 433.

We have examined the evidence upon the other questions in the case,—whether defendant was chargeable with actionable negligence, and whether plaintiff's negligence contributed to cause the injury complained of,—and conclude that the questions were properly submitted to the jury, and their verdict must be sustained.

Order affirmed.

FROST v. WASHINGTON COUNTY R. CO.

(*Supreme Judicial Court of Maine, Dec. 23, 1901.*)

[51 Atl. Rep. 806.]

Navigable Waters—Whether Railroad Trestle Authorized by Congress an Unlawful Obstruction.*

Under the commerce clause of the United States constitution (article 1, § 8, par. 3), congress has the power, in the interests of commerce, to authorize the obstruction, and even closing, of the navigation of a tide-water channel.

Same—Same—Conclusiveness of Determination of Question by Congress.

Congress having, by an act approved April 12, 1900, "declared to be a lawful structure" the trestle built and maintained by the Washington County Railroad Company across the tide-water channel between Pleasant Point and Carlow Island in the town of Perry, the court cannot now consider the question whether the trestle is "so constructed as not unnecessarily to obstruct the navigation" of that channel, as required by the act of the state legislature authorizing the construction of the trestle.

Same—Same.

The proviso in the act of congress, "Provided that such modifications are made in the trestle's present position, condition and elevation as the secretary of war may order in the interests of navigation," is of the nature condition subsequent, and the trestle must be regarded by the court as a lawful structure until the secretary of war shall order modifications which the company shall neglect to make. It does not appear in this case that any modifications have been ordered.

Same—Right to Navigate in Tide-Water Channel.

The right of navigation in a tide-water channel is not an individual private property right, protected from governmental action by the constitutional provision prohibiting the taking of private property without just compensation. It is a public right only, which may be abridged

*On general subject as to whether a bridge is an unlawful obstruction of a navigable stream, see *Hedges v. West Shore R. Co.*, 5 Am. & Eng. R. Cas., N. S., 647. Also, see 1 Rap. & Mack's Dig. 703, 716; notes to 29 Am. & Eng. R. Cas. 494; 20 Am. & Eng. R. Cas. 285; 17 Am. & Eng. R. Cas. 157; 23 Am. & Eng. R. Cas. 82; 5 Am. & Eng. R. Cas. 92.

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or extinguished at the pleasure of the sovereign acting for the public, and without making compensation to those who were wont to use it. The right is always subject to be thus extinguished, and individuals should not assume it to be permanent.

Same—Obstruction—Right to Compensation.

The fact that the building and maintenance of the trestle, and the consequent closing of the channel, by the railroad company under the authority of the legislature and of congress, has seriously damaged the business of the plaintiff and the selling value of his property adjoining the channel, does not entitle him to compensation from the railroad company, none of his property having been entered upon or used by the company. It is the common case of *damnum absque injuria*. The company has not wronged the plaintiff.

(Official.)

Report from supreme judicial court, Washington county.

Action by Charles F. Frost against the Washington County Railroad Company. Case reported, and judgment for defendant.

Action on the case brought to recover damages claimed to have been sustained by plaintiff by reason of the building and maintenance, by the defendant company, of a trestle for its railroad across the channel leading to a tide-water cove in Passamaquoddy Bay, whereby access was cut off from plaintiff's store and mill to the high seas.

It was admitted that the railroad was duly located, and the location filed with and approved by the board of railroad commissioners, and that that body had granted a certificate to operate the road over the trestle.

The cove was closed to vessels by reason of the trestle May 20, 1898, and has remained so ever since. An act of congress approved April 12, 1900, declared the trestle to be a lawful structure. Plaintiff introduced a certified copy of this act as reported back to the senate from committee, with alterations showing that the bill was not enacted in its original form. The following words were stricken out, viz., "In their present position, condition, and elevation, and shall be so held and taken to be, anything in any law or laws of the United States to the contrary notwithstanding"; also the whole of section 2, viz., "That the Washington County Railroad Company, its successors or assigns, is authorized to have and maintain its said trestles at their present site and elevation and in their present condition,"—and in place of the stricken portions was inserted the proviso at the end of the bill as printed in the opinion.

The changes in the bill were on the recommendation of the war department.

Argued before WISWELL, C. J., and EMERY, WHITEHOUSE, STROUT, SAVAGE, and PEABODY, JJ.

G. M. Hanson, A. St. Clair, and L. H. Newcomb, for plaintiff.

G. A. Curran and B. B. Murray, for defendant.

EMERY, J. A small tide-water bay or cove makes

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westerly from Passamaquoddy Bay into the land in the town of Perry. The entrance to this cove from the bay is a navigable channel between Pleasant Point on the mainland on the north and Carlow Island on the south, and this channel, for the purposes of this case, may be regarded as the only practicable passage by water in and out of the cove. For several years prior to 1898, and since, the plaintiff has owned a tract of land on the shore of this cove about three-quarters of a mile up the cove from the entrance. On this tract of land, prior to 1898, he had built a wharf into the cove, and had built a grist mill, and was carrying on a business of buying, grinding, and selling grain, etc., and also was dealing in wood, country produce, etc. The most of his transportation of the merchandise of his business was by water to and from his wharf, in and out of the cove, through the entrance above described. From this wharf and cove, vessels and boats could proceed by sea to other coast states and to the coasts of foreign nations.

The plaintiff had been carrying on this business in this manner through this navigable channel for several years prior to 1898, when the Washington County Railroad Company, in building its railroad into Eastport, built and has since maintained and now maintains a trestle across this channel between Pleasant Point and Carlow Island for the passage of its trains. This trestle practically prevents any navigation of that channel and any transportation by water in and out of the cove. This event has greatly injured the plaintiff's business and the value of his wharf and mill, although the railroad company has not taken nor trespassed upon any of his land or other property, but only interfered with his right of navigation through the channel into the bay and sea. He has brought this action on the case against the railroad company to recover compensation for the injury thus done him by the company's acts in building and maintaining that trestle.

1. The first question is whether the defendant company has any legal right to build and maintain a trestle of that character at that place with such effect. It was authorized by its charter (Sp. Laws 1893, c. 454) to locate, construct, maintain, and operate a railroad from some point on the Maine Central Railroad in Hancock county to Calais, including a branch to Eastport. It was also empowered by its charter (section 5) "to erect and maintain bridges across tide waters * * * which its railroad may cross; provided they shall be so constructed as not unnecessarily to obstruct the navigation of such waters."

Under this charter the defendant company duly located its branch line to Eastport across this channel where the trestle now is, and this location was duly filed with the railroad commissioners and the county commissioners, and was duly approved by them. The defendant company thereupon, in 1898, built the trestle on the line of the approved location to

support its railroad track, and now maintains it as a part of its through railroad from Eastport to its connection with the Maine Central Railroad and with the railroad system of the United States and Canada. The railroad commissioners gave authority to the company to operate its railroad over the trestle as now constructed.

The plaintiff, however, contends that all this gave the defendant company no authority to construct and maintain the trestle it has; viz., a trestle so constructed that it unnecessarily obstructs, and even entirely prevents, the navigation of this channel and cove. He claims that the proviso above quoted in section 5 of its charter limits its authority to build bridges and trestles to those of such character and construction as will not unnecessarily obstruct navigation as described, to his detriment, and hence this trestle is, as to him at least, an unlawful structure not authorized by the company's charter.

To meet this contention of the plaintiff's, the defendant relies upon an act of the congress of the United States approved April 12, 1900 (chapter 187, 31 Stat.), of the following tenor, viz.: "Be it enacted," etc., "that the trestle on the Eastport Branch of the Washington County Railroad Company, being the property of the Washington County Railroad Company, and running from the extreme point of land south of Pleasant Point in the town of Perry county of Washington and state of Maine to the extreme northern end of Carlow's Island in the town of Eastport in said county and state; and a certain other trestle, also the property of said railroad company, in the East Machias river in said county of Washington and state of Maine, at the extreme end of said river near the village of East Machias in said county and state, be, and both of said trestles hereby are, declared to be lawful structures: provided, that such modifications are made in their present position, condition, and elevation as the secretary of war may order in the interests of navigation." It is not disputed that the trestle first described in the above act is the trestle in question.

We have now to consider the effect of this act of congress upon the question whether the trestle, as now built and maintained, is a lawful or unlawful structure as to the plaintiff. Under the commerce clause of the constitution of the United States (article 1, § 8, par. 3), congress undoubtedly has full and exclusive jurisdiction over navigation and commerce in this channel whenever it chooses to exercise that jurisdiction. Whatever navigability existed in this channel and cove to and from the plaintiff's wharf was directly available to commerce with other states and foreign nations over the waters of the cove, channel, bay, and the great highway of the ocean. "Commerce among states does not stop at a state line. Coming from abroad, it penetrates wherever it can find navigable waters reaching from without into the interior, and may fol-

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low them up as far as navigation is practicable." *Gilman v. City of Philadelphia*, 3 Wall. 725, 18 L. Ed. 96. In *Cardwell v. Bridge Co.*, 113 U. S. 205, 5 Sup. Ct. 423, 28 L. Ed. 959, the American river, a small branch of the Sacramento, though entirely within the state and navigable only by barges and small steamboats, was yet said to be a navigable water of the United States, and as such under the control of the government of the United States, as to its navigation. So, Grand river, though wholly within the state of Michigan and flowing into Lake Michigan, was held to be within the commerce clause of the United States constitution. The *Daniel Ball*, 10 Wall. 557, 19 L. Ed. 999. When, therefore, congress acts, and so far as it acts, in the premises, the jurisdiction of the state government, judicial as well as legislative, recedes. If congress declares a bridge or other structure over or on navigable waters to be an unlawful structure, the state legislature cannot make it lawful nor can the state court declare it to be lawful. So, if congress declares the structure to be lawful, neither the state legislature nor the state court can, even upon the most plenary proof, declare it unlawful as interfering with navigation. The judgment of congress is conclusive; not to be questioned by any court. In the *Wheeling Bridge Case*, 18 How. 421, 15 L. Ed. 435, the United States supreme court had, upon allegation and proof, adjudged the Wheeling Bridge across the Ohio river to be an unlawful structure as obstructing the navigation of the river, and had decreed that it should be removed or elevated so as to permit free navigation of the river. Then congress passed an act declaring the bridge to be a lawful structure in its then position and elevation. The court held that this act of congress conclusively determined this bridge to be a lawful structure at its then elevation, and that the court could not proceed further in the matter. In the *Clinton Bridge Case*, 10 Wall. 454, 19 L. Ed. 969, the plaintiff sought to prove that the bridge across the Mississippi river was a serious and dangerous obstruction to navigation, to his special detriment. After the erection of the bridge, congress passed an act declaring that the bridge (describing it) "shall be a lawful structure." The court held that the act of congress took the question from the court. The action was thereupon dismissed without hearing any evidence. In *Miller v. City of New York*, 13 Blatchf. 469, Fed. Cas. No. 9,585, a case concerning the Brooklyn Bridge, the United States circuit court considered the effect of an act of congress declaring a bridge over navigable waters to be a lawful structure, and, after reviewing the authorities, said: "It results from the cases considered that the authority of congress is paramount in the regulation of commerce under the constitution, and that its determination in respect to interference with navigation by obstructions thereto is conclusive. What it authorizes may be justified upon its authority. What it forbids is necessarily unlawful. Nor is it to be forgotten that

this power of congress is at all times capable of exercise. If it should turn out that the judgment of congress has been mistaken, and that navigation is injuriously affected, it can by law require the bridge to be altered or removed, and can adapt its regulation of commerce to its view of the public interests." This language was quoted with approval by the New York court of appeals in *People v. Kelly*, 76 N. Y. 475, and the decision was affirmed in *Miller v. City of New York*, 109 U. S. 385, 3 Sup. Ct. 228, 27 L. Ed. 971.

It must be apparent from the foregoing authorities, and from the nature of the case, that if congress has declared this trestle, as now constructed and maintained, to be a lawful structure, this court cannot hear the plaintiff to complain that it unlawfully impedes him in navigating the channel and cove. In such case the question of lawfulness or unlawfulness of the structure has been taken from the court.

But the plaintiff contends that the act of congress has not declared the trestle to be a lawful structure in *præsent*i, but only in *futuro*, in case and when the defendant company shall perform the condition of the proviso of the act, viz., "Provided that such modifications are made in their [its] present position, condition and elevation as the secretary of war may order in the interests of navigation." He says, and truly, that it does not appear that the defendant company has made any such modifications, and he urges that such modifications are a condition precedent to the trestle becoming a lawful structure. But it does not appear, either, that the secretary of war has ordered any modifications, or that he deems any to be necessary in the interests of navigation. The proviso is evidently a condition subsequent only. The trestle is declared to be a lawful structure in *præsent*i. It is made such until the defendant company shall fail to make the modifications ordered by the secretary of war. If the secretary does not order any modifications,—and apparently he has not,—then the trestle remains a lawful structure if kept up in its then present condition. It was competent for congress to thus fix the matter (*Miller v. City of New York*, 109 U. S. 385, 3 Sup. Ct. 228, 27 L. Ed. 971; *South Carolina v. Georgia*, 93 U. S. 13, 23 L. Ed. 782); and, congress having done so, persons desiring the removal or modification of the trestle as an obstruction to navigation should apply to congress or to the secretary of war. The courts have now no jurisdiction in the matter.

2. The plaintiff further contends that even if the trestle in its present condition is a lawful structure, and is lawfully maintained by the defendant company, he has nevertheless suffered much pecuniary loss from the action of the defendant company in building and maintaining it, and should be reimbursed therefor by the company. He concedes that the company has not taken, nor even touched, any of his tangible property, real or personal. The trestle is three-fourths of a

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mile distant from the property described in this suit. But the closing of the channel by the trestle has undoubtedly reduced the earning powers and selling value of his property on the cove, and has lessened the profits of the business he was carrying on there. He claims he has a cause of action against the railroad company for the injury thus done to his property and business.

This claim cannot be sustained. The only right of the plaintiff interfered with by the defendant company was his right of navigation by water in and out of the cove through the channel. This right of the plaintiff, however, was not his private property, nor even his private right. It could not be bought, sold, leased, or inherited. He did not earn it, create it, or acquire it. He did not own it as against the sovereign. The right was the right of the public, the title and control being in the sovereign in trust for the public and for the benefit of the general public, and not for any particular individual. The plaintiff only shared in the public right. He had no right against the public. The sovereign had the absolute control of it, and could regulate, enlarge, limit, or even destroy it, as he might deem best for the whole public; and this without making or providing for any compensation to such individuals as might be inconvenienced or damaged thereby. The sovereign cannot take private property for public uses without providing for just compensation to its owner, but this constitutional provision does not limit the power of the sovereign over public rights. If, in the evolution of life and commerce, the sovereign comes to believe that the public good will be increased by the creation of some new or additional means of communication and commerce at the expense, or even sacrifice, of some older one enjoyed merely as a public right, the sovereign can so ordain, even to the detriment of individuals. If, in the judgment of the sovereign, a railroad across a navigable channel of water, and completely obstructing its navigation, is of more benefit to the public than the navigation of the channel, he has the unrestricted power to thus close the channel to navigation, without making compensation to those who had been wont to use it. Every individual making use of a merely public privilege must bear in mind that he may be lawfully deprived of that privilege whenever the sovereign deems it necessary for the public good, and he must order his business accordingly. Unless the person authorized by statute to obstruct or close a navigable channel is required by the statute to make compensation to persons injured by such action, he is under no legal obligation to do so. In such case the inconvenience and loss, however great, are *damnum absque injuria*. The company has damaged the plaintiff, but it has not wronged him. The defendant company has not interfered with the private property nor private rights of the plaintiff. It has lawfully, by express authority from the sovereign, merely abridged the

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use of a public right which was within the exclusive control of the sovereign. For this lawful act it is not obliged to make any compensation to the plaintiff, any more than to all other persons who might have occasion, however seldom, to navigate the channel.

The authorities which support the foregoing statement of the law are numerous and uncontradicted. We cite a few only: *Spring v. Russell*, 7 Me. 273; *Rogers v. Railroad Co.*, 35 Me. 319; *Gowen v. Railroad Co.*, 44 Me. 140; *Brooks v. Improvement Co.*, 82 Me. 17, 19 Atl. 87, 7 L. R. A. 460, 17 Am. St. Rep. 459; *Miller v. City of New York*, 109 U. S. 385, 3 Sup. Ct. 228, 27 L. Ed. 971; *Gilman v. City of Philadelphia*, 3 Wall. 713, 18 L. Ed. 96; *Pound v. Turck*, 95 U. S. 459, 24 L. Ed. 525; *Hamilton v. Railroad Co.*, 119 U. S. 280, 7 Sup. Ct. 206, 30 L. Ed. 393, 29 Am. & Eng. R. Cas. 490; *Escanaba & L. M. Transp. Co. v. City of Chicago*, 107 U. S. 678, 2 Sup. Ct. 185, 27 L. Ed. 442; *Cardwell v. Bridge Co.*, 113 U. S. 205, 5 Sup. Ct. 423, 28 L. Ed. 959; *Scranton v. Wheeler*, 179 U. S. 141, 21 Sup. Ct. 48, 45 L. Ed. 126.

It follows that the plaintiff has no legal claim to compensation, and cannot sustain the action. We regret that the plaintiff has been damaged by this new railroad being lawfully built across the channel he was wont to use, but he is only one of many thousands who are being individually damaged every day by the frequent lawful changes in the means and methods of manufacture and commerce, and yet cannot be said to be wronged by illegal acts.

Judgment for the defendant.

SCHWANEWEDE v. NORTH HUDSON COUNTY RY. CO.

(*Supreme Court of New Jersey, Feb. 28, 1902.*)

[51 Atl. Rep. 696.]

Injury to Person on Street Railway Track—Contributory Negligence.*

If it appears that the trolley car motorman is not going to respect your rights to cross the street first, you must wait, or you are guilty of contributory negligence if hurt.

Same—Same.

A person cannot take chances, and hold himself free from contributory negligence. There is a difference between an unforeseen peril, and being overtaken by one recklessly incurred.

(Syllabus by the Court.)

Certiorari to Hoboken district court.

Action by Frederick Schwanewede against the North Hud-

*See *Galveston City R. Co. v. Hewitt*, 67 Tex. 473; *Chicago West Div. Ry. Co. v. Ingraham*, 131 Ill. 659, 23 N. E. 350; *Warner v. People's St. Ry. Co.*, 141 Pa. St. 615, 21 Atl. 737; *Whittaker v. Eighth Ave. Ry. Co.*, 51 N. Y. 295; *Toronto St. Ry. Co. v. Dollery*, 12 Ont. App. 679; *Commonwealth v. Hicks*, 7 Allen 573; *State v. Foley*, 31 Iowa 527; *Ren v. Chicago West Div. Ry. Co.*, 8 Ill. App. 517. See also, generally, note, 12 Am. & Eng. R. Cas., N. S., 341.

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son County Railway Company. Judgment for plaintiff, and defendant brings certiorari. Reversed.

Argued November term, 1901, before VAN SYCKEL, FORT, and GARRISON, JJ.

Wallis, Edwards & Bumsted, for prosecutor.

Horace L. Allen, for respondent.

FORT, J. The judgment in this case should be reversed. The plaintiff and Peter Madison were the only witnesses to the accident called on behalf of the plaintiff. Plaintiff said he saw the car coming when he was 20 feet from the track, and that it was then going at full speed,—as far as it could. He was then asked: "Q. After you saw the car, what did you do? A. I kept on driving." On cross-examination he said: "Q. Now, when you saw this car was going,—you knew it was going very rapidly,—you thought you could get over, and you took the chance? A. Yes. Q. You could have stopped after you left the beef company, but you took the chance? A. Yes, sir." Madison testified, "I never saw a car going so fast in my life," and that he saw plaintiff "about twenty-five feet away from the track." "He was traveling on a trot toward Jefferson street." Again he said: "Q. Was Schwanewede taking a chance? A. I thought he was going to wait there, for sure. Q. Did he not try to beat the car across? A. Yes. Q. You say the accident could not be helped? A. That is what I say." A plaintiff cannot take chances of this kind, and hold himself free from contributory negligence. There is a difference between an unforeseen peril, and being overtaken by one recklessly incurred. *Railroad Co. v. Ewan*, 55 N. J. Law, 574, 576, 27 Atl. 1064. If it appears that the trolley car motorman is not going to respect your rights to cross the street first, you must wait, or you are guilty of contributory negligence if hurt. *Earle v. Traction Co.*, 64 N. J. Law, 573, 46 Atl. 613.

There was a motion to nonsuit when the plaintiff rested, and also a motion to direct a verdict for the defendant when the evidence was all in. The defendant was entitled to each motion at the time it was made.

The judgment of the district court is reversed.

SHANNON v. BOSTON & M. R. R.

(*Supreme Court of New Hampshire, Belknap, April 1, 1902.*)

[51 Atl. Rep. 1074.]

Railroads—Wrongful Death—Accident on Bridge—Negligence of Engineer—Contributory Negligence.*

Plaintiff's intestate was standing on one side of the track on a railroad bridge, at a place where he could not stand when a train was pass-

*As to company's liability for injury occasioned by negligence after becoming aware of the party's peril notwithstanding his contributory negligence, see *State v. Manchester, etc., R. Co.*, 52 N. H. 528; *Texas*

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ing, and saw an approaching train, but remained standing, and was killed by the train, though he could have avoided the danger by getting down on the pier on the side of the track, or by crossing to the other side of the track, where there was plenty of room. The engineer saw intestate when at a distance of 900 feet, but did not attempt to stop the train, though intestate acted as if he intended to stay there till the train passed; the engineer supposing that he could pass without injuring intestate: *held*, that as intestate could have avoided the injury, by the exercise of reasonable care, after the occurrence of negligence by the engineer in failing to attempt to avoid the injury by stopping the train, the contributory negligence of intestate would preclude a recovery against the company.

Exceptions from Belknap county.

Case by Edwin H. Shannon, as administrator, against the Boston & Maine Railroad, for the wrongful killing of plaintiff's intestate. Verdict for defendants, and case transferred, on exception, from the superior court. Exceptions overruled.

On the west side of the track across the bridge there was not sufficient room for a man to stand when a train passed unless he got down upon the projecting end of a pier. On the east side there was a walk, and ample room. The engineer of a locomotive drawing a train, when some 900 feet from the bridge, saw Beede standing on the bridge, west of the track, and then supposed he would get out of danger. Shortly thereafter the engineer saw him standing on the extreme westerly edge of the bridge, facing and looking at the train, and apparently intending to remain in that position until the train passed. The engineer testified that he thought there was sufficient room to pass in safety, and so made no effort to slacken the speed of the train, and that he could have slackened it materially if he had applied the brakes when he first saw Beede. The train crossed the bridge at a speed of about 35 miles an hour, and struck and killed Beede. The deceased was 49 years old, in the full possession of his faculties, and on this occasion constantly observed the approaching train. The jury were instructed that if, after the engineer saw that Beede intended to remain where he was, there was reason to believe he would be injured, and that, in the exercise of reasonable care, the engineer should therefore have then slackened his speed, and so prevented the accident, the defendants were in fault. They were further instructed that if, during the time just before the engine struck him, and practically up to the time of the collision, Beede could, and, if he had exercised reasonable care, would, have stepped out of danger, either by getting down upon the pier,

& Pacific R. Co. v. Chapman, 57 Tex. 75. See also, note appended to Balto. & O. Ry. Co. v. Anderson, 10 Am. & Eng. R. Cas., N. S., 497. See also, 3 Rap. & Mack's Dig. 246, § 5.

As to presumption that person seen on track has ordinary faculties see Piskowski v. Detroit, etc., Ry. Co. (Mich.), 19 Am. & Eng. R. Cas., N. S., 120, and note at end of case.

Injuries to deaf persons on track, see Beem v. Tama & T. Elec. R. & L. Co., 10 Am. & Eng. R. Cas., N. S., 610, and note at end of case.

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or stepping across the track to the walk, then his own negligence was so far a part of the cause of the accident that the plaintiff could not recover. To the latter instruction the plaintiff excepted upon the ground that such negligence by Beede would not be the proximate cause of the accident if the engineer could have avoided it after he discovered Beede's intention to remain.

Shannon & Young, for plaintiff.

Jewett & Plummer and Frank S. Streeter, for defendants.

CHASE, J. If the verdict of the jury was the result of the second instruction, they must have found that Beede was negligent up to the time of the collision, in not moving to a place of safety. If, after the engineer saw that Beede was apparently intending to remain in his position, the engineer could, and, in the exercise of reasonable care, ought to, have attempted to avoid the collision, Beede, according to the finding of the jury, might during this interval of time have avoided the collision by an exercise of like care. In other words, Beede, by the exercise of ordinary care, might have avoided the evil effects of the forces that had already been set in motion, or, rather, were allowed to continue in motion, by the defendants' negligence. Without his negligence, the collision would not have occurred, notwithstanding the defendants' negligence, for he would have been beyond the reach of the forces that were in action through their negligence. If his negligence was not the proximate cause of his death, it was a contributing cause, and in either event his representative is not entitled to recover damages of the defendants therefor.

Exception overruled. All concurred.

HUGHES v. BOSTON & M. R. R.

(*Supreme Court of New Hampshire, Belknap, April 1, 1902.*)

[51 Atl. Rep. 1070.]

Railroads—Personal Injuries—Trespassers—Children—Torpedoes*—Wanton Negligence.

Where plaintiff, a child nine years old, found a railroad torpedo beside defendant's track, a quarter of a mile from its station, at a point where defendant had permitted people to pass without objection, and the child struck the torpedo with a rock, and was injured by the explosion, and counsel offered to prove merely that the torpedo was of a kind used by railroads only, and that defendant's rules required its trainmen to be supplied with them, a nonsuit was properly ordered; there being no showing that plaintiff's injuries were wantonly or intentionally inflicted.

*See *Carter v. Columbia & G. R. Co.*, 15 Am. & Eng. R. Cas. 414, 19 S. Car. 20, 45 Am. Rep. 754. Distinguished in *Harriman v. Pittsburgh, C. & St. L. R. Co.*, 32 Am. & Eng. R. Cas. 37, 45 Ohio St. 11. Quoted in *Darwin v. Charlotte, C. & A. R. Co.*, 23 S. Car. 531, 55 Am. Rep. 32; *Guess v. S. Car. R. Co.*, 30 S. Car. 163, 9 S. E. Rep. 18.

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Exceptions from Belknap county; before Justice Peaslee.

Action by Edward L. Hughes against the Boston & Maine Railroad. Judgment of nonsuit, and plaintiff excepts. Exceptions overruled.

At the close of the plaintiff's opening statement to the jury, a nonsuit was ordered upon motion of the defendants, subject to the plaintiff's exception. The opening statement, so far as material, was substantially as follows: The plaintiff, at the time between nine and ten years of age, on June 25, 1900, while walking along the railroad track from the Lakeport station to Messer street crossing, at a point one-fourth of a mile from either station or crossing, found lying beside the track a railroad torpedo. He picked it up, put it upon the rail, struck it with a rock, and was injured from the resulting explosion. For many years the railroad has permitted people, including children, to pass up and down over these tracks. The portion of the railroad between Messer street crossing and Lakeport station is a common thoroughfare. A signal torpedo such as the plaintiff found is a very dangerous explosive. The defendants knew the use that was being made of their track by people, including children, who were constantly passing. Upon being inquired of as to what the evidence would be to prove the defendants' fault, counsel stated it would be that already recited; that this was a torpedo of a kind had and used only by the railroad; and that from this he should argue that it was left where found, or in some improper place, by the defendants' servants. He also offered to prove certain rules of the defendant railroad, which required all trainmen to be supplied with torpedoes, and directed their use as signals by placing and leaving them upon the rail in certain contingencies. Rule 15a is as follows: "Torpedoes must not be placed near stations or road crossings where persons are liable to be injured by them."

Shannon & Young and E. A. & C. B. Hibbard, for plaintiff.
Jewett & Plummer and Frank S. Streeter, for defendants.

PARSONS, J. If the unexploded torpedo lying beside the track rendered the defendants' premises unsafe for the use which the plaintiff, a boy nine years old, was attempting to make of them, that fact does not establish that the defendants were guilty of negligence. Actionable negligence is the breach of a duty owed by the defendant to the plaintiff. Where there is no duty there is no negligence. *McGill v. Granite Co.*, 70 N. H. 125, 127, 46 Atl. 684. "The ownership of land imposes no duty upon the owner for the benefit of trespassers." *Davis v. Railroad*, 70 N. H. 519, 520, 49 Atl. 108. Hence, in the words of the plaintiff's brief, a landowner "is not obliged to fence a disused reservoir while filling it up (*Clark v. City of Manchester*, 62 N. H. 577), or a manufacturing corporation to stop its machinery, or forcibly to eject a

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trespassing child (*Buch v. Manufacturing Co.*, 69 N. H. 257, 44 Atl. 809, 76 Am. St. Rep. 163), or a railroad to lock its turntables or discover chance trespassers (*Frost v. Railroad*, 64 N. H. 220, 9 Atl. 790, 10 Am. St. Rep. 396; *Shea v. Railroad*, 69 N. H. 361, 41 Atl. 774),” or to fence its right of way for the protection of an infant trespasser (*Casista v. Railroad*, 69 N. H. 649, 45 Atl. 712). These propositions are admitted by the plaintiff upon the authorities in this state, and from them it follows that a railroad is not in fault for not keeping its right of way clear of obstructions which may render the place dangerous to an infant trespasser. This much appears to be conceded. But it is claimed that “throwing away poisons or explosives is an altogether different case”; that carelessness in the control of explosives and poisons “is a breach of duty to the public and to the individual injured.” The claim is understood to stand upon the ground that, though a landowner is not liable for failure to take active measures for the protection of trespassers, according to the authorities above cited, he is liable for injuries intentionally or wantonly inflicted. *Davis v. Railroad*, 70 N. H. 519, 520, 49 Atl. 108; *Frost v. Railroad*, 64 N. H. 220, 222, 9 Atl. 790, 10 Am. St. Rep. 396. At the close of the opening, counsel was asked what the evidence would be to prove the defendants’ fault. The ruling granting the nonsuit was, in effect, that the facts stated were insufficient to authorize the inference that the plaintiff’s injuries were either intentionally or wantonly inflicted by the defendants. The ruling was correct. The only facts suggested were the finding of the torpedo upon the defendants’ right of way beside the track, at a point one-fourth of a mile from a crossing or station; that the torpedo was of a kind used only by the railroad; and the inference which could be made from the rules of the road, by which the trainmen were required to be supplied with torpedoes, and were directed how to use them as signals. These facts furnish no evidence of intentional or wanton injury. In the absence of evidence, it cannot be inferred from the rules requiring the use of torpedoes by trainmen that such use was unnecessary or improper. “As signal torpedoes are necessary in the operation of trains upon railroads, the possession of them by men of the train crew cannot be regarded as negligence, and it cannot be presumed they are negligently used; but negligence in such a case, as in all others, must be proved either by testimony directly establishing the fact, or by the proof of facts from which such negligence will reasonably follow and be presumed. The jury cannot be allowed to guess that there was negligence, without some proof, either direct or inferential.” *Railroad Co. v. Marsh*, 63 Ohio St. 236, 58 N. E. 821, 52 L. R. A. 142, 147; *Ghagan v. Railroad*, 70 N. H. 441, 444, 50 Atl. 146. No evidence to the contrary being offered, the only inference that can be made from the rules is that the use of torpedoes for signaling by placing them upon

the rails, except at stations and crossings, was necessary and proper. Conducting their lawful business in a manner which there was no offer to prove was illegal or improper, the defendants are not liable to one who is injured, not by the defendants' acts, but by his own intermeddling with their machinery upon their own land, where the presence of the person injured was without right. *Carter v. Railroad Co.*, 19 S. C. 20, 45 Am. Rep. 754. The case cited was very near the present in its facts. It was there said, there being "no evidence except the naked facts that the defendant had placed the torpedo upon its track for a good purpose, and that the deceased, by intermeddling with it for a bad purpose, had brought upon himself the terrible calamity which resulted from its explosion," that "there was a total want of testimony as to the defendant's negligence, the gist of the action, and therefore the nonsuit should have been granted." In the present case the torpedo was found, not on the rail, but beside it. As to the cause of its being in the latter position, we are left entirely to speculation. In the absence of evidence, the jury cannot conjecture or guess that the presence of the torpedo beside, instead of upon, the rail, was due to negligence. Much less could they be permitted to infer that it was wantonly or intentionally left where it was found. But the fact is of no consequence, because the plaintiff was not injured by coming in contact with it while walking along, but because he picked it up and struck it with a stone,—a result equally as probable if the torpedo were found upon the rail. As the defendants owed no duty to warn or protect trespassers, the fact that the plaintiff was an infant does not create a duty where none exists. *Buch v. Manufacturing Co.*, 69 N. H. 257, 44 Atl. 809, 76 Am. St. Rep. 163.

The allegation in the first part of the opening statement, which apparently is the declaration in the writ, that the plaintiff, when injured, was traveling upon the premises of the railroad, as he had a right to do, would authorize the introduction of evidence upon which, if it existed, the plaintiff might have a right to go to the jury; but it is understood from the subsequent statements and the argument that no right is claimed except what would result from the alleged fact that no objection was made to the passage of persons along the track between the Messer street crossing and the station. This claim has not been urged, but it appears to be conceded that the plaintiff was in fact a trespasser, and the case has been argued by the plaintiff only upon that ground. Invitation by the landowner to go upon his premises cannot be inferred from the fact that persons go there without objection from him. *Clark v. City of Manchester*, 62 N. H. 577, 579; *Cooley, Torts*, 606. *Harriman v. Railway Co.*, 45 Ohio St. 11, 12 N. E. 451, 4 Am. St. Rep. 507, has been cited. In that case there was evidence that the torpedoes were placed where found wantonly, and not for any necessary or useful

purpose. In the absence of evidence of this character, it is not advisable to discuss the doctrine of this case, which on other points embraced in the decision is in conflict with the law of this state.

The action of the plaintiff, though only nine years of age, in placing the torpedo upon the rail and striking it with a stone, might be thought to indicate he had some knowledge of its properties. Doubtless he did not know of the danger from an explosion so made. His injury is to be ascribed, upon the facts stated, to accident or misfortune attributable to his childish ignorance and inexperience, and not to any actionable fault of the defendants. 1 Thomp. Neg. § 1051.

Exception overruled. All concurred.

WHITMAN v. BOSTON EL. RY. CO.

(*Supreme Judicial Court of Massachusetts, Suffolk, April 2, 1902.*)

[63 N. E. Rep. 334.]

Street Railways—Collisions—Evidence—Judgment of Party Injured—Questions for Jury.*

Plaintiff, in a covered wagon, drove out of a cross street on to a street on which there was a double-track railway. As his horse's head was over the first rail, he saw a car approaching about 200 feet distant. He was driving but little faster than a walk, and continued on without quickening the pace. The motorman turned off the power, and applied the brakes, but the car struck the wagon: *held*, that the question of his negligence did not depend on his judgment as to whether there was a chance to cross the track, and evidence thereof was properly excluded.

Exceptions from superior court, Suffolk county; John H. Hardy, Judge.

Action by Morris Whitman against the Boston Elevated Railway Company. There was a verdict for defendant, and plaintiff brings exceptions. Exceptions overruled.

Geo. F. Williams and Jas. A. Halloran, for plaintiff.

M. F. Dickinson and W. B. Farr, for defendant.

HOLMES, C. J. Whether the plaintiff was negligent or not did not depend upon the plaintiff's judgment but upon that of the jury, whose duty it was to decide whether he showed the caution which a man of ordinary prudence would observe. Therefore from that point of view the excluded evidence was immaterial. *Com. v. Pierce*, 138 Mass. 165, 176, 52 Am. Rep. 264.

The question excluded did not seek to bring out a portion of the surrounding facts which could not be stated adequately in detail and which therefore needed to be summed up in some general phrase, as often happens. The external situation sufficiently appeared.

Again there was no question as to what the plaintiff knew about the situation.

*See generally, note, 2 R. R. R. 66, 25 Am. & Eng. R. Cas., N. S., 66.

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The only material fact that we can think of that possibly might have been conveyed by the plaintiff's answer is that he did not get himself run down on purpose. But it does not appear that the defendant charged him with intentionally bringing about the accident, or that the question had any such matter in view. If it was thought necessary to deny intention, a question easily could have been framed that would have been free from objection. Unless it was argued that the plaintiff did intend to get himself run down, his own judgment of the facts sufficiently appeared by what he did. He was allowed to testify that he formed a judgment. See *Railway Co. v. Miller*, 8 Tex. Civ. App. 241, 246, 27 S. W. 905.

Exceptions overruled.

METROPOLITAN ST. RY. CO. v. SLAYMAN.

(*Supreme Court of Kansas, Division No. 1, April 5, 1902.*)

[68 Pac. Rep. 628.]

Street Railroads—Collision with Wagon—Contributory Negligence.*

Where the driver of a heavy wagon attempts to cross the tracks of a street car company at night, and, before doing so, looks both ways upon the track, and is unable to discover any car approaching, but does see the headlight of one, which he believes to be moving toward him at a distance of three or four hundred yards; and where the evidence justifies the jury in determining that such car was traveling at an unusual, reckless, and dangerous rate of speed, which fact such driver did not and could not know before starting to drive across such track; and when, by reason of such high rate of speed, and the failure of those in charge of the car to make any effort to stop it, such wagon is struck, and the driver is injured,—the question as to whether the latter was so far guilty of contributory negligence as that he may not recover is one of fact, for the jury, under proper instructions of the court.

(Syllabus by the Court.)

Error from court of common pleas, Wyandotte county; Wm. G. Holt, Judge.

Action by John Slayman against the Metropolitan Street Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Argued before DOSTER, C. J., and SMITH, GREENE, and ELLIS, JJ.

Miller, Buchan & Morris, for plaintiff in error.

True & Sims, for defendant in error.

ELLIS, J. On the 27th day of December, 1899, the plaintiff below was driving a heavy wagon along Southwest boulevard, in the city of Rosedale. The street railway company operates a line of its road on that boulevard, and, just as it became dark on the day named, one of its cars, manned by an extra motorman and conductor, was "running in," after

*See generally, note, 2 R. R. R. 66, 25 Am. & Eng. R. Cas., N. S., 66.

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having made the last trip for the day. The plaintiff below testifies that he had been driving for some distance along one side of the street; that the road was rough, and he thought it would be smoother on the other side, and so, after looking both ways upon the track, and seeing nothing but the headlight of a car, which appeared to be three or four hundred yards behind him, he attempted to pull his team across the track, and had nearly accomplished the endeavor, when the rear end of his wagon was struck with great force by the street car, the light of which he had seen. The horses were thrown down, and he was thrown off upon the ground and seriously injured, while the wagon was considerably broken up. For the injury thus sustained he brought this action in the court of common pleas of Wyandotte county, and recovered judgment, to reverse which, proceedings in error were instituted in this court.

The negligence charged against the street railway company in the petition is as follows: "That the defendant, by and through its agents, servants, and employees in charge of said car, unnecessarily, carelessly, negligently, maliciously, and wantonly ran said car at the high, reckless, and dangerous rate of speed of about twenty miles an hour, without ringing any bell, sounding any alarm, or in any way warning the plaintiff of the approach of said car, and without attempting to check the speed thereof after seeing and knowing the plaintiff's dangerous position on the track." The contention of the street railway company is that the testimony of defendant in error shows him to have been guilty of contributory negligence, and that the court ought to have declared the same as a proposition of law, and the first and principal error assigned is the failure of the court so to do. After reciting the statements of Mr. Slayman as to his discovery of the headlight of the car just before attempting to cross the tracks, and his belief as to the distance the car then was from him, counsel for the street railway company select from his testimony the following extracts, which they regard as tending to support their claim of contributory negligence: "Q. What did you do, Mr. Slayman, if anything, before you attempted to go across that track? A. Why, I looked both ways for cars. Q. Did you see any car approaching from the east? A. No, sir. Q. Did you see any car approaching from the west? A. No, sir. Q. Did you see anything that would indicate that a car was coming? A. I seen a light from the west. Q. Coming from the west? A. Yes, sir. Q. What did you think it was? A. Well, I thought it was a car coming. Q. Thought it was a headlight? A. Yes, sir. * * * Q. Now, what else did you do, if anything, in attempting to cross that track? A. Well, when I started to go across, I looked both ways, and kept urging my team to get across onto the other track. Q. Did you see any car approaching at that time? A. No, sir. Q. After you got up onto the track, did you see what had

become of that approaching headlight? A. I saw it got up onto me, close. Q. Did you try to get out of its way? A. Kept jerking and urging my team right along. Q. Did you get out of its way? A. I got just about— Well, it came pretty near clearing. It just struck the hind end of the wagon. * * * Q. What did you cross the street car tracks at Minnie avenue for, when the east side was your proper way down to the city? A. Crossed over onto that side to get a smoother road. Q. It was all paved along there, wasn't it? A. It was macadamized; yes, sir. Q. Macadamized on the east and west side, both, isn't it,—both sides? A. Yes; but it was rough rocks, and I thought I would pass over onto the west side of the tracks. Q. There was no teams or obstructions to keep you from going on the east side of the track? A. No, sir. * * * Q. Before you started across you looked to the north, to see if there was a car coming? A. I looked both ways; kept looking all the time. Q. And when you started across you did not see any car? A. When I started across I saw a light. * * * Q. Did you notice how far down the street it was? A. Yes, sir. Q. You thought it was far enough away, that you had plenty of time to cross? A. Yes, sir. Q. But you made a mistake, didn't you? A. Yes. Q. You made a mistake. The car was not far enough away. Before you started onto the track, did you look to the north? A. I looked to the north; yes, sir. Q. And before you started onto the track you looked to the south? A. Yes, sir. Q. After you started onto the track, when did you look to the south? A. Kept looking and listening all the time. Q. You saw the lights of the car which struck you before you started on? A. Yes, sir. Q. Did you watch that light all the time? A. I was looking right this way when she struck the wagon. Q. You were looking right at it when it struck the wagon? A. Yes, sir; and jerking and urging my team all the time to get across. * * * Q. Or, if you had waited until the car went by, after you saw the headlight, you would not have been hurt, would you? A. No; I would not have got hurt. Q. You saw the headlight before you started upon the track, didn't you? A. Yes, sir. Q. And when you saw the headlight your team and wagon were entirely clear of the track, were they not? A. I turned them, and was heading them on there. Q. But when you first saw the headlight of this car, neither your horses nor your wagon were upon the track, were they? A. No; they were not upon the track. * * * Q. How far were your horses away from the track when you first saw this headlight? A. Driving right alongside of the track. Going right alongside of the track. Q. How many feet from it? A. I can't tell you how many feet. * * * Q. How many feet was the outside rail of that track from the street curb? A. I couldn't tell you. * * * Q. Well, there was plenty of room between the outside rail and

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the street curb for you to drive along, wasn't there? A. Yes; but there was better road the other side."

These extracts from the testimony of the witness are the most favorable to the railway company, and some of them were qualified by other statements of that witness; but, waiving this consideration, we do not think this testimony so conclusively proves the negligence of plaintiff below as to justify the court in declaring, as a matter of law, that such plaintiff, by reason of his negligence, could not recover in the action. It needs no citation of authorities to prove that persons traveling upon a public street along or across a street railway are not held to the exercise of the same degree of care as when traveling along or upon or across an ordinary railroad. The trains of the former, being propelled by cable or electricity, and being short and light, are usually under control of those in charge, and may be readily stopped by proper use of the appliances with which they are equipped, while as to the latter all of these conditions are absent. Such streets are intended for public travel, and one who drives a team upon them has the same right to use them as has the street railway company, subject, always, to the duty imposed by necessity upon such driver to turn out for, and not unnecessarily obstruct, the cars, and to use proper care to avoid colliding therewith. For that reason such driver may not undertake to cross the tracks of a street railway company so near a moving car as to impede its passage or incur danger of collision; but even if he does do so, in violation of his duty, and those in charge of the car discover his danger, it is incumbent upon them to check its speed, and, if possible, avoid an accident. If to the driver of a vehicle there reasonably appears to be sufficient time for him to cross the track before a moving car will, while running at its ordinary speed, arrive at the place of crossing, and if, in good faith, and in the exercise of due care, he attempts to so cross in front of such car, it cannot be said, as a matter of law, that he is so far negligent in making such attempt as that he cannot recover, should an accident occur because the car was running much faster than usual, and because no effort was made by those in charge of it to prevent disaster. It is hardly necessary to say that the degree of watchfulness and caution requisite in any case to constitute ordinary care must be commensurate with, and measured by, the danger to be avoided. Here it is evident that plaintiff below misjudged the distance as well as the velocity of the car. Still, as the circumstances were such that he might easily have been misled, and as the testimony fully justifies the conclusions which the jury undoubtedly reached,—that the car was moving with unnecessary and reckless celerity, and no effort whatever was made to stay its course or save plaintiff below from injury,—the court did not err in refusing to take the case away from the jury and direct a verdict in favor of the street railway company.

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Although not, in terms, so stated in their brief, the chief objection of counsel for the street railway company to the instructions grows out of the failure of the court to assume that the plaintiff below saw the car before he turned his team upon the track. It will be noted that such plaintiff testified he did not see the car, but saw a light which he took to be the headlight of a car moving towards him. We think, under the circumstances, the court would have been justified in regarding that statement of the witness as tantamount to an admission that he saw the car. Still it was not error for the court to submit to the jury the question as to whether he did in fact see the car, when he, in terms, denied having done so. However, this matter is unimportant, for the court plainly told the jury that "if the plaintiff would have avoided the injury which he received, by the exercise of reasonable care and diligence, and he failed to exercise such reasonable care and diligence, and thereby directly contributed to the cause which produced his injury," they should render a verdict for the defendant. In other instructions than the one from which we have just quoted, the court advised the jury that, if the plaintiff failed to exercise ordinary care to avoid a collision, he could not recover in the action. The instructions which were in fact given were as favorable to the street railway company as those which were requested by its counsel and refused by the court. Every phase of negligence charged against either party was fairly submitted to the jury, and its general finding against the street railway company must be regarded as exculpating plaintiff below, and finding the defendant guilty as charged.

Upon all the essential matters in controversy there was evidence tending to support the verdict of the jury. It is not claimed that the damages allowed were excessive, and the judgment is affirmed. All the justices concurring.

TUNISON v. WEADOCK *et al.*

(*Supreme Court of Michigan, March 26, 1902.*)

[89 N. W. Rep. 703.]

Care Required of Person Driving along Street Railway Tracks.*

Though a traveler driving upon or in close proximity to the tracks of a street railway is bound to look ahead to see whether a car is liable to come in collision with him, it cannot be said as a matter of law that he is bound to be constantly looking backward for that purpose, so as to be free from negligence.

Same—Question for Jury.

The evidence showed that plaintiff was following in his wagon the beaten track in the road alongside a car track, and so near as to make it reasonably certain that a collision would occur unless the car was stopped. The driver of the vehicle thought he was far enough away from the track to avoid any car that might come up from behind, but

*See note, 2 R. R. R. 66, 25 Am. & Eng. R. Cas., N. S., 66.

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there was no testimony as to his listening for the ringing of any bell. There was some evidence that the driver turned in towards the track just as the car reached it: *held*, the question whether the driver was negligent was for the jury.

Grant, J., dissenting.

Error to circuit court, Bay county; Theodore F. Shepard, Judge.

Action by Petronilla Tunison against John C. Weadock and another, receivers of the Bay Cities Consolidated Railway Company. From a judgment for plaintiff, defendants bring error. Affirmed.

Plaintiff and her husband, who was driving, were returning home from Bay City about half past 5 on the evening of December 15, 1899, along Center avenue. They were driving on the south side of defendants' track. Just behind them was another horse and wagon, with two occupants,—a man and his wife, named Robinson. A street car was coming from the rear. It passed Mr. Robinson's wagon, and some part of the car struck some part of the wagon in which plaintiff was riding, overturned it, and injured her. In some manner the wagon and its occupants were carried or thrown to the north side of the track, so that when the car stopped the horse stood facing in the opposite direction. The night was clear and cold. As the witnesses stated: "The cold made a squeaky noise. You could hear the wheels squeak." The road was level between the car tracks and the gutter, a width of 12 to 15 feet. Three grounds of negligence are alleged: (1) That the car was going at an unlawful rate of speed, viz., more than 12 miles an hour, the limit allowed by the ordinance; (2) that the motorman failed to give any signal or warning of the approaching car by ringing the bell or otherwise; (3) that he neglected to see plaintiff, and take measures to prevent a collision with her buggy.

It seems essential to state somewhat fully the testimony upon which recovery is sought. Mrs. Robinson, who was riding in the wagon behind plaintiff, testified: "We were going right along in the beaten track. We were close to plaintiff's carriage. We were more than a foot from the south rail of the street car track,—about a foot; not more than that. We were coming right behind Tunison's rig, and the car passed us as quick as lightning, and it came onto this head rig. It must have been in a little further than ours. It turned it bottom side up, and threw it further onto the track like, and caught onto the car, and the car was dragging it along." Cross-examination: "It was quite light, so you could see a car a great many blocks away, and a rig a great distance ahead of you. The road was free and clear. * * * I did not notice how close Tunison's rig was being driven to the track. I was not thinking anything about the car coming, it caught us so quick. I knew the cars came there regularly. I was sitting on the side next to the car, and thought I was

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entirely safe, and didn't pay any further attention to the car, nor how far from the track Tunison's rig was. In my judgment, they were almost, if not quite, as far from the track as our rig was. The car struck the side of the buggy,—the side that was to the car,—the whole side at once. It kind of struck it and threw it over in front of the car. It gave it a whirl around. * * * I did not know which part the car struck. I saw Mrs. Tunison on the south side of the track when the car caught her rig. It caught her rig, and kind of turned her around the opposite way, over onto the other side. The rig was not on the track. The car caught the side of the buggy. The horse got around in front of the car. It jumped over the track. The car must have shoved the buggy in front of it and along until it worked loose, and went over on the other side of the track. It kept going until it got loose from the car." Redirect examination: "It must have caught onto the side, and pulled the horse in front of the car. The horse kept on going after the buggy was struck." Recross-examination: "Q. How did the buggy get around on the other side? A. The car struck it, and it was right in front of the car, and of course the car kept shoving it off. Q. Then the whole buggy was in front of the car? A. Yes, sir."

Mr. Robinson testified: "We were going along the regular beaten road. In some places the road was beaten a little closer to the railroad, and in some places a little further. The first thing I knew about it, the car struck the rig, and the rig came right around in front of the car. The car was running on at the rate of about 18 or 20 miles an hour. * * * The north side of Tunison's rig was about two feet and a half from the south rail of the track, as near as I could tell, at the time of the collision, in the regular beaten road. We was about two and a half feet in the regular beaten road. In some places it goes closer in than at others. No bell was rung until the buggy was struck. Tunison's rig was nearer the car track than mine at the time of the accident. I was positive he was in the beaten portion of the track. The side of the car must have scraped his buggy, and the horse got frightened and started. It threw the buggy over to the south a little. The horse made a kind of jump, and jumped over towards the car track. The buggy followed the horse. After the car ran ahead, the horse became separated from the buggy, about forty or fifty feet from the first collision. The buggy then left the track." On cross-examination he testified: "There is a broad, open roadway between the south rail of the track and the gutter line of the street where the accident took place. One portion may be a little better beaten than the other portion, but it is all a broad, open, level roadway. You can drive on it all with convenience and safety. As near as I can tell, it is about 12 or 15 feet wide. * * * I thought I was far enough from the track to be entirely safe. I was right in the same beaten track he was. There was plenty of room to

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be six or eight feet away from the track, I suppose, if I had wanted to be; and Tunison was in the same beaten road. His rig was about a foot and a half from the track. I was observing at the time. I noticed because of the regular beaten track. There was nothing to hinder his driving along without reference to the regular beaten track. I thought he was safe. Just at the point where the accident happened Mr. Tunison's rig came in too close to the track,—came in suddenly. As near as I can tell you, he must have turned in suddenly with the bend of the road, or otherwise. He must have pulled in onto the track suddenly, almost instantaneously; and at the time he pulled in close to the track the car was coming right behind and right alongside of me, and before he could get away the car struck him."

Adelbert Curry testified that he was upon the sidewalk about 60 feet from the place of the collision. Saw the car coming for two blocks, and the rigs. That the car was running about 20 miles an hour. "That Tunison's rig looked to me as though he was 3 or 4 feet off the track. When the car struck the rig, the latter was, I thought, three or four feet away from the track. When the car got opposite the rear of Tunison's rig, the latter was still on the south side of the track, and had not started to cross the track. I don't know how it came to get on the track, unless the way the road was beat, and the horse happened to take the road and to turn in towards the track.

* * * About the time the car struck the rig, the horse gave a jump and dragged the buggy over onto the track. During the time I was attending to my own affairs the car and the rig came together. As quick as I heard the noise, I turned around." Cross-examination: "The horse must have turned in suddenly to get the wagon where it could be hit. It could not have been more than a second—a short bit—before the collision. At the time the horse turned in, the car was right behind him, I think, so there was not more than a second between his turning in on the track and the striking of the buggy by the car." On redirect examination he testified: "At the time the rig was first touched it must have been on the track, of course, ahead. I couldn't tell positively whether the rig was right ahead of the car or at one side."

Mr. Tunison, plaintiff's husband, testified: "I must have been pretty close to the track. If I had not been on the track, the car could not have struck me. I was driving in the beaten track, which is sometimes close to the rail and sometimes goes off two or three feet." On cross-examination he testified: "I don't know how the accident happened, but I thought I was far enough away from the tracks to be safe. I know I did not turn onto the track. I was on the side at the time the street car struck the buggy. I was not turning." The witness admitted that he gave the following testimony upon the former trial: "Q. Hadn't you started across the track? A. I didn't start across the track. Q. Hadn't you

got your horse across the track, and your wagon right on the track, before the car struck you? A. I didn't calculate to go across the track. The horse shoved. That is more than I know yet. Q. Hadn't the horse got across the track? Wasn't the fore wheel of your wagon across the first rail and on the second rail before the car ever struck you at all? A. I don't know anything about it at all. Q. You don't know anything about it at all? A. No. Q. Why don't you? A. I don't know anything about it. Q. Will you say that you had not? A. Yes, I said I did. Q. You don't mean that, do you? A. I say I don't know that. Q. You don't know, then, whether you had turned your horse to go across the track, or whether you were crossing the track, at the time the car struck you? A. No, I don't know about that." He further testified: "I could not say how close to the track the buggy was. Maybe a foot, maybe ten inches, maybe six inches. I can't tell how long the buggy had been so close to the track. I didn't pay any attention to it. There was plenty of room there to keep away from the track." He also admitted having testified upon the former trial as follows: "Q. You don't know where your buggy was at the time the car struck it,—whether it was in front of the car or beside it? A. No."

Plaintiff testified that she did not know where the buggy was when the car hit it. The above comprises all the testimony on the part of the plaintiff referring to the manner of the accident.

One Mrs. Butterfield, the sole occupant of the car at the time, was called as a witness for the defendants, and testified that there was a switch they had just passed, and that a car goes slower across a switch; that the car did not go fast by the switch on that occasion; that she heard the bell ring; that it started to ring near Green avenue, and kept ringing long enough for a half dozen teams to get out of the way. "I was in the front end of the car on the south side. I thought I would look around, and see what the trouble was, and started to get up from my seat. Just then the horse's head struck the window on the north side of the car. I got out of the car, and noticed that the rig was on the north side of the car. The motorman was trying to stop the car."

One Charles Walt was returning from his work to his home from the east, and testified that he heard the bell just before he heard the crash of the collision; that he had gone about 30 feet, after hearing the bell, before the collision; and that he was on the track of the Michigan Central Railroad Company, east of the place of the accident, when the bell was rung.

The motoneer testified: That he slacked down for the switch. That when crossing Green avenue he saw two rigs alongside the track, from two to three feet from it. As he got closer, he rung the gong, as he always did. That when he got up to the rig behind, "this other rig

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pulled right across ahead of me. The car struck it in the side, and the old lady and gentleman was right in front of the window, sitting right there in front of the car. The rig slid around and tipped over. It lay right at the hind end of the car when I stopped. When I first saw the rig, I was going about six miles an hour, and when I caught up with the rig I was going between four and five miles an hour. I shut off the current and put on the brakes. When I saw they were going to cross, I reversed." That he saw the rig as soon as it started to cross the track. That before that it had been a safe distance from the track. "Just as soon as they started to cross, I commenced to take precautions, and undertook to stop. It was not possible for me to avoid striking them. After it was struck, no part of the rig was on the south side of the car. * * * When I hit the buggy the horse was on the north side of the track,—headed towards the north,—had gotten across the track." That a car running about six miles an hour could be brought to a stop in about sixty feet by using brakes and reversing. There was no conductor on the car.

Plaintiff and her husband had often traveled over this street between the city and their home, were perfectly familiar with the situation of the tracks and the running of cars thereon, and knew that cars were passing every few minutes. The accident occurred about 150 feet east of Green avenue. The only testimony as to the distance the car went after striking the buggy was that of Mr. Robinson, who testified that, "after the car ran ahead, the horse became separated from the buggy about 40 or 50 feet from the first collision." The court, in his instruction to the jury, said that the claim of the plaintiff was that the car struck the left forward wheel of the buggy, and that by some means the horse and buggy then got around in front of the car and on the north side of the car. If the car struck the forward wheel first, it is evident that the horse and buggy were going towards the track. Plaintiff recovered verdict and judgment.

T. A. E. & J. C. Weadock, for appellants.

Edward E. Anneke, for appellee.

GRANT, J. (after stating the facts). The following facts are established by the testimony: (1) Plaintiff and her husband were familiar with the manner and the usual speed of running cars in that part of the city. (2) A car passed every few minutes, and therefore they should have expected one. (3) Plaintiff and all her witnesses, including her husband, who was driving, supposed that they were far enough away from the track to permit a car to pass. (4) Plaintiff's husband turned suddenly towards or across the track just before the buggy was struck. (5) There was a good and safe roadway, 12 to 15 feet wide, between the track and the gutter. (6) Plaintiff and her husband took no steps to determine

whether a car was coming. Either could have seen the car and its headlight in a second by turning his or her head. They do not testify that they took the precaution to listen for the ringing of the bell. The disputed facts relate to the speed of the car, the ringing of the bell or gong, and the position of the horse and buggy at the time the car struck the buggy. Two witnesses on the part of the plaintiff alone testified to the speed of the car,—Mr. Robinson, who did not see the car until just as it was passing his buggy; and Mr. Curry, who stood upon the sidewalk. Robinson testified to a speed of 18 to 20 miles an hour, Curry to a speed of 20 miles an hour. Mr. Curry testified that he did not know anything about the speed of cars running in the locality, but that they ran very swiftly, he should think. He did not see the car between Green avenue and the place of collision, a distance of 150 feet. His attention was directed to something else. He was then asked as to his competency to testify about the speed of the car that night, and was permitted to do so. Such testimony is of no value, and does not rise to the dignity of evidence, and should have been excluded. The horse was going at a "slow jog." If the car was going at a speed of 18 to 20 miles an hour, it would manifestly be impossible for the horse to jump in front of the car and to the other side of the track without being struck, and all agree that the horse was not struck. The opinion of Mr. Robinson as to the speed is shown to be unreliable and incorrect by the undisputed facts and by his own testimony, for he says the car was stopped at 40 to 50 feet from the place of the collision. It would be impossible to stop a car in that distance going at the rate of 6 miles an hour, according to the uncontradicted testimony of the motoneer, who has been a motoneer on this road for six years. It is common knowledge that it could not be stopped in that distance if it was running at a speed of 18 to 20 miles an hour. The motoneer was the only witness on the part of the defendants who testified to the speed, and he fixed it at about 6 miles per hour. The sole passenger testified that the car did not go fast by the switch, which had just been passed, but gave no opinion as to the speed. The lawful rate of speed was 12 miles an hour. Whether this testimony was sufficient to justify the jury in finding that the car was running at an unlawful rate of speed, I do not deem it necessary to determine, as I think the case must be disposed of upon another point. The only disagreement among the witnesses in regard to the ringing of the bell is the distance of the car from the carriage when it was rung. Three of the witnesses for the plaintiff agree that the bell was rung at or before the collision. Mr. Robinson, on the part of the plaintiff, testified he was listening; that "at the time he went by me he struck the buggy and the bell rang." Mrs. Robinson testified: "It did ring just as it struck the rig. It rang three or four times." Mr. Curry said, "There was no bell until about the time the

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car struck the rig." Plaintiff testified that "the bell did not ring before we were struck." Mr. Tunison testified, "I heard no bell rung before we were struck." In view of the noise made by the two horses and carriages over a hard and frosty road, it would not be surprising if these witnesses, only one of whom testified that he was listening, did not hear the bell, if it was rung. Three witnesses who were in position to know, and two of whom were entirely disinterested, swear positively that the bell was rung. The important questions are: What duty did the defendants owe to the plaintiff? and what duty did she owe to herself and the defendants while both were traveling upon the public highway, over which each had a right of passage? Courts have almost universally held that street railways have no exclusive right of way, and that motormen must be vigilant in keeping a watch for pedestrians and teams crossing their tracks or driving in front of the cars. Electric cars have become a necessity, and they are traversing not only cities and villages, but country towns. They must, and are permitted to, travel faster than ordinary vehicles drawn by horses; otherwise they would be of little use. At street crossings and other places, where the motoneers see people about to cross, or see them upon the track, or in a dangerous position, or partially on the track in front of them, they are bound to ring their bells or gongs as a warning; and, when they see any signs of danger, to keep their cars under control as much as possible. These cars cannot be stopped as speedily as carriages drawn by horses. Their speed is fixed by ordinance within cities and villages, and in this case the speed in the populous parts of the city is fixed at 8 miles per hour, and outside those limits 12 miles. The speed allowed where this accident occurred was 12 miles per hour. This court, speaking through Chief Justice Morse, in *Rascher v. Railway Co.*, 90 Mich. 413, 51 N. W. 463, 30 Am. St. Rep. 447, said: "A street car can neither turn to the right nor left. It runs with greater rapidity and with greater momentum than a wagon or omnibus. Therefore greater caution must be taken in its running to avoid collision. It ought to be lighted in the nighttime, so that its approach can be seen by other travelers; and between twilight and dark, if not lighted, it ought to be run so slowly as to avoid collision, or else give by some signals warning of its approach. Street cars have precedence, necessarily, in the portion of the way designated for their use. This superior right must be exercised, however, with caution, and due regard for the rights of others; and the fact that it has a prescribed route does not alter the duty of the defendant to the public, who have a right to travel upon its track until met or overtaken by its cars." A corresponding duty is also imposed upon the traveler by the fact of these heavy cars being run over the public highways for the convenience and carriage of the public. He is chargeable with notice that they travel faster than ordinary vehicles, that the

momentum is greater, and that while running at a lawful rate of speed they cannot be instantaneously stopped. Therefore, when he turns his carriage to cross the street, it is his duty to look and see whether a car is approaching so near as to make it dangerous for him to make the attempt to cross. The same rule applies when one suddenly turns towards the track, and brings his carriage in line of an approaching car. Applying this principle, what was the duty imposed by the law upon the plaintiff and her husband? They believed that they were at a safe distance from the track. So did those who saw them, until a sudden turn was made towards the track, which brought the carriage within the danger line. They were in as good, and probably better, position to know they were at a safe distance from the track than was the motoneer. A man has not the right, knowing that the cars are apt to approach any moment, to put himself at what he believes to be a safe distance, and then hold the defendant company liable for damages because its motorman made a like error in judgment. If the plaintiff and her husband were riding upon the track, or were crossing it, or were in obvious danger while riding too close, it would have been the duty of the motoneer to not only ring his bell, but to apply his brake and reverse his motive power. The motorman is not called upon to act until he sees or should see that a person is in danger, or liable to run into danger. *Daly v. Railway Co.*, 105 Mich. 193, 63 N. W. 73; *Lyons v. Railway Co.*, 115 Mich. 114, 73 N. W. 139. While the travelers by carriage have the right to use the entire highway from curb to curb, yet they have not the right to turn quickly and blindly from a safe distance to a dangerous nearness to the track, or to attempt to cross without looking for an approaching car. Such negligence has been termed by this court gross negligence. *Wood v. Railway Co.*, 52 Mich. 402, 18 N. W. 124, 50 Am. Rep. 259, 19 Am. & Eng. R. Cas. 129; 2 Thomp. Neg. § 1389; *Graham v. Traction Co.* (N. J. Sup.) 44 Atl. 964; *Christensen v. Trunk Line*, 6 Wash. 75, 32 Pac. 1018; *Davidson v. Tramway Co.*, 4 Colo. App. 283, 35 Pac. 920; *Sonnenfeld Millinery Co. v. People's Ry. Co.*, 59 Mo. App. 668. In *Christensen v. Trunk Line* the car and the plaintiff were traveling in the same direction, and plaintiff suddenly turned to cross the track in front of the car. The court held that the motorman "had a right to assume that the respondent would remain off the track, and not knowingly place himself or his property in imminent danger; and he was not bound to regulate his speed at such a rate as would certainly avoid injury to any one who might attempt to cross the road in an unreasonable and improper manner." In *Davidson v. Tramway Co.* it is said: "It is very difficult to imagine circumstances which would excuse the injured party for his neglect to use his eyes as well as his ears to guard against an accident occurring while he is crossing the track." In *Sonnenfeld Millinery Co. v. People's Ry. Co.* it was held

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not to be the duty of a motorman to stop his car on seeing a person in the street, near the railway tracks, if such person when seen by him is not in a position of peril. In *Fritz v. Railway Co.*, 105 Mich. 50, 62 N. W. 1007, plaintiff was driving a milk wagon in the same direction that the car was going, —the car coming from behind. He testified that he listened for the ringing of the bell, but could not hear anything. Without looking, he then turned diagonally across the track, and the rear wheel of his wagon was struck by the car. At page 53 my Brother Montgomery, who wrote the majority opinion, discussed the general rules relating to travelers upon the highway and street cars, and said: "Unless he had the right to assume that there was no car in the rear with which he was likely to come in contact, or unless he had the right to rely upon his failure to hear the sound of the gong, it was clearly negligent for him to turn across the track suddenly, and without assuring himself by proper investigation that no car was coming. Booth, St. Ry. Law, § 315. In fact, until the car approached the crossing, it is very doubtful whether it was the duty of the motorman to sound any gong. So long as the plaintiff was traveling in the same direction, and at such a gait as would not result in collision, it cannot be said that the motorman had any occasion to sound the gong, as he would have no reason to apprehend that the plaintiff would come to a stop or make a short turn across the track." In *Blakeslee v. Railway Co.*, 105 Mich. 462, 63 N. W. 401, it was held to be negligence to go upon a street car track without taking precautions to ascertain whether or not it is safe to do so, and that plaintiff could not avoid the legal effect of such negligence by placing himself in such position where he could not easily see an approaching car. In that case my Brother Hooker cited with approval *Fritz v. Railway Co.*, and said: "It was there held that one riding in a covered carriage, and thereby prevented from looking behind, could not recover against the street railway company when he turned suddenly upon the track in front of a car and was injured." So, in this case, plaintiff and her husband were riding at a safe distance from the track, and suddenly turned towards it, and brought themselves within the danger line. In *Wood v. Railway Co.*, supra, plaintiff was driving a one-horse vehicle along the street on one side of the tracks, when, encountering obstructions, he turned towards the tracks so that his right-hand wheels were over the rails. He did not look behind him to see if the car was coming, until he felt something strike the rear wheel. It was held, as a matter of law, that he was guilty of contributory negligence. In *Lyons v. Railway Co.*, 115 Mich. 114, 73 N. W. 139, we held that a motoneer has the right to assume that a person standing on the track will step out of the way, and that the motoneer is not bound to check the speed of the car until he has good reason to believe that such person is paying no heed to the

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customary signals. Why should the motoneer be required to assume that one traveling at a safe distance from the track will suddenly walk or drive upon it?

Counsel for plaintiff cite and rely upon two cases: *Manor v. Railway Co.*, 118 Mich. 1, 76 N. W. 139, and *Rouse v. Railway Co.* (Mich.) 87 N. W. 68. In the former case plaintiff had crossed the track from the south side to the north side, and before doing so looked both ways, and no car was visible. The roadway for about 9 feet from the track on the north side was macadamized with broken stone, worn smooth only in two parallel tracks where the wheels of vehicles ran. Plaintiff drove so that the wheels would follow in the beaten portions of the road. Cars passed at intervals of a half hour each. She had driven about 300 feet, when she heard a bell, and attempted to guide her horse away from the track, but was struck before she had time to do so. It was there contended that plaintiff had turned in towards the track. This, however, was a controverted question of fact, and, of course, properly submitted to the jury. The court plainly instructed the jury that, if this were so, she could not recover. That case would rule this if there were any dispute as to plaintiff's husband suddenly turning his horse towards or across the track, and if the roadbed in this case had been like the one in that. In the latter case there was a deep ditch upon the side of the highway, and the roadway at the side of the track was so narrow that teams in the daytime were driven into the ditch when cars were passing. The roadway was between 9 and 10 feet wide, and the footboard extended over the roadway outside the rail 2 feet. The deceased and his companion had never driven over the road before. It was in the night, and dark. We held, speaking through my Brother Long, that the question of contributory negligence was for the jury. Clearly, in my judgment, those cases do not control this one, where there was a roadway 12 to 15 feet wide, perfectly level, and the plaintiff and her husband knew that cars were passing every few minutes, and that one was liable to overtake them at any moment, and yet took no steps whatever to protect themselves from injury, which they might have done without any inconvenience.

To sustain this verdict establishes the rule that jurors may find that travelers are free from negligence when they ride in a level street alongside street car tracks at what they consider, and what in fact is, a safe distance therefrom, and suddenly turn towards the track and into the danger line, without taking any precaution whatever to determine whether a car is approaching, and in reliance upon their ability to hear the gong sounded or bell rang amid the noise made by two horses, two carriages, each with four wheels, riding over frozen ground. If such were the rule, it would be unsafe for street cars to run at the speed now allowed by law, and necessary for the convenience of the public. Such a rule is not, in my

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judgment, a just and reasonable one. A traveler has the right to drive upon the street car tracks, and has an undoubted right to rely upon a warning from the approaching car, for him to give it the right of way; in which case he is entitled to sufficient time to place himself outside harm's reach. But when, in his own judgment, as well as that of the motoneer, he is traveling outside harm's reach, I cannot recognize a rule which calls upon the motoneer to assume that he will suddenly turn within harm's reach. If it be granted that there was a conflict of evidence as to the speed and the ringing of the bell, and that the defendant was negligent in these respects, it is apparent to me that plaintiff was equally negligent. The learned circuit judge very clearly defined the rights and duties of the parties, in the following language: "Now, the plaintiff's husband, in driving along there, knew that the street car track was there, and that cars were being operated upon it every few minutes, and he should use care in driving. He should be careful not to get on the track, or, if he did go on or near enough to the track to endanger them, before doing so it was his duty to look out; to look around to see that no car was approaching; to do what a reasonable and prudent person should to see that it was safe for them to go on the street railway track, or to go at any time so near to it as to endanger their conveyance or themselves. And the street railway, or the car motorman in operating his car, was bound to keep a lookout for any obstructions that might exist upon the track, and to be careful and exercise due care lest he should run against or upon any obstructions there might be upon the car track, so as to avoid running against anybody in case they were upon the track. Any person driving along the highway has no right, as I have stated, to drive upon the track, or attempt to cross the track suddenly, without looking out to see whether or not the car was approaching. They have no right to attempt to cross a street railway track, or put themselves in a place of danger, without looking or listening or taking some means to be certain that a car is not approaching. It is recognized nowadays that electric cars as well as steam cars are dangerous. They run with rapidity. They cannot be instantly controlled. They must be operated with care, and the people who use the streets and highways where they are in operation must equally understand that they must watch out and be careful, and not expose themselves to unnecessary danger. Now, the plaintiff in this case and her husband had a right to drive on the street car track if they did it carefully. And, if it became necessary in any way for their purposes, they had a right to drive on the track; and if, while on the track, a car comes from behind, and the motorman sees them driving on the track or in close proximity to it, and he does not take care nor attempt to get his car under control so as to prevent hitting them, and he hits them, then he is guilty of negligence, and the company is liable, because they have

rights on the track, and he must be careful. But that is a very different thing from what it is for a driver to suddenly turn on the street car track when the motorman has reason to expect or anticipate no such thing, and, in fact, has a right to assume that the driver going along on the street with a clear road ahead will continue so to drive. The motorman has a right to fairly assume that they will do so." The vice of the instruction lies in the fact that there was no conflict of testimony. Plaintiff and her husband did the very things that the judge told the jury constituted negligence on their part. They used no care. They did not look or listen, or take any means to be certain that a car was not approaching. Under the plaintiff's own theory, both she and her husband erred in judgment as to the distance they were from the track. If plaintiff and her husband had no reason to anticipate that they were in the danger line, why should they expect the motorman to have a judgment superior to theirs? Where a traveler is riding beside the track, and there is a good road-bed 12 to 15 feet wide, it is his duty to drive a sufficient distance from the track to avoid collision with a car. It is a reasonable rule that he do so, since the car cannot turn aside, and he can. By so doing he does not inconvenience himself and avoids delays and dangers to other travelers upon the cars.

I think the judgment should be reversed, and new trial ordered.

LONG, J., took no part in the decision. HOOKER and MOORE, JJ., concur with MONTGOMERY, C. J.

CHICAGO CITY RY. CO. v. MORSE.

(*Supreme Court of Illinois, June 19, 1902.*)

[64 N. E. Rep. 304.]

Injury to Street Railway Passenger—Crowded Car—Suddenly Stopping Car.*

Where, in an action by a passenger against a street railway company for injuries, it appeared that the car was so crowded that he had to stand in the aisle, and hold onto one of the straps, and that the car stopped suddenly, throwing a number of the passengers against him with great force, causing the injuries, the declaration was sufficiently supported to make the question one of fact for the jury, and hence not reviewable after affirmance by the appellate court.

Appeal from appellate court, First district.

Action by Orlin B. Morse against the Chicago City Railway Company. From a judgment of the appellate court (9th Ill. App. 662) affirming a judgment in favor of plaintiff, defendant appeals. Affirmed.

William J. Hynes, Samuel S. Page, and Watson J. Ferry (Mason B. Starring, of counsel), for appellant.

James C. McShane, for appellee.

*See notes at end of case.

Chicago City Ry. Co. v. Morse

WILKIN, J. This is an action on the case, begun in the superior court of Cook county by Orlin B. Morse, who is appellee here, to recover damages for personal injuries claimed to have been sustained by him while a passenger on one of the electric cars of appellant, the Chicago City Railway Company. The declaration charges that on January 24, 1899, appellee was a passenger on one of the cars of appellant; that the company failed and neglected to provide him with a seat, and he was compelled to stand in the aisle; that while riding and standing in the aisle defendant negligently permitted said car to become greatly crowded and packed with additional passengers, and while in that condition the car was negligently and carelessly stopped so suddenly and violently that some of the passengers were thrown with great force and violence upon appellee, and in consequence thereof he sustained a serious and permanent inguinal hernia and other serious injuries, etc. To this declaration a plea of the general issue was filed, and the case was tried before a jury. At the close of all the evidence an instruction was asked by the defendant to withdraw the case from the jury, which was denied. A verdict was rendered in favor of appellee for \$2,000, and judgment pronounced thereon, which, upon appeal to the appellate court for the First district, has been affirmed. The case is brought to this court upon further appeal.

Counsel for appellant contend, first, "that the verdict is not justified by the evidence." By this they must mean that there is no evidence in the record tending to support the finding and judgment, because, under the statute, the finding of the jury and judgment of affirmance in the appellate court have conclusively settled the weight of the evidence as to all controverted questions of fact. It cannot be said there is no evidence tending to support the allegations of the declaration. The evidence shows that the car upon which appellee was riding was greatly crowded, and he was compelled to stand in the aisle, and hold to one of the straps suspended from the ceiling, provided for that purpose, and that on one occasion the car came to a sudden and violent stop, throwing the passengers forward who were standing, and some of them were violently thrown against him. He testified that, in order to prevent his being thrown off his feet, he held onto the strap, and at the time felt a sharp pain in his right groin, and that after getting off the car and proceeding to the place of his employment he discovered that hernia had been developed. This evidence was corroborated, and clearly tends to support the declaration. The question was therefore one of fact, which was properly submitted to the jury.

It is further contended that the damages allowed are excessive. That likewise was a question of fact settled by the judgment of affirmance in the appellate court.

Counsel for appellee says this appeal appears to be prose-

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cuted merely for delay, and therefore he asks for statutory damages. The question whether or not the case made by the evidence was one which should be submitted to the jury admits of enough doubt to justify an appeal without the appellant being held to incur the statutory penalty for damages.

The judgment of the appellate court will be affirmed.
Judgment affirmed.

NOTES.

CARRIERS OF PASSENGERS—DUTIES DURING TRANSPORTATION.

- I. Scope of Note.
- II. Overloading Conveyance.
- III. Duty to Provide Seats.
- IV. Allowing Passengers to Expose Themselves to Danger.
 - A. In General.
 - B. Warning Passengers of Danger.
 - C. Removal of Passenger from Place of Danger by Force.
- V. Allowing Passenger to Alight Temporarily at Intermediate Station.
- VI. Duties to Drover Alighting at Intermediate Station to Care for Stock.
- VII. Announcement of Station and Change of Cars.
- VIII. Transfer of Passengers.
- IX. Opening and Closing of Car Doors.
- X. Rescue of Passenger Falling from Train.

I. SCOPE OF NOTE.

The object of this note will be to discuss the duties of carriers to passengers during transportation which have not been dealt with in previous notes, particularly the note on the liability of carriers of passengers for injuries by collisions, appended to *Chicago, etc., R. Co. v. Durand*, 3 R. R. R. 519, 26 Am. & Eng. R. Cas., N. S., 519, the note on the liability of carrier for injuries to passengers by jerks and jolts of trains or cars, appended to *Freeman v. Metropolitan, etc., R. Co.*, 3 R. R. R. 584, 26 Am. & Eng. R. Cas., N. S., 584, and the note on the liability of carriers for negligence on account of running trains or cars at an excessive rate of speed, appended to *Northern, etc., R. Co. v. Adams*, 3 R. R. R. 734, 26 Am. & Eng. R. Cas., N. S., 734.

II. OVERLOADING CONVEYANCE.

In view of the common practice of street railway companies to overcrowd their cars, and of the fact that the practice ordinarily only affects the comfort, and not the safety, of the passengers, it cannot be said that it is negligence, as a matter of law, to carry more passengers than can be seated, or even to so crowd their cars with passengers that some of them are compelled to ride on the platforms. *Meesel v. Lynn, etc., R. Co.*, 8 Allen (Mass.) 234; *Mt. Adams, etc., R. Co. v. Reul*, 4 Ohio Cir. Ct. 362, 2 O. C. D. 596. And it has been held that the fact that a ferry company undertakes to carry a greater number of passengers than it can accommodate with seats is not alone sufficient to show negligence on the part of the carrier. *Burton v. West Jersey Ferry Co.*, 114 U. S. 474, 5 Sup. Ct. 960. But every carrier of passengers, whether by railroad, street railway, stage coach, or other means, is bound to exercise care to prevent the overcrowding of its conveyances to such an extent that the ordinary and usual risks of the transportation are materially increased. See the following illustrative cases:

California.—*Lynn v. Southern Pac. Co.*, 103 Cal. 7, 36 Pac. 1018, 24 L. R. A. 710.

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Illinois.—Chicago, etc., R. Co. v. Dumser, 161 Ill. 190, 43 N. E. 698, affirming 60 Ill. App. 93.

Kansas.—Topeka, etc., R. Co. v. Higga, 38 Kan. 375, 16 Pac. 667, 34 Am. & Eng. R. Cas. 529, 5 Am. St. Rep. 754.

Massachusetts.—Treat v. Boston, etc., R. Co., 131 Mass. 371, 3 Am. & Eng. R. Cas. 423.

Minnesota.—Brusch v. St. Paul, etc., R. Co., 52 Minn. 512, 55 N. W. 57.

Nebraska.—Pray v. Omaha, etc., R. Co., 44 Neb. 167, 62 N. W. 447, 48 Am. St. Rep. 717.

New Jersey.—Hansen v. North Jersey, etc., R. Co., 64 N. J. L. 686, 46 Atl. 718.

New York.—Graham v. Manhattan R. Co., 149 N. Y. 336, 43 N. E. 917, reversing 8 Misc. (N. Y.) 305, 28 N. Y. Supp. 739, 4 Am. & Eng. R. Cas. 256, 260; Lehr v. Steinway, etc., R. Co., 118 N. Y. 556, 23 N. E. 889; Sheridan v. Brooklyn, etc., R. Co., 36 N. Y. 39, 93 Am. Dec. 490, 34 How. Pr. (N. Y.) 217.

Pennsylvania.—Dennis v. Pittsburg, etc., R. Co., 165 Pa. St. 624, 31 Atl. 52, 36 Wkly. N. Cas. 81.

Texas.—Williams v. International, etc., R. Co. (Tex. Civ. App. 1902), 67 S. W. 1085; International, etc., R. Co. v. Williams (Tex. Civ. App. 1899), 50 S. W. 732.

Washington.—Graham v. McNeill, 20 Wash. 466, 55 Pac. 631, 12 Am. & Eng. R. Cas. N. S., 149, 43 L. R. A. 300.

The failure of a railroad company to provide a passenger with a seat or other safe and secure place to ride, whereby a passenger is obliged to ride in an unsafe place, undoubtedly tends to shew negligence. Werle v. Long Island R. Co., 98 N. Y. 650, 21 Am. & Eng. R. Cas. 429. The question of negligence must, however, depend upon whether the overcrowding, under the circumstances of each particular case, was not consistent with the high degree of care which the law exacts of passenger carriers, and is almost always a question of fact for the jury. Maury v. Talmadge, 2 McLean (U. S.) 157, Fed. Cas. No. 9,315; Graham v. Manhattan R. Co., 149 N. Y. 336, 43 N. E. 917, reversing 8 Misc. (N. Y.) 305, 28 N. Y. Supp. 739; Lehr v. Steinway, etc., R. Co., 118 N. Y. 556, 23 N. E. 889. When plaintiff boarded defendant's motor train it was so crowded that he was unable to get inside, but he secured standing room on the rear platform of the trailer. When the first stop was made, four blocks distant, he stepped off the train to allow a fellow passenger to alight, and was unable to get upon the platform again, his place being occupied by other passengers. He went forward immediately, and secured standing room on the front step of the trailer, holding on to the dashboard and to the iron rail attached to the car for the distance of a block, when he was forced, by the pressure of the other passengers on the platform, to relinquish his hold, and fell, receiving injuries. There was evidence tending to prove that the pressure which forced him off the train was occasioned by the conductor forcing his way through the crowd while engaged in collecting fares. It was held that the question of negligence was for the jury, and that it was error to direct a verdict for the defendant. Pray v. Omaha, etc., R. Co., 44 Neb. 167, 62 N. W. 447, 48 Am. St. Rep. 717. It has been said that it is gross negligence in a street railway corporation to overcrowd and load down its cars with passengers beyond any reasonable limit, so that it is not able to control and readily stop its cars as they approach an intersecting street in order to prevent a collision. Richmond R., etc., Co. v. Garthright, 92 Va. 627, 24 S. E. 267, 53 Am. St. Rep. 839, 32 L. R. A. 220. It has been held that when a street railway company undertakes to carry large numbers of people, vastly in excess of the seating and standing capacity of its cars, permits passengers to ride on the platforms, stops its car when in such crowded condition that other persons may get upon it, and, because of the crowd, a passenger, who has boarded the car before it becomes crowded, is pushed off a platform to his injury, the company is guilty of negligence. Reem v. St. Paul, etc., R. Co., 77 Minn. 503, 80 N. W. 638.

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It has been said that if it is impossible to prevent a greater number of passengers than can be carried with safety from getting on a train, the carrier has a right to refuse to move the train until proper control can be secured. *Lynn v. Southern Pac. Co.*, 103 Cal. 7, 36 Pac. 1018, 24 L. R. A. 710.

III. DUTY TO PROVIDE SEATS.

In some of the United States it is provided by statute that common carriers of persons must furnish passengers with seats. Cal. Civ. Code, sec. 2185; Dak. Comp. Laws, sec. 3894; Mont. Civ. Code, 1895, § 2895. And independently of statute, while the carrier probably is not bound absolutely and under all circumstances to provide every passenger with a seat, it cannot be questioned that it is the duty of the carrier to make the usual and reasonable provisions for seating the passengers whom it undertakes to carry. *Trumbull v. Erickson*, 97 Fed. 891, 17 Am. & Eng. R. Cas., N. S., 93; *Hardenbergh v. St. Paul, etc., R. Co.*, 39 Minn. 3, 38 N. W. 625, 34 Am. & Eng. R. Cas. 359, 12 Am. St. Rep. 610; *Camden, etc., R. Co. v. Hoosey*, 99 Pa. St. 492, 6 Am. & Eng. R. Cas. 454, 44 Am. Rep. 120. And it has been held that a common carrier employing a servant to work at a terminal point, and contracting to transport him to and from work, cannot through its train officials lawfully require him to vacate a seat which he is occupying in the car to which he has been duly assigned. *New York, L. E. & W. R. Co. v. Burns*, 51 N. J. Law 340, 17 Atl. 630, 39 Am. & Eng. R. Cas. 423.

If the carrier neglects or refuses to discharge this duty to its passengers, without a just excuse, the passenger may treat the contract as violated by the carrier, and he may leave the train, and sue for a breach of the contract. Thus, a passenger who left a train upon failing to obtain a seat in consequence of the refusal of the conductor to require passengers, who were occupying more than their share of seats, to make room for him, was held to be entitled to damages. *Louisville, etc., R. Co. v. Patterson*, 69 Miss. 421, 13 So. 697, 22 L. R. A. 259. Possibly, too, the passenger may remain upon the train without waiving his right to recover damage under the contract for the inconvenience of riding without a seat. But, if he wishes to repudiate the contract he must do so in toto; he cannot avail himself of the benefit of the transportation and at the same time refuse to perform his part of the contract. Hence the failure of the carrier to provide a passenger with a seat does not entitle the passenger, who remains upon the train after having had a reasonable opportunity to leave it, to refuse to surrender his ticket or pay the fare. *St. Louis, etc., R. Co. v. Leigh*, 45 Ark. 368, 55 Am. Rep. 558; *Davis v. Kansas City, etc., R. Co.*, 53 Mo. 317, 14 Am. Rep. 457; *Close v. Cooper*, 34 Ohio St. 98; *Memphis, etc., R. Co. v. Benson*, 85 Tenn. 627, 4 S. W. 5, 31 Am. & Eng. R. Cas. 112, 4 Am. St. Rep. 776. But a passenger, who is properly on a train, and who, exercising due diligence, learns that he cannot obtain a seat, does not, by refusing to pay the fare, become a trespasser, until he has been given a reasonable opportunity to leave the train. *Hardenbergh v. St. Paul, etc., R. Co.*, 39 Minn. 3, 38 N. W. 625, 34 Am. & Eng. R. Cas. 359, 12 Am. St. Rep. 610.

In some cases, if a passenger is unable to obtain a seat in the cars in which he is entitled to ride, but there are vacant seats in another car which he ordinarily has no right to enter, he cannot be left standing without a breach of the contract of carriage. Thus, it has been held that if a male passenger is unable to find a seat in the cars provided for men, but there is room to seat him in a car set apart for women, he may enter the women's car, if he can do so peaceably and unforbidden, and is entitled to remain there until he is furnished with a seat elsewhere. *Bass v. Chicago, etc., R. Co.*, 36 Wis. 450, 17 Am. Rep. 495, 42 Wis. 654, 24 Am. Rep. 437. And it has been held that a passenger who is unable to obtain a seat in the ordinary coaches of a train, in which he is entitled to ride, may pass into a drawing room car and, without paying extra fare for the privilege, take a seat therein until he is furnished a

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seat in the other cars. *Thorpe v. New York, etc., R. Co.*, 76 N. Y. 402, 32 Am. Rep. 325.

As has been shown in the next preceding section of this note, a carrier may in some cases be chargeable with negligence in so overloading its conveyance that a passenger is not only unable to find a seat but is forced to occupy a dangerous position. And no doubt if a passenger, exercising reasonable care and prudence, is injured in consequence of the carrier's neglect to provide him with a seat, he is entitled to damages. See *Camden, etc., R. Co. v. Hoosey*, 99 Pa. St. 492, 44 Am. Rep. 120, 6 Am. & Eng. R. Cas. 454. But, while there may, of course, be circumstances under which due care on the part of a carrier requires that its passengers be furnished with seats, ordinarily it cannot be said, as a matter of law, that the mere failure of a carrier to provide all of its passengers with seats of itself amounts to negligence. *Burton v. West Jersey Ferry Co.*, 114 U. S. 474, 5 Sup. Ct. 960, 29 L. Ed. 215.

IV. ALLOWING PASSENGERS TO EXPOSE THEMSELVES TO DANGER.

A. In General.

Generally speaking, it is the duty of a passenger carrier to exercise care to prevent passengers from incurring unnecessary perils. *East Saginaw, etc., R. Co. v. Bohn*, 27 Mich. 503. And the due performance of this general duty may require the carrier to warn passengers of dangers to which they are exposed, to direct passengers to remove from a perilous position, and even, in some cases, to enforce a compliance with the direction.

B. Warning Passengers of Danger.

A carrier of passengers is under no obligations to warn passengers against dangers which would not be apprehended by the exercise of the high degree of care which the law exacts of the carrier (*Craighead v. Brooklyn, etc., R. Co.*, 123 N. Y. 391, 25 N. E. 387, 23 N. Y. S. R. 620, reversing 25 N. Y. S. R. 941, 5 N. Y. Supp. 431), nor, at least under some circumstances, against dangers which are as apparent to the passengers as to the carrier's servants. *Ebert v. Gulf, etc., R. Co.* (Tex. Civ. App. 1899, 49 S. W. 1105. And a carrier is not always bound to know that a passenger is occupying an exposed position, and, unless the carrier does, or due care requires that it should, know that the passenger is unnecessarily exposed, the passenger cannot complain that he was not warned. *Kentucky, etc., R. Co. v. Thomas*, 79 Ky. 160, 2 Ky. L. Rep. 114, 42 Am. Rep. 208. See *Carroll v. Interstate, etc., Transit Co.*, 107 Mo. 653, 17 S. W. 889, 52 Am. & Eng. R. Cas. 273. Plaintiff, a boy of eight years of age, voluntarily and without the knowledge of the conductor, left his place inside of a crowded street car, and pushed his way to the front platform, where his companion was riding. The conductor, after having collected the fares on the rear platform and in the body of the car, came forward, opened the wicket in the front door, and demanded the fares of those on the front platform, among whom were these two boys. When the conductor asked plaintiff's companion for his fare, the boy claimed that he had paid his fare on a car from which he had been transferred, but the conductor refusing to accept his statement as true, told him that he must either pay his fare or get off, and then opened the door. As the conductor opened the door, plaintiff, who had heard the conversation, and was himself on the car without a transfer check, which had been denied him by the conductor of a car from which he had transferred, stepped with one foot down on the step of the car, and, holding to the iron support at the side of the car, attempted to get off backward. The driver caught him and placed him back on the platform, saying, "Don't you get off, you will fall"; but almost immediately thereafter he repeated the act, and, although the driver again attempted to push him back, he was either thrown off or jumped off backward, receiving the injury complained of. It was held that there was no evidence from which the negligence of the company could be fairly inferred. *Sandford v. Hestonville, etc., R. Co.*, 136 Pa. St. 84, 20 Atl. 799. But a carrier is undoubtedly under an obligation

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to give passengers timely warning of perils which are known to the carrier, or which would be known to, or apprehended by, the carrier, if in the exercise of the required degree of care, but of which the passengers, though exercising due care, are ignorant. Thus, if passengers on a vessel are accustomed to pass over a hatchway, which is likely to be open at certain times, passengers, who have no knowledge of the possible danger, should receive proper caution. *Behrens v. The Furnessia*, 35 Fed. 798. A passenger who is exposed, while assisting to care for another passenger who has become ill, to a danger of which he is not aware, but of which the carrier's servants, if exercising due care, would have knowledge, is entitled either to be protected against, or to have timely warning of, the danger. *Lake Shore, etc., R. Co. v. Salzmann*, 52 Ohio St. 558, 40 N. E. 891, 31 L. R. A. 261. In an action to recover for injuries received by plaintiff in consequence of the defective condition of a car which had been continued in the service, after its condition had been discovered, for the purpose of taking it to the company's power house for repairs, it was, in effect, said that defendant was not justified in continuing the car in the service and allowing passengers to ride thereon, without giving the passengers full notice of the condition of the car, and allowing them an opportunity to decide, after full knowledge, whether they would continue as passengers. *Washington v. Spokane, etc., R. Co.*, 13 Wash. 9, 42 Pac. 628. It has been held that, although passenger on a street car was guilty of contributory negligence in protruding his arm from the window of the car, in consequence of which it was struck by the girder of a bridge over which the car was passing, defendant was nevertheless liable if conductor, who saw the passenger's danger, neglected to give him warning. *South Covington, etc., R. Co. v. McCleave*, 18 Ky. L. Rep. 1036, 38 S. W. 1055. When a street car runs so close to a fixed structure that a person standing on the foot-board will come in collision therewith, unless he stands very close to the car, it is negligence to allow a passenger, who has no knowledge of the structure, to ride on the foot-board, without warning him of the danger. *West Chicago, etc., R. Co. v. Marks*, 182 Ill. 15, 55 N. E. 67, affirming 82 Ill. App. 185. When an overhead structure, as, for example, a snow-shed, is not of sufficient height to allow persons who are on top of freight trains to pass under in safety, a passenger on a freight train who is rightfully on top of the train is entitled to be duly warned, either by word or some other appropriate method, of the approach of the train to the overhead structure. *Nelson v. Southern, etc., R. Co.*, 18 Utah 244, 55 Pac. 364, 14 Am. & Eng. R. Cas., N. S. 374. And it may be negligence to fail to warn a passenger upon a freight train, which has been delayed, of the possibility that the train will be run into by another train which is approaching on the same track. *Whitehead v. St. Louis, etc., R. Co.*, 99 Mo. 263, 11 S. W. 751, 39 Am. & Eng. R. Cas. 410, 6 L. R. A. 409; *Missouri, etc., R. Co. v. Cook*, 12 Tex. Civ. App. 203, 34 S. W. 178.

If a train or street car is run in an unusual manner, and a danger arises therefrom which does not ordinarily exist, it is the company's duty to warn passengers of the danger. *Citizens', etc., R. Co. v. Hoffbauer* (Ind. 1900), 56 N. E. 54. Thus, it may be the duty of a railroad company, through its servants in charge of a train, to warn passengers that the train will start with a jerk radically different from that usually experienced when a train is put in motion. *Farnon v. Boston, etc., R. Co.* (Mass. 1902), 62 N. E. 254, 1 R. R. R. 95, 24 Am. & Eng. R. Cas., N. S., 95. In an action to recover for the death of a passenger, a shipper of cattle, who was killed by being thrown off the foot-board of a switch engine, where he was riding by the direction of defendant's servants, in consequence of the sudden acceleration of the speed of the engine in making a running switch, it was said that, the proof showing that the making of a running switch is usually attended with danger, and would be especially dangerous to a person in the position of the deceased, it became the duty of defendant's servants to advise the deceased of the facts before attempting the running switch, so that he might have taken extra precaution, or have gotten off the engine before the switch

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was attempted. *Lake Shore, etc., R. Co. v. Brown*, 123 Ill. 162, 14 N. E. 197, 5 Am. St. Rep. 510, 31 Am. & Eng. R. Cas. 61.

When a train is stopped under such circumstances as to lead passengers, who are exercising due care, to believe that they are to alight, the passengers should, generally speaking, be warned against, or otherwise prevented from, alighting. See sections V and XV of note to *Phillips v. St. Charles, etc., R. Co. (La.)*, 1 R. R. R. 902, 24 Am. & Eng. R. Cas., N. S., 902. So, too, when the act of alighting from a train or street car is attended with perils which the passengers cannot reasonably be expected to discover for themselves, they should be properly warned. See note to *Phillips v. St. Charles, etc., R. Co. (La.)*, 1 R. R. R. 902, 24 Am. & Eng. R. Cas., N. S., 902. If, for any reason, it is dangerous to leave a car by the rear platform, it is the duty of the carrier to warn the passengers, or to take proper precautions to prevent passengers from attempting to alight therefrom, and a failure to do either may justify a finding of negligence. *McDonald v. Illinois, etc., R. Co.*, 88 Iowa 345, 55 N. W. 102, 58 Am. & Eng. R. Cas. 263. In a case in which it appeared that plaintiff had been injured, while alighting from defendant's street car, by stepping into an excavation in the street, alongside of which the car had been stopped after dark, it was said that plaintiff should have been warned of, and assisted over, the excavation. *Richmond, etc., R. Co. v. Scott*, 86 Va. 902, 11 S. E. 404, 44 Am. & Eng. R. Cas. 418. It has been said that it was certainly an act of carelessness on the part of the conductor of a train, which has stopped at the station to let off passengers, to leave his train before the passengers had reasonable time to get off the cars, when he knew that a switch engine was to be coupled to it, without giving them any notice of the danger to which they might be subjected. *East Line, etc., R. Co. v. Rushing*, 69 Tex. 306, 6 S. W. 834, 34 Am. & Eng. R. Cas. 367. Where a train is stopped, for the purpose of letting off passengers, at an unusual place, which is unsafe and dangerous, and the circumstances are such that the character of the place is not open to the observation of the passengers, they should be warned of the dangerous character of the surroundings. *McGee v. Missouri, etc., R. Co.*, 92 Mo. 208, 4 S. W. 739, 31 Am. & Eng. R. Cas. 1, 1 Am. St. Rep. 706. In an action to recover for injuries sustained by plaintiff in alighting from a street car, which, instead of being stopped, as requested, at the usual stopping place where the ground was practically on a level with the track, was stopped a short distance beyond where the ground was from two to eight inches below the level of the track, it was held that the trial court properly refused an instruction to the effect that, if the conductor had no special information as to the condition of the place, he was under no obligation to give her information in regard thereto. *Bass v. Concord St. Ry.*, 70 N. H. 170, 46 Atl. 1056.

Undoubtedly, street railway companies may in many cases, as in the case of an adult, or in the case of a person reasonably competent to care for himself, carry passengers on the platforms of their cars without being chargeable with negligence as a matter of law. *Sandford v. Hestonville, etc., R. Co.*, 136 Pa. St. 84, 20 Atl. 799. Where a boy under 14 years of age got upon the lower step of the platform of a crowded street car, and rode for a long distance as a passenger, and was finally thrown off by the jolting of the car, it was held not to be negligence per se when the passenger occupied this place upon the car, without objection of the driver or conductor, but that the questions of negligence and contributory negligence, under all the circumstances, taking into consideration the age and capacity of the lad, were for the jury. *West Philadelphia, etc., R. Co. v. Gallagher*, 108 Pa. St. 524, 27 Am. & Eng. R. Cas. 201. But in the case of a passenger who is obviously and manifestly incompetent, either from extreme youth or other cause, to exercise any proper judgment or discretion for his own safety, a somewhat larger measure of duty may be said to devolve upon the conductor of a street car than under ordinary circumstances. He is not, of course, held to the exercise of critical skill or judgment; for the performance of his ordinary duties in a crowded car may give him little opportunity to observe

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closely the capacity or intelligence of a particular person in his charge. He is, in this respect, held only to the exercise of that degree of discrimination which a reasonably prudent and observing man would be expected to exercise under the circumstances. His duties require him to give his attention not only to those who may wish to board the car, but to those who wish to leave it, as well as to such as remain. It is his duty to collect the fares, regulate the movements of the car, and generally to conduct the affairs of the company in his charge. He may, therefore, when the car is crowded, and passengers are passing in and out, have little chance to test with accuracy the intelligence or capacity of the individual passengers. But he is bound to give his undivided attention to his business, and if any person boards his car who is obviously incompetent to choose a place of safety, or whom he knows, or as an observing and prudent man ought to know, to be thus incompetent, it is his duty to exercise the highest care and vigilance consistent with the performance of his ordinary duties for his safety. *Sandford v. Hestonville, etc.*, R. Co., 136 Pa. St. 84, 20 Atl. 799. It has been held that to allow a boy five years of age to ride on the front platform of a horse car is evidence of negligence sufficient to go to a jury. *Jensen v. Barbour*, 15 Mont. 582, 39 Pac. 906. Where a child was compelled by the conductor of a horse car to stand upon the crowded platform, and while there, was thrown from the car by the hasty and careless exit of another passenger, it was held that the company was liable. *Sheridan v. Brooklyn, etc.*, R. Co., 36 N. Y. 39, 93 Am. Dec. 490. But it has been held that to call a boy to the platform of a street car when the car is about to reach his destination and the car is being stopped for the purpose of letting him off, the stop signal being made and the boy being called at the right time, is not negligence. *Cronan v. Crescent City R. Co.*, 49 La. Ann. 65, 21 So. 163, 6 Am. & Eng. R. Cas., N. S., 225.

Whether the circumstances require that the passengers be warned of a danger is usually a question for the jury. Thus, it has been held to be error to charge a jury that if a street car, instead of being run in the usual manner, was run on the wrong track, with the running board next to the poles erected between defendant's two tracks, and the passengers were not warned, defendant was guilty of negligence. *Citizens', etc.*, R. Co. *v. Hoffbauer* (Ind. 1900), 56 N. E. 54. A boy 13 years old was permitted to ride on the platform of a street car with no admonition or objection from the conductor. Announcing his purpose loud enough for the conductor to hear the boy stepped off the car while in motion, and was injured. A verdict directed by the lower court was set aside on the ground that the question of negligence should have been submitted to the jury. *Crissey v. Hestonville, etc.*, R. Co., 75 Pa. St. 83.

C. Removal of Passenger from Place of Danger by Force.

Ordinarily, the duty of the carrier to prevent passengers from unnecessarily exposing themselves to danger, is discharged by warning them of the danger, or by directing passengers who are occupying positions of peril to remove to places of greater safety, and the carrier is under no obligation to exercise force to prevent passengers from voluntarily exposing themselves to unnecessary perils. The duty of the carrier does not "extend to the imprisonment of the passenger so as to prevent the latter by his recklessness or folly from voluntarily exposing himself to needless peril." *Indianapolis, etc.*, R. Co. *v. Rutherford*, 29 Ill. 82, 92 Am. Dec. 336. No doubt a carrier usually has the power to remove a passenger from a perilous position by force, but ordinarily he is not bound to do so in the case of an adult passenger, or in the case of a passenger who is reasonably able to care for himself; a simple request is sufficient. *Aufdenberg v. St. Louis, etc.*, R. Co., 132 Mo. 565, 34 S. W. 485, 3 Am. & Eng. R. Cas., N. S., 323. Thus, a passenger who remains on the rear platform of a car, after he has been requested or ordered by one of the carrier's employees to leave the platform and enter the car, assumes the risk of being thrown to the ground by the starting of the train. *Louisville, etc.*, R. Co. *v. Bisch*, 120 Ind. 549, 22 N. E. 662, 41 Am. & Eng. R. Cas. 89. The passage of the train, upon

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which plaintiff was a passenger, was obstructed by burning tanks of oil, which had been wrecked on the track ahead. The passengers were conducted around the wreck to a point 256 feet away from it to wait for a train. While they were waiting, plaintiff, out of curiosity, voluntarily approached to within 80 feet of the burning tank and stood there for twenty minutes watching them, and was injured by an explosion. It was held that defendant was not bound, under the circumstances of the case, to restrain plaintiff by physical force in order to keep him out of manifest danger, which was as obvious to him as to defendant. *Conroy v. Chicago, St. P., M. & O. R. Co.*, 96 Wis. 243, 38 L. R. A. 419, 70 N. W. 486, 8 Am. & Eng. R. Cas., N. S., 714. The mere fact that a passenger has been drinking does not make it the duty of the trainmen to remove him from the platform of a railroad coach by force, if he is apparently in a condition to be able to take care of himself. *Fisher v. West Virginia, etc., R. Co.*, 42 W. Va. 183, 24 S. E. 570, 4 Am. & Eng. R. Cas., N. S., 86, 33 L. R. A. 69. But if a passenger, by reason of his youth, is not able to understand the risk, or able to judge for himself, or if it is known to the carrier that he is insane or otherwise unable to exercise discretion, the duty of the carrier to prevent passengers from unduly exposing themselves would not be fully performed without an enforcement of proper regulations to compel the passenger to occupy a position less exposed. *East Saginaw, etc., R. Co. v. Bohn*, 27 Mich. 503. Thus, when a boy is occupying an exposed position on the platform of a street car, unless he is of an age and discretion to justify his being allowed to act and judge for himself, the conductor does not perform his whole duty by merely directing him to go inside of the car; it is his duty to compel obedience. *East Saginaw, etc., R. Co. v. Bohn*, 27 Mich. 503. A little girl of 5 years of age, in company with another of 11, was permitted to ride on the front platform of a street car. When she came near to her home she attempted to get off, and was injured. Mr. Justice Williams, in delivering the opinion of the court, said: "It was gross negligence to allow children of that age to get on the platform, and to ride there. If they got on without his (the conductor's) permission, instead of consenting that they might ride on the platform, it was the duty of the company to compel them to go inside, or to stop and put them off." *Pittsburgh, etc., R. Co. v. Caldwell*, 74 Pa. St. 421. A boy eight years and four months old got upon the rear platform of a street car, intending to ride thereon to his home, several blocks distant. While sitting upon this platform with his feet upon the car step, where there was no gate, the car started, and while it was running fast the boy became dizzy, fell off, and was injured. The motorman (who was also conductor) knew that the boy was on the car. It was held that, since it was within the province of the acting conductor to compel this boy to go inside the car, or stop it, and put him off, if he did not do so, the jury had a right to say that the conductor was guilty of negligence which was imputable to the company. *Jackson v. St. Paul, etc., R. Co.*, 74 Minn. 48, 76 N. W. 956.

V. ALLOWING PASSENGER TO ALIGHT TEMPORARILY AT INTERMEDIATE STATION.

It has been stated, without qualification, that "where a passenger enters a railway train, and pays the regular fare to be transported from one station to another, his contract does not obligate the corporation to furnish him with safe egress or ingress at any intermediate station." *De Kay v. Chicago, etc., R. Co.*, 41 Minn. 178, 43 N. W. 182, 39 Am. & Eng. R. Cas. 463, 16 Am. St. Rep. 687, 4 L. R. A. 632. But while it may be, and very likely is, true that the plaintiff in the case in which this statement was made was not entitled to leave the train at the intermediate station where he was injured, the principle enunciated by the words quoted is altogether too broad. Without being supported by reason, it is inconsistent with the recognized and reasonable practice of passengers, and contrary to the clear weight of authority. According to the better view, the right of passengers temporarily to leave the carrier's train, coach, or boat, at an intermediate station or stopping place,

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and the duty of the carrier to passengers doing so, must depend upon whether the temporary absence from the carrier's conveyance for any particular purpose is, under the circumstances of each case, reasonably incident to the usual and proper performance of the contract of transportation. See *Dodge v. Boston, etc.*, S. S. Co., 148 Mass. 207, 19 N. E. 373, 37 Am. & Eng. R. Cas. 67, 12 Am. St. Rep. 541. No doubt the circumstances under which some stops are made do not justify passengers in alighting from the train. For example, when a train is stopped at a place not provided for, and for a purpose other than, the letting off and taking on of passengers, as at a water tank to take on water or upon a side track to allow another train to pass, and the stop is made under such circumstances that the duty and safety of passengers both concur in suggesting that they remain in the cars, a passenger who temporarily alights from the train, is not entitled to protection as a passenger until he has resumed his place on the train. *State v. Grand Trunk Ry.*, 58 Me. 176, 4 Am. Rep. 258; *De Kay v. Chicago, etc.*, R. Co., 41 Minn. 178, 43 N. W. 182, 39 Am. & Eng. R. Cas. 463, 16 Am. St. Rep. 687, 4 L. R. A. 632. Where a train was stopped on a dark night near one of the regular stations for the purpose of allowing another train to pass, and no notice was given the passengers to leave the cars, plaintiff, who, being told by some one, whom he mistook for the conductor, that he must go and look to his baggage, got off the train and was injured by falling into a cattle guard, was very properly denied recovery against the carrier. *Frost v. Grand Trunk R. Co.*, 10 Allen (Mass.) 387, 87 Am. Dec. 668. But where a passenger on a railroad train, without objection on the part of the carrier or its agents, alights at an intermediate station or stopping place, which is a place for the reception and discharge of passengers, for any reasonable and usual purpose, as to obtain refreshments, to send or receive telegrams, to exercise by walking up and down the platform, or the like, he does not cease to be a passenger, and the carrier owes him the duty of continuing to exercise care for his safety.

United States.—Alabama, etc., R. Co. *v. Coggins*, 60 U. S. App. 140, 88 Fed. 455, 32 C. C. A. 1; *Andrist v. Union Pac. R. Co.*, 30 Fed. 345; *Hrebrik v. Carr*, 29 Fed. 298.

Colorado.—Atchison, etc., R. Co. *v. Shean*, 18 Colo. 368, 33 Pac. 108, 58 Am. & Eng. R. Cas. 360, 20 L. R. A. 729.

Louisiana.—Peniston *v. Chicago, etc.*, R. Co., 34 La. Ann. 777, 44 Am. Rep. 444.

New York.—Parsons *v. New York, etc.*, R. Co., 113 N. Y. 355, 21 N. E. 145, 3 L. R. A. 683, 10 Am. St. Rep. 450.

Texas.—St. Louis, etc., R. Co. *v. Humphreys* (Tex. Civ. App. 1901), 62 S. W. 791; Texas, etc., R. Co. *v. Mayfield* (Tex. Civ. App. 1900), 56 S. W. 942; Missouri, etc., R. Co. of Texas *v. Overfield* (Tex. Civ. App. 1898), 47 S. W. 684; Galveston, etc., R. Co. *v. Cooper*, 2 Tex. Civ. App. 42, 20 S. W. 990. See also, Galveston, etc., R. Co. *v. Cooper*, 70 Tex. 67, 8 S. W. 68.

In a case which goes to, perhaps, an extreme length in establishing this right, it appeared that the train, upon which plaintiff was a passenger, was stopped at an intermediate point along the road from half an hour to an hour in the nighttime, to await the arrival of another train of the company, to convey its passengers to its destination. The train stopped over an open ditch six or eight feet deep, at the bottom of which there were rocks and timbers, which ditch was known to the conductor but unknown to the passengers. There were no stationary lights by which it could be seen by plaintiff. While the train was standing there the plaintiff stepped out of the car, and was precipitated into the ditch and had his leg broken and was crippled for life. It was held that the plaintiff had the right under the circumstances to step out of the car, and that the company was liable for damages for the injuries resulting to him, on the ground of negligence. *Montgomery, etc.*, R. Co. *v. Boring*, 51 Ga. 589. The passengers of carriers by waters are entitled to the same privileges as those of railroad

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carriers in this respect. Thus it has been held that where a passenger on a steamboat, who has occasion to go ashore on business before reaching his destination, is injured while attempting to pass from the boat to the wharf, in consequence of the carrier's negligent omission to provide lights, the carrier is liable. *Dice v. Willamette Transp., etc., Co.*, 8 Ore. 60, 34 Am. Rep. 575. And where plaintiff, who was a passenger upon defendant's steamboat whereon meals were served to passengers whose tickets entitled them to meals, or who chose to pay for them, but whose ticket did not entitle him to meals, attempted to land for the purpose of obtaining breakfast, as was the custom of many passengers, at a wharf where the boat stopped a considerable time, it was held that he had a passenger's right to protection during his egress from the boat. *Dodge v. Boston, etc., S. S. Co.*, 148 Mass. 207, 19 N. E. 373, 37 Am. & Eng. R. Cas. 67, 12 Am. St. Rep. 541. And it has been held that a passenger who has taken his place on board a vessel, has a right to return to the shore even for the purpose of obtaining tobacco, and the carrier owes him the duty of exercising care to provide a safe means of passage from the vessel to the pier. *Hrebrik v. Carr*, 29 Fed. 298.

A passenger who alights at an intermediate station for a proper purpose, and who remains within a reasonable distance of the train, is entitled to have reasonable notice or warning of the starting of the train to enable him to regain his place in the train with safety. *Andrist v. Union Pac. R. Co.*, 30 Fed. 345; *Mitchell v. Western, etc., R. Co.*, 30 Ga. 22. See *State v. Grand Trunk Ry.*, 58 Me. 176, 4 Am. Rep. 258.

Although a conductor is asked by a passenger how long a train will stop at a certain station, the conductor is not presumed to know that the enquirer wishes to alight and spend the time of the stop away from the station, and if the passenger, without informing the conductor that he wishes to stop at the station and without the conductor's knowledge, alights from the train, the carrier is under no obligation to hold the train for the length of time mentioned by the conductor. *Missouri Pac. R. Co. v. Foreman*, 73 Tex. 311, 11 S. W. 326, 15 Am. St. Rep. 785. But, if the conductor has knowledge of the fact that the passenger has left the train, it is negligence to start it before the expiration of the stated time, without due notice to the passenger, who is so far away that he cannot get aboard. *Foreman v. Missouri Pac. R. Co.*, 4 Tex. Civ. App. 54, 23 S. W. 422. See *Missouri Pac. R. Co. v. Foreman* (Tex. Civ. App. 1898), 46 S. W. 834.

When a train is stopped at a station for supper, and the length of the stop is announced, the fact that the train is not held the length of time specified, will not, it seems, authorize a recovery of damages by one of the passengers for being left at the station, if the passengers are given due notice to get aboard before the train is started. *Texas Trunk R. Co. v. Mullins* (Tex. App. 1891), 18 S. W. 790.

VI. DUTIES TO DROVER ALIGHTING AT INTERMEDIATE STATION TO CARE FOR STOCK.

While a carrier of live stock cannot, by stipulating that the stock shall be cared for by the shipper, relieve itself of that duty, it may, nevertheless, grant the privilege or license to the shipper to look after his stock, and when the shipper with the consent or by the direction of a trainman in authority, goes to the stock car for the purpose of looking after his stock, he is entitled to the exercise by the carrier of proper care and caution for his safety. *Receivers' International, etc., R. Co. v. Armstrong*, 4 Tex. Civ. App. 146, 23 S. W. 236. The statement of a conductor, in answer to an inquiry by a stockman who wishes to get off at an intermediate station to look after his stock, that the train is at the station, when, in fact, it is standing upon a trestle, has been held to justify a finding of negligence. *International, etc., R. Co. v. Downing*, 16 Tex. Civ. App. 643, 41 S. W. 190.

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VII. ANNOUNCEMENT OF STATION AND CHANGE OF CARS.

As has been shown in an earlier note, while there are dicta, there is a very little common-law authority to the effect that it is the duty of railroad passenger carriers to announce the names of stations. See note to *Phillips v. St. Charles, etc., R. Co. (La.)*, 1 R. R. R. 902, 24 Am. & Eng. R. Cas., N. S., 902. This is also true as to the duty to announce changes of cars. But, although there is little, if any, authority to support the proposition, it is probably true that when it is necessary for passengers on a railroad train to change cars in order to reach their destination, it is the duty of the carrier to give due notice of the change, in such a manner that passengers of ordinary intelligence, and exercising ordinary caution, will acquire the necessary information. *Barker v. New York, etc., R. Co.*, 24 N. Y. 599. See *Church v. Chicago, Milwaukee, etc., R. Co.*, 6 S. Dak. 235, 60 N. W. 854, 26 L. R. A. 616, 2 Am. & Eng. R. Cas., N. S., 1. Certainly where the ticket agent at the time of selling a ticket to a passenger erroneously informs him that the train for which the ticket is sold is a through train, and will take him to his destination without change of cars, the passenger has a right to rely upon such information unless a different announcement is seasonably made upon the train by one of the train officials in such manner and under such circumstances that it can be reasonably said that it was heard by the passenger. *Dye v. Virginia, etc., R. Co.*, 9 Mackey (D. C.) 63. And it has been held that where a passenger in a caboose attached to a freight train which was making a regular scheduled trip, was, before he or the train reached their destination, taken off in the caboose on a branch line, on an irregular side trip, without notice, and exposed to cold, causing rheumatism, the jury was warranted in finding the carrier guilty of negligence. *Rosted v. Great Northern Ry. Co. (Minn. 1899)*, 78 N. W. 971. But it has been held that if a passenger learns en route that it is necessary to change cars, it is the duty of the passenger to inform himself as to where the change is to be made. *St. Louis, etc., R. Co. v. McCullough*, 18 Tex. Civ. App. 534, 45 S. W. 324.

VIII. TRANSFER OF PASSENGERS.

When the passenger's journey is not accomplished upon the same conveyance, but the passenger is required to change from one to another of the carrier's conveyances, the carrier is as much bound to exercise care for his safety while the change is being made as when he is actually being carried. *Citizens', etc., R. Co. v. Merl*, 134 Ind. 609, 33 N. E. 1014; *Baltimore, etc., R. Co. v. Hauer*, 60 Md. 449, 12 Am. & Eng. R. Cas. 149; *Oliver v. Columbia, etc., R. Co.*, 55 S. Car. 541, 33 S. E. 584; *Cameron v. Union Trunk Line*, 10 Wash. 507, 39 Pac. 128. Thus where the progress of a train is stopped in consequence of some obstruction upon, or break in, the track, and it is necessary to transfer the passengers to a point beyond, for the purpose of taking another train, the passengers are entitled to the same care in making the transfer as at any other time during the transportation. *Jamison v. San Jose, etc., R. Co.*, 55 Cal. 593, 3 Am. & Eng. R. Cas. 350; *Conroy v. Chicago, etc., R. Co.*, 96 Wis. 243, 70 N. W. 486, 38 L. R. A. 419, 8 Am. & Eng. R. Cas., N. S., 714.

IX. OPENING AND CLOSING OF CAR DOORS.

Railroad and street railway companies have sometimes been held liable to passengers for injuries sustained by them, while getting on or off trains or cars, by the shutting of car doors upon their hands, in consequence of the violent and unexpected movement of the trains (*Poole v. Georgia R., etc., Co.*, 89 Ga. 320, 15 S. E. 321; *Kentucky, etc., Bridge Co. v. Quinkert*, 2 Ind. App. 244, 28 N. E. 338, digested in section V of note to *Phillips v. St. Charles, etc., R. Co. [La.]*, 1 R. R. R. 902, 24 Am. & Eng. R. Cas., N. S., 902), or the negligent closing of doors by the carrier's servants. Plaintiff was riding on a street-car with a com-

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panion and had her finger cut off as they were leaving the car at the rear door. The door of the car was opened or shut by the driver from his place in front, and plaintiff testified that she started out first, and in passing out placed her hand on the side of the door, and that the door closed and cut off her finger. The driver and another witness testified for the company that the door did not close while plaintiff and her companion were getting off. It appeared that the accident was immediately proclaimed, and there was no other way of accounting for it. It was held that it was negligence in the driver to close the door before they had time to leave the car, and that there was sufficient evidence to support a verdict for plaintiff. *McGlynn v. Brooklyn Crosstown R. Co.*, 6 N. Y. S. R. 51, 42 Hun 656. On the other hand, a recovery has been denied, in a case of this kind, where the slamming of the car door was not due to the negligent management of the train. *Skinner v. Wilmington, etc., R. Co.* (N. Car. 1901), 39 S. E. 65, 22 Am. & Eng. R. Cas., N. S., 32, digested in section V of note to *Phillips v. St. Charles, etc., R. Co.* (La.), 1 R. R. R. 902, 24 Am. & Eng. R. Cas., N. S., 902. And in most of the cases where the accident resulted during the course of the transportation, the passenger has been denied recovery. See *St. Louis, etc., R. Co. v. Rexroad*, 59 Ark. 180, 26 S. W. 1037, 58 Am. & Eng. R. Cas. 615; *Hardwick v. Georgia R., etc., Co.*, 85 Ga. 507, 11 S. E. 832, digested in section II of note to *Freeman v. Metropolitan, etc., R. Co.*, 3 R. R. R. 584, 26 Am. & Eng. R. Cas., N. S., 584. A passenger who placed his hand on the door jamb as the door was opened by one of defendant's employees whom he was following into the car, but who did not know of the passenger's presence, has been denied a recovery for injuries sustained by the closing of the door by the servant. *Ham v. Georgia R., etc., Co.*, 97 Ga. 411, 24 S. E. 152. A passenger on one of defendant's trains, who had been unable to find a seat, took a stand in the aisle of one of the cars near the water-closet, braced his left hand on the door of the closet, and caught hold of the arm of the seat on the opposite side with his right hand, to steady himself, and prevent the motion of the cars from throwing him down. While plaintiff was standing in that position, talking to another passenger, defendant's flagman came through the car, approaching the plaintiff from behind, and suddenly opened the door of the closet, and looked in. As the door opened, plaintiff's fingers immediately slipped into the crevice next to the hinges, and the flagman suddenly closed the door, before plaintiff had time to remove his hand, catching his middle and third fingers between the shutter, and crushing them. He did not know the fingers were in till they were crushed, it was so sudden. There was nothing to prevent the flagman seeing the position of plaintiff's hand. It was held that the injury received by the plaintiff resulted from a mere accident, and was not due to any negligence on the part of the railroad company or its servants. *Murphy v. Atlanta, etc., R. Co.*, 89 Ga. 832, 15 S. E. 774. But in a very similar case it was held that the questions of defendant's negligence and plaintiff's contributory negligence were for the jury. *Romine v. Evansville, etc., R. Co.*, 24 Ind. App. 230, 56 N. E. 245.

It has been said, in effect, that the servants of railroad companies, in opening and closing doors of cars, are bound to exercise that care which an ordinarily careful and prudent person would use under the circumstances. *St. Louis, etc., R. Co. v. Ball* (Tex. Civ. App. 1902), 66 S. W. 879. But ordinarily it is not negligence for a porter on a railway train to close the doors of the company's cars, without first warning the passengers of his intention to do so. *Gulf, etc., R. Co. v. Davidson*, 61 Tex. 204, 21 Am. & Eng. R. Cas. 431.

X. RESCUE OF PASSENGER FALLING FROM TRAIN.

A railway carrier of passengers, who knows, or ought to know, that a passenger has fallen or been thrown from one of its trains, has no right to leave him in a helpless condition in a position of known danger, without using every reasonable effort to prevent injury to him by passing

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trains, or otherwise (Cincinnati, etc., R. Co. v. Cooper, 120 Ind. 469, 22 N. E. 340, 16 Am. St. Rep. 334, 6 L. R. A. 241); the carrier is bound to stop the train from which the passenger has fallen, and remove him to a place of safety, if that can be done without danger to its passengers and employees, or notify those in charge of a train from which he is in danger of receiving injury, and cause it to be operated with a due regard for his safety, or adopt some other reasonable precaution to avoid injury to him. Cincinnati, etc., R. Co. v. Kassen, 49 Ohio St. 230, 31 N. E. 282, 52 Am. & Eng. R. Cas. 427, 16 L. R. A. 674. But the carrier is under an obligation to stop a train for the purpose of rescuing a passenger who has fallen off, only when it can do so without endangering the safety of its other passengers and its servants. Reed v. Louisville, etc., R. Co., 20 Ky. L. Rep. 815, 47 S. W. 591, 44 L. R. A. 823, rehearing denied in 20 Ky. L. Rep. 990, 48 S. W. 416, 44 L. R. A. 824. This duty to exert every practicable effort to rescue a passenger who has fallen from a train, is imposed upon the carrier although the passenger falls off, without fault on his part or that of the carrier, but as the result of a pure accident (see Cincinnati, etc., R. Co. v. Cooper, 120 Ind. 469, 22 N. E. 340, 16 Am. St. Rep. 334, 6 L. R. A. 241), and even though he falls off in consequence of his own negligence. Cincinnati, etc., R. Co. v. Kassen, 49 Ohio St. 230, 31 N. E. 282, 52 Am. & Eng. R. Cas. 427, 16 L. R. A. 674.

THEODOR MEGAARDEN.

O'LEARY v. ERIE R. CO.

(Court of Appeals of New York, Dec. 31, 1901.)

[62 N. E. Rep. 346.]

Railroads—Licensee—Injury—Custom—Voluntary Duty—Failure to Perform—Liability.*

Where it has been the custom of a railroad company in placing its cars on a side track under the loading spout of an elevator to set the brake on the lowest car, and the company knew that the work performed by the employees of a loading contractor was dangerous unless the brake was so set, and such employees relied on the railroad company's compliance with the custom, it was negligence for the company to fail to comply with such duty voluntarily assumed, rendering it liable for injuries to an employee of the contractor resulting therefrom.

Appeal from supreme court, appellate division, Fourth department.

Action by Michael O'Leary against the Erie Railroad Company. From a judgment in favor of plaintiff, reversed by the appellate division (64 N. Y. Supp. 511), plaintiff appeals. Reversed.

Appeal from a judgment of the appellate division of the supreme court in the Fourth judicial department, entered April 17, 1900, upon an order which reversed a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial, and granted a new trial. This action was brought to recover for personal injuries alleged to have been caused by the negligence of the defendant. The defendant was the owner of an elevator on the bank of Buffalo

*As to the care due licensees, see generally, note, 20 Am. & Eng. R. Cas., N. S., 394 et seq.; note, 21 Am. & Eng. R. Cas., N. S., 309 et seq.

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creek, in the city of Buffalo, N. Y., about 240 feet in length, extending north and south. A siding started at a point in the main track of the defendant's railroad north of the elevator, extended through it and to a point 292 feet south of the southerly end. The track within the elevator was level. In the portion which extended to the south there was a gradual rise from the south door of 2.3 feet in the entire distance of 292 feet. Cars left on that part of the siding without setting the brakes, it is claimed, would start and move by gravity slowly down towards and into the elevator. The track was built with this incline to facilitate placing the cars by hand under the grain spouts in the elevator. The defendant had entered into a contract with one Sheehan, which was in force at the time of the accident,—a similar contract having been in force for some years prior,—which provided, among other things, that Sheehan was "to load and trim all cars with grain that may be placed at second party's elevator in Buffalo, known as the 'Erie Elevator,' " and "to furnish all labor necessary to move all cars from the south end of said Erie Elevator, and place such cars under the loading spout, and remove all such cars immediately after loading to a distance not less than sixty feet north from the northerly entrance of said Erie Elevator." Shortly after the close of the day's work on the 5th of May, 1895, but in broad daylight, the defendant pushed a string of 11 cars from its main track on the north onto the elevator track, leaving about half of the cars standing upon the level track in the elevator and the other half on the incline track at the south end. The cars were all coupled together, and were left perfectly stationary, the four or five cars on the level track securely holding in place the cars on the incline. Having placed the cars in the position above indicated, the engine was detached, and the train crew and all of the employees of the defendant left the elevator. After the cars had been standing 15 or 20 minutes in exactly the same position in which they had been placed by the defendant, Sheehan directed his men, including the plaintiff, to move the northerly four or five cars farther into the elevator, so that the doors at the south end might be closed for the night. The first, or northerly, car of the line was moved with Sheehan's team, the next two were pushed forward by some of his men. The plaintiff then went behind the fourth car and moved it forward by putting his shoulder against it and pushing. When he had moved it a short distance, and while pushing it, all the cars behind him on the incline started and moved slowly down the grade into the elevator, catching the plaintiff between the car he was pushing and the one immediately behind him. His arm was crushed and injured in such a manner that amputation at the shoulder joint was necessary, which is the injury complained of. The evidence tends to show that it had been the custom

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of the defendant, for years prior to the accident, when it placed cars upon the elevator track for Sheehan to load, to set the brake upon the southerly car, or those standing upon the incline; that the plaintiff relied upon such custom, and the accident resulted because of the failure of the defendant to follow such custom upon the occasion in question. It is claimed that such failure constituted negligence for which the defendant is liable to the plaintiff.

John Cunneen, for appellant.

Adelbert Moot, for respondent.

LANDON, J. (after stating the facts). The plaintiff's act in moving the fourth car was not a negligent act if he had reasonable grounds to believe that the defendant had set the brake upon the rear car of the string of coupled cars. The defendant had placed the cars there, and had not set the brake upon the rear car. If the defendant had sufficient cause to apprehend that the plaintiff or his fellow workmen would, in the usual course of his or their service, start the forward cars without looking to see whether the rear brake was set, in reliance upon defendant's usual custom to set it, then defendant had notice that its omission to set the brake was setting a track into which the plaintiff or his fellow workmen would be in imminent danger of falling, and thus that its omission would expose the plaintiff to the danger which befell him. This would be, in legal sense, the sole negligent cause of plaintiff's injury, for without such negligence it would not have happened, and no negligence of the plaintiff would have contributed to it. The verdict of the jury, upon evidence tending to support it, establishes just the situation stated. The defendant is liable because, although it owed no contractual duty to the plaintiff, it had a contract with his employer under which plaintiff was, with the defendant's consent, engaged in moving these cars for defendant's benefit, and it was defendant's duty to perform whatever service it undertook in execution thereof with reasonable care, and not to omit such customary care as usually sufficed to protect plaintiff and his fellow workmen from danger, upon which it knew they habitually relied. The contract does not impose any duty of care upon the defendant in placing the cars, nor, when defendant undertakes to place them, does it exempt it from care. The obligation of care arises from its duty to do what it undertakes to do in such way as not to lead others, as lawfully present and employed as itself, to dangers created by itself, and not obvious to them. The defendant had voluntarily assumed to perform the first step in the sequence of acts, in which the plaintiff's act would be the second, and known to defendant to be a dangerous one if the first should be negligently performed. Hence the duty of reasonable care rested upon defendant, and under the circumstances reasonable care was

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the defendant's customary care, because defendant had notice that plaintiff was accustomed to rely upon it.

The judgment and order should be reversed, and the judgment entered upon the verdict affirmed, with costs in all the courts.

PARKER, C. J., and GRAY, O'BRIEN, HAIGHT, CULLEN, and WERNER, JJ., concur.

Judgment accordingly.

JAMES v. ILLINOIS CENT. R. CO.

(*Supreme Court of Illinois, Feb. 21, 1902.*)

[63 N. E. Rep. 153.]

Dedication—Evidence—Plat.

A plat made by witness of lands adjacent to a railroad cannot prove a dedication of the right of way over the railroad tracks to the public for a highway, he never having owned the land where the right of way was.

Tracks Adjacent to Station Not Public Places—Duty to Trespasser on Track.*

Railroad tracks adjacent to a railroad station are not public places, where one having no business with the company can go; so that one walking along them in hope of meeting the telegraph operator coming from his house is a trespasser, to whom no duty is owed by those operating trains till they see her.

Appeal from appellate court, First district.

Action by Elvira James against the Illinois Central Railroad Company. From judgment of the appellate court (93 Ill. App. 294) affirming judgment for defendant, plaintiff appeals. Affirmed.

Rosenthal, Kurz & Hirschl, for appellant.

William A. Howett (J. G. Drennan, of counsel), for appellee.

RICKS, J. This was an action on the case, brought by appellant against appellee in the circuit court of Cook county for personal injuries alleged to have been received on the 31st day of October, 1890. The place where the accident occurred was at a crossing at South Chicago between Seventy-Fifth and Seventy-Sixth streets. The declaration contained six counts. Three of them averred, with reference to the place where the injury was incurred, that appellant "was walking upon and along a certain tract of land with the defendant's permission and invitation, then and long prior used by the public in general as approaches to its trains and depot, and appearing to be a public highway." Three other counts charged that the place where the injury was received was a public highway, and general negligence, and the statutory omissions to ring bells and sound whistles were set out. The

*See *Tully v. Philadelphia, etc., R. Co. (Del.)*, 23 Am. & Eng. R. Cas., N. S., 209, and foot-note.

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cause was heard, and upon the conclusion of plaintiff's evidence the court directed a verdict for the defendant, and on appeal the appellate court for the First district affirmed that judgment. But two matters are urged as ground for reversal: First, the giving of the instruction directing a verdict for defendant; and, second, the refusal to admit in evidence a certain plat offered by appellant.

Appellant lived on Drexel avenue, between Seventy-Fifth and Seventy-Sixth streets, and which was some five or six blocks west from the place where the injury was incurred. She had spent the night preceding the accident at the Kemp Hotel, which was on Seventy-Sixth street, and east of appellee's railroad. The place where the injury occurred is a mesh of railroad tracks. The Illinois Central has four tracks running practically north and south; and running northwesterly and southeasterly across the Illinois Central, in this block between Seventy-Fifth and Seventy-Sixth streets, are two other railroads,—the Lake Shore & Michigan Southern and the Ft. Wayne,—each having double tracks, and lying together and running parallel with each other, but so crossing the Illinois Central railroad as to form a double "X." On the east side of the Illinois Central Railroad, and between the other two roads that cross it, was a depot, in which the evidence shows was maintained a day telegraph office. The Kemp Hotel, where appellant spent the night, was on the south side of Seventy-Sixth street, and near to the south side of the Ft. Wayne tracks, and between 200 and 300 feet from the crossing of the latter tracks and the tracks of the appellee. Appellee's statement is that she started on the morning of the injury to the depot building to send a telegram; that she went on Seventy-Sixth street, and there crossed a bridge across a ditch and near the Ft. Wayne tracks, that led her onto a little walk leading along the south side of these tracks, and also to a walk that led almost directly north across those tracks to the depot; that when she got across this bridge she was 80 or 90 feet from the crossing of the railroads, and about the same distance from the depot, and that there it occurred to her that the telegraph operator would not be at the office that early in the morning, and she then changed her mind about going to the depot, and concluded to follow the Ft. Wayne tracks in a northwesterly course until she should strike Seventy-Fifth street, upon the theory that she would probably meet the operator on his way to the office, and, if she did not, that she would find him at his home, as he lived near to her home; and so, instead of following the walk and street and going on toward the depot, she says she kept on the south side of the track of the Ft. Wayne road, and went up to the crossing of it and appellee's road. She says further that when she came out from the hotel on Seventy-Sixth street, and looked west, she saw standing on the appellee's road a freight train, which she says was a long train, and was

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standing still. She never noticed this train any more until she was on appellee's track, and shortly before she was struck by it as hereinafter stated. She followed this side of the Ft. Wayne tracks up to appellee's tracks. The tracks of appellee were four in number, and were numbered from the west to the east. The track nearest to her was No. 4, and the one next to it was No. 3. Nos. 1 and 2, on the west side, were tracks used for suburban trains, and the evidence shows that a train came in from the north and stopped on track 1, and a train also pulled in from the south on track 2, both being suburban trains. In some manner, not explained by her or by the evidence at all, instead of staying on the south side of the tracks of the Ft. Wayne road, appellant got across the Ft. Wayne road, between it and the Lake Shore road, on the north side of said Ft. Wayne road, and at the east edge of the appellee's tracks, some 40 or 45 feet north of the Ft. Wayne track, and from the walk on the south side thereof, which walk she said she was going to follow on her course to meet the operator. At the place she was there is no evidence showing that there was any walk or crossing over the tracks, nor is any reason shown why she sought or attempted to cross at that particular place. She states that as these suburban trains were in, and one of them was about to move, she saw a man at the rear end of one of them give a signal by motioning his hand; that she did not know whether it was a signal for her or for whom, but, taking it to be for her, she moved ahead to cross appellee's tracks; that she first crossed track No. 4; that shortly before she had started, and while she was standing directly opposite and east of the point where she was struck, she says she looked south, and saw the freight train still standing there, and thinks it was perhaps 200 feet away from her. After crossing track No. 4, and just as she had reached the first rail of track 3, and was about to step onto the track, she was struck by the engine of this freight train, that was moving at the rate of about five or six miles an hour. It could not have been going rapidly, as one of the witnesses who testified for her saw the engine strike her and throw her forward, and he jumped in front of the train, and pulled her out, and saved her life, the only injuries being severe bruises and shocks. It is also in evidence that just before she went upon this track, a moment before she was struck, some one at the baggage room of the depot hallooded to her, and tried to warn her of the danger. She says that she was looking northwest, her attention being attracted by the suburban trains moving on tracks 1 and 2, and did not think of, and did not see or hear, the train that struck her, from the time she saw it standing down near Seventy-Sixth street until she was struck by it. The proof showed also that neither the engineer nor any one in charge of the freight trains saw her, or realized that she was in peril, or had any reason to suppose that she was going to cross the track, until

the engine was within four or five feet of her, when the whistle was sounded and alarms given. The greater weight of the evidence shows that no bell was being rung and no whistle being sounded until the time, or about the time, she was struck. The evidence shows that the view was unobstructed, and trains could be easily seen for five or six miles, looking to the south.

It is claimed that the place where the appellant was struck was a public highway, and was part of Woodlawn avenue, which is an avenue that runs north and south, with some interruptions, for a number of blocks. In the effort to prove that the place was a street, one Paul Cornell testified that he had lived in Chicago 50 years, and had been a property owner in the vicinity of this injury since 1855; that the Illinois Central Railroad tracks were laid where they were at the time of the accident in 1852 or 1853; that he was the owner of the Grand Crossing Hotel (now the Kemp House), and had made some walks for the use of his hotel up toward the depot some 15 or 20 years ago; and that he had platted certain properties adjacent to the scene of this injury in 1872, and had lived many years in that vicinity. He stated further that Woodlawn avenue, from Seventy-Fifth or Seventy-Sixth street, was not a traveled public highway; that there has never been any work or grading done, except that for the railroads; that it has never been traveled by the public with horses and vehicles and wagons, and that it could not be because of the railroad tracks; that the line of Woodlawn avenue would lie right along over the tracks of appellee, running north and south; that there is nothing there but railroad tracks; that the railroad right of way there is 200 feet wide, and that it had never been condemned, to his knowledge, and that he would have known, as he had owned property there since 1855, and that to his knowledge there had never been any action taken by the public authorities by actual work or legal proceedings for opening that avenue between Seventy-Fifth and Seventy-Sixth streets. A plat of adjacent properties, which this witness had, was offered in evidence and rejected. This witness did not pretend to have ever owned the ground where the right of way and injury were, and any plat made by him of adjacent lands in 1872 could not have proved a dedication of appellee's right of way over its tracks to the public for a highway, and was properly excluded. This was practically all the evidence with reference to the public character of the place where this injury was received, except the general evidence that a station was maintained there, and that people alighted there from trains, and frequented the station on telegraph business. The appellant also stated that she had lived there a number of years; was well acquainted with the tracks, and knew that the first and second tracks were used for suburban trains, and that the third and fourth tracks were

used for heavy freight trains; and that early in the morning, at the time she was injured,—being about 6:30,—the traffic on the appellee's road at that point was heavy, and greater than later in the day.

From this brief statement and a review of all the evidence it seems clear to us that appellant utterly failed to show that the place where the injury was received was a public highway, and also failed to show that she had any legitimate business or purpose at the place where she was injured. When she was 20 feet away from Seventy-Sixth street—the street that the evidence shows she should have followed to reach her home, and the nearest and ordinarily traveled route—she had made up her mind that she would not go to the station to send the telegram in question, and the only purpose that she had or gave for going where she did at all was that she might meet the operator on his way to the station. After having determined that she would not go on a business mission to the station in the vicinity of the injury, she traveled on the right of way of appellee something near 120 feet, when she attempted to cross the tracks in a place where nobody was invited to cross, and where she had no business to be. Appellant states, however, that she was rightfully there, because appellee had a station there, or near there, and that by maintaining the station the place became a quasi public place, where all the public had a right to go; and in support of that contention cites a number of authorities, none of which we think apply. It is true that we have held in a number of cases that railroad stations are quasi public places, and that the public, for certain purposes, are invited there, and that they are not trespassers when they go there; but no case is cited, and we think none can be found, in which it has been held that the railroad tracks adjacent to a railroad station are public places, or such places as the public are invited upon, or have a right to be, unless it be shown that it was for some purpose connected with the business between such parties and such railroad company, or in company with some person having business with such company. In other words, we do not understand the law to be that because a railroad company maintains a depot or station along its line it thereby invites loiterers or persons having no business with it to go from the platforms of the station and travel upon or across its tracks for their individual convenience and upon their individual business in no manner connected with such railroad. As we view this evidence, appellant was as much a trespasser at the place where she was, and under the circumstances, as if there had been no railroad station there. From the place where she was injured north to Seventy-Fifth street was over 250 feet, and south to Seventy-Sixth street, where the freight train had stood, was also over 250 feet, and the place not being a public highway, the appellee company was under no obligation, for the protection of trespassers and loiterers, to

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keep its bell ringing or its whistle sounding from one street crossing to the other. It owed no duty to appellant until it or its servants in charge of its train saw appellant. When they did see appellant, it was their duty to use reasonable care to avoid injury to her; but the evidence shows that she was not seen until the engine was within five feet of her, when it was too late for anybody in control of the engine to save her from being struck by it; that the whistle was then sounded, the engine reversed, and effort made, but to no avail. She also says that she was looking in a direction away from the one whence the engine was coming, and under the circumstances shown in this case it cannot be said that she was using any care whatever for her own safety, but seemed to have given that no thought at all. The evidence offered by appellant, with all the reasonable inferences that could be drawn from it, does not fairly tend to show that the appellee was guilty of wanton or willful conduct that caused the injury to appellant, or that appellee did not use reasonable care after discovering appellant's presence and peril, and the court was warranted in giving the instruction directing a verdict for defendant. *Railroad Co. v. O'Connor*, 189 Ill. 559, 59 N. E. 1098; *Same v. Godfrey*, 71 Ill. 500, 22 Am. Rep. 112.

The judgment of the appellate court is affirmed. Judgment affirmed.

KAISER v. NEW ORLEANS & C. R. CO.

(*Supreme Court of Louisiana, April 28, 1902.*)

[32 So. Rep. 75.]

Street Railroads—Injury to Person on Track.*

Where a boy of 13 walks from one side of a street, on which there are double car tracks, toward the other side, at night, and, without stopping, collides with a car, blazing with light, loaded with passengers, and moving at the rate of six miles per hour, which there was nothing to prevent his seeing and hearing, there can be no recovery for injury resulting from such collision.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Walter B. Sommerville, Judge.

Action by Charles Kaiser against the New Orleans & Carrollton Railroad Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Louis P. Paquet and Andrew J. Murphy, for appellant.

Dart & Kernan, for appellee.

Statement of the Case.

MONROE, J. The plaintiff alleges that his minor son, for whose use and benefit he sues, had his foot cut off by one of

*See *Robinson v. Louisville Ry. Co.* (C. C. A.), 1 R. R. R. 838, and monographic note, 842, 24 Am. & Eng. R. Cas., N. S., 838, and monographic note, 842.

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the defendant's cars through the criminal negligence of the defendant and its servants, and he prays for damages. The answer is a general denial and a plea of contributory negligence. The evidence shows that, upon the evening of February 21, 1900, Peter Kaiser, the injured boy, with his elder brother, Charles, left their home, at the corner of Fourth and Franklin streets in this city, with the intention of going to Canal street, in order to see an illuminated procession which was expected to appear. They were city-bred, intelligent, schoolboys, accustomed to electric cars and other perils incident to street travel, and were 13 and 14 years of age, respectively. Near the lower crossing of Perdido street, on Baronne, at about 5 minutes past 7 o'clock, Peter Kaiser's right foot was crushed under the wheel of car No. 185 of the defendant's Jackson avenue line, which was then going in the direction of Canal street, upon the eastward, or river side, track. The car was moving at about schedule speed, and was carrying a large number (70 or more) of registered passengers, who were packed in the seats and the aisle and upon both platforms; and it seems likely that there were others, not registered, upon the bumper, outside of the rear platform, and hanging upon the hand rails, with their feet upon the steps of one or both of the platforms. Neither the conductor nor the motor-man were aware at the time that any accident had occurred, nor can it be said that any of the passengers were aware of it, and the car proceeded on its way to Canal street. There seems to be no doubt that the little boy's foot was crushed by the front wheel on the left, or woods, side. Nungesser and Monaghan, two passengers, were occupying the front seat on that side; the former next to the aisle, and the latter next to the window, which was open. Nungesser testifies that about Poydras street, one square above the scene of the accident, two boys caught onto the car, with their feet upon the step of the front platform, supporting themselves, no doubt, by hanging onto the after hand rail, with their bodies swinging back, and that as the position was one of peril, by reason of the fact that they were liable to be knocked off by a car going up on the parallel and adjacent track, the situation attracted his attention, and he commented on it to Monaghan, and that, in passing Perdido street, he felt a jar, and remarked, "There is somebody run over," to which Monaghan replied, "No; the car would have stopped." Monaghan's testimony is somewhat peculiar. He at one time appears to testify that the boys were on the car, and that Nungesser called his attention to the fact, but is afterwards unable to say whether they were there or not, and is unable to recall any conversation with Nungesser on the subject, though he fully corroborates that witness as to the remarks above quoted. Bonaparte, a negro boy, was standing on, or just inside, the sill of the rear door of the car, and testifies that at Perdido street he heard someone outside of the car call out that a "boy got run over."

Beyond this there is absolutely no evidence that any one on the car knew or suspected, or had any reason to suspect, that an accident had occurred.

The story that the injured boy tells is fairly included in the following excerpt from his cross-examination; the first question referring to his starting from his home at the corner of Fourth and Franklin streets, to wit: "Q. You walked on Fourth to Baronne, and on Baronne to Perdido? A. Yes, sir. Q. Did you pass many of these electric cars on Baronne street? A. Yes. Q. There were plenty of boys hanging on the cars? A. No. Q. You did not see any people hanging on them, on the back platform or the front? A. No. Q. But you saw plenty of these cars coming down the street loaded with people, didn't you? A. Yes. Q. And you saw plenty of them going uptown? A. Yes. Q. Both full of passengers? A. Yes. Q. On which side did you come down Baronne street? A. On the woods side. Q. When you got to Abbott's store, you looked in the window? A. Yes. Q. And you left your brother there, and you went on by yourself? A. Yes. Q. Until you got the lower side of Perdido street? A. Yes. Q. Did you go on the crossing there? A. Yes. Q. What crossing? A. Downtown crossing. Q. Did you walk or run over the crossing? A. I walked over. Q. You say you looked up and down the street? A. Yes. Q. What was that for? A. To see if a car was coming. Q. You knew that there was a car going to come there? A. Yes. Q. And you looked to see if the car was coming? A. Yes. Q. And you did not see it come? A. No. Q. And then you walked over? A. Yes. Q. Then what hit you? What was it that struck you? A. The car. Q. What part of the car struck you? A. The front part. Q. What part of the car? Was it the woods side of the car? A. Yes. Q. The woods side? A. Yes. Q. Which way was your face turned when you were struck? A. Toward the river. Q. You did not hear the car? A. No. Q. And you did not see it? A. No. Q. And yet it hit you? A. Yes. Q. How came it that you did not see the car when it ran over you? A. I don't know. Q. There were electric lights burning in the car. Did not the car have a headlight in front? A. Yes. * * * Q. How did you get your foot under the front wheel? You were not on the track? A. I had this foot right on the track. Q. When you were struck, you had one foot on the track? A. Yes. Q. You had only one foot on the track? A. Yes. * * * Q. You had just put your foot on the rail when you were struck? A. Yes." Charles Kaiser testifies that Peter left him at Abbott's window, and went on to Perdido street, and that his attention was next attracted by the scream which followed the accident. He also testifies that he heard the witness Stagno call out, "There is somebody run over," and that the car went on. Both boys deny that they had caught on to the car. Stagno testifies that he was walking down the middle of Baronne street, with his wife and

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child; that about half way across Perdido street he fell behind his companions and, being between the two Baronne street tracks, he saw a boy crossing from the lower woods corner of Perdido street; that he turned his attention from the boy, and, a moment afterwards, heard a scream, and found that the accident had happened. He refuses, however, to identify the boy who was crossing the street with the boy who was injured. This witness also testifies that he called out, "There is a boy run over."

Abovitch, who is the only witness, besides the boy himself, who professes to have seen the accident, was on the woods side of Baronne street, above Perdido, walking down. He undertakes to give the facts with considerable detail, but falls into several errors. Thus, he testifies with great positiveness and reiteration, though his attention was repeatedly called to what he was saying, that the car which inflicted the injury passed him, going at unusually high speed, while he was in the middle of the square between Poydras and Perdido streets, walking in the direction of Perdido street, and, although he does not claim to have been walking very rapidly, he tells us that, when the accident occurred, on the lower crossing, he was within 10 feet of the upper corner. This statement he afterwards returned to the stand to correct, saying that he was 20 feet from the corner. He also testifies that he observed that the number painted on the side of the car was 180, though after the accident he could not have seen it, and before the accident there was no reason why he should have observed it, as there were cars passing and repassing every few minutes, and it is hardly likely that he noticed the numbers of all of them. Moreover, the number of the car was 185, while 180 was the number of the car that came up on the other track, and, because it was the only car that was stopped at the corner just after the boy had been picked up, was supposed by some person to have been the car by which the injury was inflicted. This witness also testifies that no bell was rung on the car that ran over the boy, and, although Stagno, who was much nearer, was unable, because of the darkness, as he says, to identify the boy who was injured with the boy whom he had, a second before, seen crossing the street in the direction of the car, Abovitch was able, while making the other observations which have been mentioned, to notice that Peter Kaiser had just extended his left foot forward onto the defendant's track when he was struck by the car. Another witness, Marks, who was walking up Baronne street on the woods side, and was a short distance below the corner of Perdido, speaks of having seen "the form of a boy tumbling into the street" near the passing car, and also of having seen a boy crossing from the corner he (the witness) was approaching, in the direction of the point at which the "tumbling" took place; but there appears to have been no such continuity of observation as to enable him positively to

identify the boy who was "crossing" with the boy whom he saw tumbling a moment afterwards. This witness also states that he was on his way to supper and was walking rapidly. Being asked, "How fast do you suppose you were walking,—at what rate?" he replied, "About twenty miles per hour. Q. You were going pretty fast? A. Yes; maybe more than that," etc.

Ott, the conductor, testifies that he was on the rear platform; that, after passing Poydras street, his attention was called by the driver of a passing wagon to the fact that there was a boy hanging on the side of the car or platform, at that end; and that he saw the boy and told him to get off. He also speaks of having seen a boy approaching the car from the woods side on Perdido street, and of having seen a boy standing between the tracks; but he states that he heard no one hail him and say that a boy had been run over, and he was not aware at that time, and had no reason to believe, that an accident had happened. He further testifies that he has been a conductor for 13 years. Reiman, the motorman, testifies that the car was crowded; that there were four men on the front platform to his left, and one to his right; but that they stood back so far as not to obstruct his view of the street. The car, he says, was going at the usual speed, i. e., "five points, or about six miles, an hour," and that he was not aware at the time that any accident had happened. He was asked: "It is said that a boy about 13 years of age tried to go across Baronne street, at Perdido, and that he was struck by the front part of the car, just as he put his foot on the rail. Did such an accident happen to your car?" He answered: "No." He was asked: "Could it have happened without your knowing it?" He answered: "No; it could not." He states that the four passengers to his left would have prevented his seeing a boy holding on to the "grab handle" of the front platform, and he does not know whether there was a boy so holding on. This witness was not in the employ of the defendant at the time that he testified. He had been a conductor for five years without causing damage to person or property, and had left the service and had gone to work for a cistern maker.

Perke is a motorman, who was in charge of car No. 180, which was coming up Baronne street, and had reached Gravier street, two squares below the scene of the accident, when the accident occurred. He testifies that as the downcoming car, being car 185, was leaving Perdido street, he saw a boy fall, and that as the car approached him he saw another boy hanging to the side, and called to him to get off. When he reached Perdido street, he slackened the speed of his car and heard somebody say "that a boy had got his leg cut off," and some one took the number of his car. Prester was the conductor of car 180. He also testifies that, on reaching Perdido street, some one said, "That was the car," referring to car 180, and

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that he then learned that an accident had happened. He also testified that there were boys hanging onto the car that passed down. This witness had likewise left the defendant's employee, after four years service, with a certificate of good character, and was working elsewhere when he testified. It is abundantly shown that the car by which the injury was inflicted was brilliantly illuminated, with an electric headlight and some 15 incandescent lights inside, and it is not suggested that there was anything which could have prevented the boy who was hurt from seeing and hearing it for several squares.

Opinion.

There are but two possible hypotheses as to the manner in which the accident occurred,—the one that the little boy walked from the "woods" side of Baronne street toward the river side, and that he crossed the defendant's uptown track in safety, and, having made one step onto the downtown track, was struck by the car on that track; the other, that he and his brother were hanging on by the "grab handle" of the front platform of the car, and that he fell off, or fell under the wheel after he had jumped off. And upon neither hypothesis can the plaintiff recover. Accepting the statement of the little fellow himself, and taking the view of the testimony most favorable to the claim which is made on his behalf, he walked, without stopping, from the banquette on the "woods" side of Baronne street, until he collided with the car or was struck by it. The moment before he took the one, and only, step which he had time to take onto the defendant's downtown track, it was entirely within his power to have stopped; and it was not to have been anticipated, in view of the fact that the car, blazing with light, loaded with passengers, moving at the rate of six miles per hour, and making a noise that could have been heard a square or two away, was practically on him, that he would have taken that one step which placed his foot beneath the wheel, nor was it within the limit of human power, after that step had been taken, to have stopped the car in time to have avoided the accident, since the accident occurred before a second step could follow the first, and there is no great interval of time between the steps of a boy of 13, who is on his way to see a procession, the lights of which are reddening the sky just before him.

We need not deal with the theory suggested on behalf of the defense that the boy was one of those who had been hanging on the car. Nor is it necessary that we should enter into any extended discussion of the supposed presumption of negligence arising from the fact that the conductor and motorman did not know that the accident had occurred and failed to hear the calls afterwards. It seems to us to be reasonably certain, not only from the testimony of the defendant's, but from that of the plaintiff's, witnesses, that the boy was never in front of the car, where he might have been seen by the motorman,

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but that the point of collision was aft of the bumper and guard, and just forward of the front wheel. As to the calls of Stagno and Marks, that a boy had been run over, they were certainly uttered, not only after the fact, but after those witnesses had had time to realize what had happened, and in the meanwhile the crowded car was speeding down the street. It is not surprising, therefore, that the calls were not heard or understood.

The case was tried in the district court without a jury. The learned judge before whom it was tried reached the conclusion that the plaintiff was not entitled to recover. We are of the same opinion, and the judgment is accordingly affirmed.

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(*Supreme Court of Minnesota, May 16, 1902.*)

[90 N. W. Rep. 400.]

Injury to Licensee on Track—Care Due from Company.*

Persons having no invitation to go upon railway tracks, but who walk thereon for their own convenience, are mere licensees, taking existing conditions as they find them, and cannot require the railroad company to protect them from dangers which are as apparent and open to their own observation as to the company.

Injury to Licensee Pushed on Track by Cow—Failure to Fence—Proximate Cause.

Where a licensee walking upon railroad tracks was approached by a train, and stepped therefrom to avoid collision, but was pushed upon the rails by a straying cow pasturing on the right of way, the failure of the company to build the statutory fences cannot be held the proximate cause of the accident, for which it would be liable to answer in damages.

(Syllabus by the Court.)

Appeal from district court, Wright county; A. E. Giddings, Judge.

Action by Michael Schreiner against the Great Northern Railway Company. From a judgment sustaining a demurrer to the complaint, plaintiff appeals. Affirmed.

A. C. Middelstadt, for appellant.

W. E. Dodge and E. L. Sutton, for respondent.

LOVELY, J. Appeal from an order sustaining a general demurrer to a complaint. The facts set forth therein may be briefly stated as follows: Defendant operated its road be-

*See *Morgan v. Wabash R. Co.* (Mo.), 20 Am. & Eng. R. Cas., N. S., 372, and extensive note, 394 et seq.; *Gulf, C. & S. F. Ry. Co. v. Bryant*, (Tex.), 1 R. R. R. 952, 24 Am. & Eng. R. Cas., N. S., 952; *Tully v. Philadelphia, etc., R. Co.* (Del.), 23 Am. & Eng. R. Cas., N. S., 209; *Southern Ry. Co. v. Williams* (Ga.), 22 Am. & Eng. R. Cas., N. S., 415; *Fleming v. Louisville & N. R. Co.* (Tenn.), 20 Am. & Eng. R. Cas., N. S., 549; *Neal v. Southern Ry. Co.* (N. Car.), 20 Am. & Eng. R. Cas., N. S., 941; *Baker v. Louisville & N. Terminal Co.* (Tenn.), 20 Am. & Eng. R. Cas., N. S., 946; *Illinois Cent. R. Co. v. Arnola* (Miss.), 20 Am. & Eng. R. Cas., N. S., 945.

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tween Waverly and Melrose, in this state. It had at all times failed to comply with its statutory duty to fence its tracks between these places. Plaintiff was injured while walking upon defendant's track under what he claims to have been an implied invitation. His pleading in this respect substantially alleges that the public have used the railroad right of way and its roadbed ever since its construction to walk thereon, and that it has been the usual custom of the people who live at Melrose, Waverly, and the surrounding country, for their own convenience and benefit, to make such use of the tracks daily for 25 years, with the knowledge of defendant, and without objection or interference. On the occasion of the accident plaintiff was walking upon the tracks between the places referred to. A freight train approached from the opposite direction, running at the rate of 35 miles an hour. At the same time cattle were pasturing on the right of way. Plaintiff stepped from the rails to avoid the train, and while it was passing a cow ran against him, threw him upon the ground, pushed one of his arms upon the rails, whereby he received severe injuries, for which he seeks recovery. The construction of the complaint most favorable to plaintiff is that he was on the railway tracks in pursuance of a usage by the public, which was permitted without objection from defendant. It does not go further than this. Plaintiff was not passing over the tracks at a crossing which had been adopted or recognized by the railway company, but was simply making use of its tracks to walk thereon from one place to another, which is a practice adopted by many persons for pleasure or convenience. That such a user is to a certain extent common is well known, but is unquestionably dangerous, and ordinarily regarded as an intrusion upon the legal rights of the railroads, who maintain their tracks and right of way, except at stations and crossings, for the purpose solely of operating their trains thereon. It is not easy to see how such a user by the public could be wholly prevented without force, which would be attended with difficulties that might not be overcome without the imposition of unnecessary burdens upon the railway company, and it may well be doubted whether, upon the allegations of the complaint, the plaintiff was not a trespasser upon the defendant's property at the time he sustained his injury; but it is not necessary to so hold in this case. Conceding, however, that plaintiff had defendant's permission, resting upon the usage of the public, to walk upon its tracks, in availing himself of that privilege he was, at best, a mere licensee. His presence thereon was not expressly invited, and was of no advantage to the defendant. Where a licensee, for his own benefit, is upon the property of another, without objection from the owner, such owner owes no duty to guard such licensee or visitor against the obvious risks and dangers which exist thereon. In other words, the licensee or visitor must take care of himself in using the premises as he finds them,

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and is not entitled to be protected from existing conditions upon the property in their ordinary state. *Sullivan v. Waters*, 14 Ir. C. L. 460; *Cusick v. Adams*, 115 N. Y. 55, 21 N. E. 673, 12 Am. St. Rep. 772; *Reardon v. Thompson*, 149 Mass. 267, 21 N. E. 369; *Redigan v. Railroad Co.*, 155 Mass. 44, 28 N. E. 1133, 14 L. R. A. 276, 31 Am. St. Rep. 520.

The fact set forth in the complaint, that defendant had neglected its statutory duty to fence the right of way, is not available to plaintiff, for it must be presumed that he possessed sufficient intelligence to realize the dangers he incurred. The duty to fence railways is required as a police regulation, to prevent cattle from straying thereon, where their presence might cause injury to the cattle, as well as property in transit, or to the lives of passengers. The presence of foot travelers upon such right of way in no manner affects the operation of trains or prevents incursion of cattle upon the same. An infant of tender years, incapable of exercising intelligence sufficient to avoid going upon the tracks, has been held to be within the protection of the fencing statutes. *Rosse v. Railway Co.*, 68 Minn. 216, 71 N. W. 20, 37 L. R. A. 591, 64 Am. St. Rep. 472, 7 Am. & Eng. R. Cas., N. S., 351; *Nickolson v. Railway Co.*, 80 Minn. 508, 83 N. W. 454; *Marengo v. Railroad Co.* (Minn.) 87 N. W. 1117, and cases cited. The reason, however, for this protection, does not extend to an adult person voluntarily upon the track for his own convenience. The plaintiff might, as a mere licensee, have the right to complain of a willful act by defendant in running him down, or of traps and pitfalls, which would be an allurement to unknown danger; but where he has full notice of conditions which are as open and apparent to him as to the railway company itself, he takes the risk of injury therefrom. Aside from these considerations, we would be required to hold, even if plaintiff were upon the tracks through an express invitation from defendant, that there was no probable or natural relation between the injury he received and the proximate cause of the same, for the possibility of a person walking upon the tracks being pushed thereunder by a straying animal at the moment when a train passes is so remote that the railway company could not be required to anticipate that so unusual and peculiar a combination of circumstances as occasioned this accident would happen. We have found no parallel case to this, and we apprehend that the peculiar incidents set forth in the complaint under review would strike the average mind as extremely outre and singular. Persons upon railroad tracks, even by express invitation, may reasonably be expected to avoid dangers from trains. This is the rule, even at grade crossings, and it would likewise be supposed that they might avoid contact with cattle straying upon the right of way, and either avoid contact therewith or protect themselves from injury by them; hence it must be held that the failure to fence the right of way against the straying animal was not the prox-

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imate cause of plaintiff's injury. *Nelson v. Railway Co.*, 30 Minn. 74, 14 N. W. 360; *Groff v. Mill Co.*, 58 Minn. 333, 59 N. W. 1049; *Johnson v. Howells*, 55 Minn. 61, 56 N. W. 460; *Barrett v. Railway Co.*, 75 Minn. 113, 77 N. W. 540; *Weisel v. Railway Co.*, 79 Minn. 245, 82 N. W. 576.

Our conclusion is that the demurrer was properly sustained, and the order appealed from is affirmed.

ST. LOUIS S. W. RY. CO. v. ABERNATHY *et al.*

(*Court of Civil Appeals of Texas, March 8, 1902.*)

[68 S. W. Rep. 539.]

Failure to Sufficiently Warn Child of Danger of Going on Train.*

A boy 10 years old, and of ordinary intelligence, who is told not to go about a train, and that he may get killed or hurt, but not told as to the manner in which he may get killed or hurt, is not guilty of contributory negligence in going about the train, not being of sufficient discretion to himself appreciate the danger.

Failure to Prevent Children from Riding on Train.†

Employees of a work train, having no right to permit any one to ride on the train, are guilty of negligence in failing to use care to prevent children from riding thereon.

Same—Undiscovered Peril.

Where children are on or about a work train so frequently that a person of ordinary prudence will apprehend danger to them, the fact that employees do not know that a child is on the train in a dangerous position does not relieve the railroad company from liability from an accident resulting therefrom.

Appeal from district court, Navarro county; L. B. Cobb, Judge.

*See generally, *Geist v. Missouri Pac. Ry. Co.* (Neb.), 22 Am. & Eng. R. Cas., N. S., 364, and foot-note, 365; *St. Louis S. W. Ry. Co. v. Shiflet* (Tex.), 20 Am. & Eng. R. Cas., N. S., 38; *Tully v. Philadelphia, W. & B. R. Co.* (Del.), 20 Am. & Eng. R. Cas., N. S., 322; *Trudell v. Grand Trunk Ry. Co.* (Mich.), 20 Am. & Eng. R. Cas., N. S., 316; *Swack v. New York, L. E. & W. R. Co.* (N. Y.), 16 Am. & Eng. R. Cas., N. S., 609; *Weldon v. Philadelphia, W. & B. R. Co.* (Del.), 13 Am. & Eng. R. Cas., N. S., 759; *Smith v. Pittsburgh & W. Ry. Co.* (C. C.), 13 Am. & Eng. R. Cas., N. S., 716; *Krenzer v. Pittsburgh, C., C. & St. L. Ry. Co.* (Ind.), 12 Am. & Eng. R. Cas., N. S., 343; *Van Natta v. People's Street Railway, etc.*, Co. (Mo.), 3 Am. & Eng. R. Cas., N. S., 433; *Adams v. Southern Ry. Co.* (C. C. A.), 9 Am. & Eng. R. Cas., N. S., 747; *Mitchell v. Tacoma R. & M. Co.* (Wash.), 1 Am. & Eng. R. Cas., N. S., 264; *Riley v. Salt Lake R. T. Co.* (Utah), 1 Am. & Eng. R. Cas., N. S., 264; *Thomson v. Buffalo R. Co.* (N. Y.), 1 Am. & Eng. R. Cas., N. S., 264; *Johnson v. Reading City Pass. R. Co.* (Pa.), 1 Am. & Eng. R. Cas., N. S., 264; *Hedin v. City & Suburban R. Co.* (Ore.), 1 Am. & Eng. R. Cas., N. S., 265; *Fritz v. Detroit City St. R. Co.* (Mich.), 1 Am. & Eng. R. Cas., N. S., 265; *Cronan v. Crescent City R. Co.* (La.), 6 Am. & Eng. R. Cas., N. S., 225; *West Chicago St. Ry. Co. v. Scanlan* (Ill.), 9 Am. & Eng. R. Cas., N. S., 482; *Gunn v. Ohio River R. Co.* (W. Va.), 6 Am. & Eng. R. Cas., N. S., 275.

†See *Tully v. Philadelphia W. & B. R. Co.* (Del.), 20 Am. & Eng. R. Cas., N. S., 322, and note, 327; *Flores v. Atchison, etc.*, R. Co. (Tex.), 1 R. R. R. 709, 24 Am. & Eng. R. Cas., N. S., 709; *Levin v. Second Ave. Traction Co.* (Pa.), 23 Am. & Eng. R. Cas., N. S., 318; *Illinois Cent. R. Co. v. Wilson* (Ky.), 21 Am. & Eng. R. Cas., N. S., 644.

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Action by G. W. Abernathy and another against the St. Louis Southwestern Railway Company for the wrongful killing of plaintiffs' child. From a judgment for plaintiffs, the defendant appeals. Affirmed.

Frost, Neblett & Blanding and E. B. Perkins, for appellant.
Simkins & Mays, for appellees.

RAINEY, C. J. Abernathy and wife sued appellant for damages caused to them by the death of their 10 year old son, alleged to have resulted from the negligence of the defendant's employees in the operation of its work train. Appellant pleaded a general denial and contributory negligence on the part of both plaintiffs and their son.

Conclusions of Fact.

Appellees' child, a boy 10 years of age, was run over and killed by appellant's work train on the 17th day of November, 1899. The railroad of appellant runs through the corporate limits of Corsicana, and did at the time of the death of the deceased, Howard Abernathy. At the time of the injury appellant was using a steam plow on its roadbed in ditching and leveling up the roadbed. There were some three or four cars besides the engine in the train. From one of the cars a large beam extended to carry the plow and scraper, and to the end of this beam the plow and scraper were attached. The plow could be used or the scraper could be used, and the beam revolved so it operated on either side of the train. They also had an air engine on the train, and several men were engaged on this construction train. The engine pulled or pushed the train to which the plow and scraper were attached. This construction train began work near the residence of appellees. Appellees' lot, on which they resided with their deceased son, Howard Abernathy, ran up to the right of way of appellant. Appellees' house in which they resided was 40 feet from the right of way, and it was 50 feet from the line of their lot to the center of the railroad track. There was no fence which separated the lot of appellees from the right of way. The children could walk right off the yard on the right of way. Appellees had been living on the place from March to the 17th of November, when the injury occurred. The work began at one corner of appellees' yard, and continued about eight days. The machinery and apparatus was something new in that town, and attracted many small boys and grown people to see it operate. From the time work was commenced till appellees' son was killed, numbers of small boys from 5 to 8 years of age were attracted by the train and machinery, especially before and after school hours, and on Saturdays all day, ranging in numbers from 10 to 50. The boys were permitted by the employees to ride upon and be in and around said train, in the caboose, on the steps, on the flat cars, around the air machinery, in the cab of the engine, on the cow catcher, along

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and upon the right of way, and in front of the plow and behind it.

At the time of the accident the train was moving slowly west, pulled by an engine, which was backing. There were two pilots on the engine, one in front and the other in the rear of the tender. The pilot on the rear of the tender, as the train was then moving, was obscured from the view of the engineer and fireman by the tender, and from the balance of the crew by both engine and tender. Just before the accident the boy was seen on the pilot attached to the tender by Miss Maggie Lewis, but the employees all testify that they did not see him or know that he was there. He was seen about 25 feet from the train by an employee just before the train started, and there is testimony showing that for him to have reached the pilot he would have had to pass near the train for its full length and in view of some of the employees. When the engineer first noticed his peril he was lying across the rail just in front of the back wheels of the tender, and then all possible effort was made to avert the injury.

The employees had no right to permit or invite any one to ride on that train. The boy was of the average intelligence of boys of his age. He had been frequently told not to go about the train, that he might get hurt or killed, but just in what way he might get hurt or killed was not told him, and he was not of sufficient intelligence and discretion to appreciate the danger that he incurred, and therefore not chargeable with contributory negligence. The employees were negligent in not using proper care to prevent the deceased and other children from being on or about the train. The appellees were not guilty of contributory negligence.

Conclusions of Law.

1. Under the facts the trial court was warranted in submitting to the jury for their determination the question whether or not the trainmen had such knowledge of boys frequently being on and about said train "as ought reasonably to induce in their minds the expectation or apprehension that boys might be found on or about the train at such time as when plaintiffs' son was injured"; and, if so, then it was their duty to use such care as a person of ordinary prudence would have used under similar circumstances in ascertaining, or trying to ascertain, whether or not boys were then on or about the train and in situations of danger, etc. The principle of discovered danger announced in the Bredow Case, 90 Tex. 26, 36 S. W. 410, and like cases, is not applicable here. If, as a matter of fact, boys of immature years and discretion were on and about the train so frequently that persons of ordinary prudence would have apprehended danger to them, although the employees at the time did not know deceased was on the train, then it devolved upon the employees to use ordinary care to ascertain whether or not some were on the

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train and prevent injury. This was an issue under the evidence, and we think it was properly submitted to the jury.

2. The question of the boy's capacity and intelligence to comprehend and appreciate the danger was raised by the evidence. This issue was properly submitted to the jury, and the testimony warranted the verdict.

3. The court properly charged on contributory negligence both as to the boy and the parents. The evidence on this issue is sufficient to support the verdict.

4. While the testimony was conflicting on the controverted issues, yet there is sufficient evidence to support the verdict and judgment.

We find no material error in the record, and the judgment is affirmed. Affirmed.

EDGINGTON v. BURLINGTON, C. R. & N. RY. CO.

(*Supreme Court of Iowa, April 12, 1902.*)

[90 N. W. Rep. 95.]

Children—Leaving Turntable Insecurely Fastened.*

A railroad company maintaining a turntable on an unfenced lot, near a public alley, and which was from 80 to 300 feet from the street, is liable for injuries received by a seven year old child while playing thereon, caused by the company's failure to use reasonable care to so guard and fasten the turntable as to prevent injuries to children tempted to play on it.

Same—Same.

Where, in an action against a railroad company for injuries received by a child while playing on defendant's turntable, it was shown that the turntable was unfastened by one of the children with plaintiff, the question of the sufficiency of the fastening used was one of fact for the jury.

Same—Apprehension of Danger.

A child seven years and eight months old cannot be considered, as a matter of law, of sufficient age and intelligence to appreciate the danger to which she exposed herself in playing on a railroad turntable, and such question was properly left to the jury in determining the question of contributory negligence.

Same—Turntable Accident—Defenses.

The fact that injuries received by a child while playing on a railroad turntable were immediately caused by the child's playmates in unfastening and operating the turntable, does not relieve the company from liability, the gist of the action being the keeping of a dangerous machine in a place where children might reasonably be expected to resort and to play thereon.

Appeal from district court, Muscatine county; P. B. Wolfe, Judge.

Action at law for the recovery of damages on account of

*See Alabama, G. S. R. Co. v. Crocker (Ala.), 1 R. R. R. 800, and foot-note, 24 Am. & Eng. R. Cas., N. S., 800, and foot-note; East Tennessee & W. N. C. R. Co. v. Cargille (Tenn.), 19 Am. & Eng. R. Cas., N. S., 282; Delaware, I. & W. R. Co. v. Reich (N. J.), 11 Am. & Eng. R. Cas., N. S., 313; Turess v. New York, S. & W. R. Co. (N. J.), 11 Am. & Eng. R. Cas., N. S., 297.

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personal injury. Verdict and judgment for plaintiff, and defendant appeals. Affirmed.

Carskaddan & Burk and S. K. Tracy, for appellant.

C. A. W. Kent and Clymer A. Coldren, for appellee.

WEAVER, J. The defendant company owns and operates a line of railroad entering the city of Muscatine, Iowa. In connection with its station and yards at this place, it maintains and uses a turntable, a well-known machine or device for turning locomotives. This table turns about a central point or axis, and, when unfastened, is easily revolved by hand power applied to bars or levers. At and prior to the time of the accident upon which this action is based the table, when not in use, was ordinarily fastened by a pin, bolt, or latch of some kind, the exact description of which is not disclosed by the record before us. This machine stood upon an unfenced lot, owned by the defendant, near the line of a public alley, and at a distance from the street variously estimated at from 80 to 300 feet. Children of the neighborhood were to some considerable degree in the habit of passing through the alley, and at times loitered and played upon and about the turntable. This practice does not seem to have been with the express knowledge or consent of the defendant, and upon at least one occasion its employees drove the children away. There was a box factory not far distant, to which also children resorted by way of the alley, and near the turntable, to gather scraps of wood for fuel. On the 16th day of June, 1899, the plaintiff, then a child of seven years and eight months, living in that neighborhood, started from her home, with several little girls somewhat older, intending to go to the box factory for wood. Passing down the alley, they stopped to play upon the turntable. One of them removed the bolt or catch which fastened the machine, and soon afterward two small boys arrived, and began to revolve it, while the other children rode upon the platform or frame. Under these circumstances the plaintiff in some manner stepped or fell into the space between the outer edge of the table and the wall of the pit in which it revolved, receiving severe, painful, and permanent injuries. Negligence is charged against the defendant upon the theory or claim that the turntable was a dangerous machine, and of such nature and construction as to be specially attractive to children; and that, having placed it upon an open lot near a public way, where they might reasonably be expected to pass or gather to play, it was defendant's duty to use reasonable care to so guard or fasten said machine as to prevent injury to young and inexperienced children who might be tempted to play upon it. Defendant denies that it was charged with any such duty, and denies that it failed to exercise all reasonable and proper care in the premises. It further insists that the children, in playing upon the turntable, were trespassers, and the law imposed upon the

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defendant no duty to exercise any care for their safety except to refrain from willful or wanton injury to them after discovering them upon its property. It also claims that in entering upon the company's property without permission and in playing upon the turntable the plaintiff was guilty of contributory negligence, and therefore is not entitled to recover damages.

The question of the liability of a railroad company for injuries to children playing upon its turntables is one of interest and importance. During the last 30 years it has called for the consideration of many courts, both state and federal, throughout the United States, and has developed two opposing and irreconcilable lines of decisions, to which more extended reference is hereinafter made. Two cases of the kind have heretofore been presented to this court (*Carson v. Railroad Co.*, 96 Iowa, 593, 65 N. W. 831, and *Merryman v. Railroad Co.*, 85 Iowa, 634, 52 N. W. 545); but in each instance the party injured had reached an age and maturity to be properly chargeable with contributory negligence, and a recovery was denied, without considering whether the company may be held liable under other circumstances. In this case, however, the child is of such tender years that we cannot say, as a matter of law, she was guilty of negligence contributing to her own injury, and we are thus called upon for the first time to assume a position upon the controverted question. In view of its importance, and the wide divergence in the views of eminent courts and lawyers, we have endeavored to give the subject that careful attention which it deserves, and, in our judgment, the conclusion at which we have arrived has the support of the greater weight of authority, and is most nearly in accord with the principles which underlie and pervade the laws of civilized society.

That the ordinary turntable is a very dangerous machine for children to play with, and possesses strong attractions to their sportive instincts, is manifest from the numerous cases of injuries thus received which come before the courts for adjudication. These cases are all strongly alike in their circumstances, and, generally speaking, the story of one is the story of all,—an open lot; a turntable insecurely fastened, or wholly unfastened; children gathering upon it, some riding while others work the levers; a misstep, a fall, and a little body is maimed, or a young life is extinguished. It is useless to moralize upon the instinct for play which controls the action of a child, or argue for its control by parental authority and guidance. It exists, ingrained in the child's being, and we must deal with it as we find it. Nothing seems to appeal to it more strongly than some device in the form of a merry-go-round; and the temptation to ride it, if the opportunity offers, is practically irresistible, until approaching maturity brings some reasonable measure of judgment and discretion. Accepting these facts, we come to the vital question raised by the issue now before us: Is a landowner who exposes dan-

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gerous but attractive machinery upon an open lot in close proximity to a public way or other place where he may reasonably expect young children will pass or resort for play under any duty to fasten or guard such machinery, or to exercise care to provide against children interfering with it to their injury? The first instance in which this question, as applicable to turntables, was presented for judicial consideration, appears to have been in the federal courts. See *Stout v. Railroad Co.*, 2 Dill. 294, Fed. Cas. No. 13,504, and the same case on appeal to the supreme court of the United States, 17 Wall. 657, 21 L. Ed. 745. In some of the reviews of this case it is assumed that this decision announces a new principle, and marks the abandonment of rules which prior thereto defined the extent of a man's dominion over his own property. This, as we shall try to demonstrate, is an error. It is true, the facts involved in the *Stout Case* were new to the courts, but the principle which controlled its decision has its root and life in the fundamental doctrines of the common law. The principle remains invariable, but its application must, of necessity, be extended and adjusted to the varying circumstances of business and of life. With the steady advance in industrial arts and sciences, the rapid expansion and diversification of business interests, and the increasing density of population forcing men into closer contact, and compelling them, in gradually increasing measure, to yield something of individual right for the general good, there arise from day to day for settlement by the courts disputes which are without precedent in their facts and circumstances. But their settlement requires no mere judicial experimentation, for somewhere in the treasure house of the law there is to be found the principle upon which the rights of parties may be justly determined. The basic principles of our jurisprudence have their birth in the enlightened conscience and the ineradicable distinction between right and wrong, and are unchangeable; but, as we have already noted, their use and application extend and expand to meet the demands of changing conditions.

The law thus presents the seeming paradox of a structure which is at once a finished product and a ceaseless evolution, developing new strength with each new demand upon its energies. The exercise of the sovereign power of eminent domain by private citizens for private profit; the extension of railroads to every city and every hamlet; the development of electricity as a source of heat, power, and light; the discovery and development of oil, gas, and other riches concealed beneath the earth's surface,—are but samples of a multitude of new and vastly important interests with which the courts have had to deal as matters of first impression within the memory of living men, and in each instance the seeming chaos of conflicting rights and theories has been reduced to order, and adjusted according to old-time rules wisely con-

strued in the light of the conditions calling for their application. Not that every case has been correctly decided, or that every judicial opinion with which the books are filled is sound; but the great body of the law, as pronounced by the courts, is alive with the spirit of justice, and its tendency is uniformly and irresistibly toward the right. The rules which assure to a person dominion over his own property and deny protection to the trespasser in his wrongdoing are of the most ancient origin, and their justice is undisputed; but they are not entirely without limitation or restriction. Ordinarily, the owner of property, real or personal, may use or deal with it as he likes; but this right can never be divorced from the responsibility suggested by the maxim, "*Sic utere tuo alienum non lædas.*" In other words, no man is at liberty, under the law, to so use his own as to endanger the person or property of his neighbor. This is a necessary result of social organization, and an indispensable requisite of social order. So long as one lives in comparative isolation, this rule rests lightly upon him, and he need scarcely feel its restraint; but, as population multiplies, and he is brought into proximity with his kind, he finds the range in which he may exercise absolute control over his own is constantly being narrowed. As a lone dweller upon the prairie, he may indulge in target shooting, may store tons of dynamite in his dwelling, may erect a slaughter house upon his premises, may leave undrained his malaria-breeding swamps, may leave unguarded pits and traps in his open fields; for these things affect none but himself. When neighbors arrive, or his home becomes one of the many in a city or town, he must adjust himself to the changed conditions, and at all times have due regards for the effect which his conduct in the use of his property may have upon others. Railroad companies are comparatively new entities or agencies in the world of business, but in the law they are persons, and hold and manage their property subject to the same limitations and obligations which characterize ownership in the hands of the individual citizen. But we are told that, conceding all this, the law makes no provision for the protection of a trespasser, and that he who enters unbidden upon the land of another assumes all risk of pitfalls, traps, and other sources of danger which may be there encountered, and that he who officiously or needlessly intermeddles with property of any kind to which he has no legal right has no cause of complaint if thereby injured. This is a general rule of unquestioned authority and justice, but, as we have said, like other rules, is not without limitation. If the owner of a lot build a fence around it, or if he cultivate or reside upon it, or beautify it with lawn and ornamental shrubbery, he gives notice to the world of his desire for its exclusive enjoyment, and he who disregards this notice takes upon himself the risk to which his trespass may expose him. If, however, the owner take away the fence, throwing his lot open in unused and unimproved

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condition, leaving the public to swarm over and across it and children to play upon it, he cannot be held innocent of wrong if by his act this semipublic use of his property is made hazardous to human life, and he fails to take reasonable precaution against the danger thus occasioned. Nor is such responsibility confined entirely to vacant and unused property. Assume, for instance, that a manufacturer of merry-go-rounds desires to erect one, not for public use, but to test the machinery, or to advertise his business to the people passing by, and he chooses for that purpose an open lot, owned by him, bordering immediately upon a much-used street, or immediately adjoining the unfenced grounds of a primary school building. He knows that the sight of this device with its gaudy trappings will be absolutely certain to attract to it a swarm of children, who will just as certainly play with it; and, if he leave it thus exposed and unfastened, and thereby some inexperienced and immature child is caught and crushed in the machinery, it would be a shocking distortion of sound principle to hold that no liability is here incurred. Nor has the law, in its wonderful adaptation to the prosecution of order and promotion of right conduct, waited for the advent of turntables before settling the rule which governs this case. The rule did not have its origin in the Stout Case, nor is its application to turntable accidents an exceptional proposition by which railroad companies are singled out for a liability which does not, under similar circumstances, attach to every property owner. For many years the courts have been gradually approaching unanimity upon the idea that the law which withdraws its protection from the trespasser applies to the unheeding infant with less harshness than to the adult, and under some circumstances does not apply in any degree. So, too, the once prevalent doctrine, based upon mistaken precedent rather than principle, which held the unconscious child by imputation or substitution guilty of the negligence of its parent, has been relegated in most jurisdictions to its proper place among the barbarisms from which the law has happily been redeemed.

Let us now turn to some of the leading authorities bearing upon this discussion. No case directly bearing upon the duty which a property owner may owe to an infant (even when such child is technically a trespasser) has been more often quoted than *Lynch v. Nurdin*, 1 Q. B. 29. The facts giving rise to this case were as follows: The defendant, being the owner of a horse and cart, left them standing unhitched in the street while he entered a shop. During his temporary absence a little child climbed into the cart, while another undertook to lead the animal, with the result that an accident occurred, and the child upon the cart was injured. The court held the defendant liable, Lord Denman pronouncing the judgment. It is there said: "Suppose * * * the plaintiff merely indulged the natural instinct of a child in amusing

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himself with an empty cart and deserted horse. * * * The defendant cannot be permitted to avail himself of that fact. His most blamable carelessness * * * having tempted the child, he cannot blame the child for yielding to that temptation." Speaking also of the claim that the plaintiff could not recover because of contributory negligence, Lord Denman says: "The child, acting without prudence or thought, has, however, shown these qualities in as great a degree as he could be expected to possess them." That this decision was not at once recognized by all English courts is shown by the later case of *Mangan v. Atterton*, L. R. 1 Exch. 239, in which a child was denied damages for injuries received while meddling with a machine left unguarded upon the street. The reason made use of to justify this result has been the subject of severe criticism, and is now, in effect, overruled by *Clark v. Chambers*, 3 Q. B. Div. 327, where it is said: "It appears to us that a man who leaves in a public place, along which persons, and among them children, have to pass, a dangerous machine, which may be fatal to one who touches it, is not only guilty of negligence, but negligence of a very reprehensible character." Of *Mangan v. Atterton* it is said by an able law writer, "Nothing worse than this as a specimen of judicial reasoning can be found in the reports." *Beach*, *Contrib. Neg.* 139; and a like opinion is expressed in *Thomp. Neg.* 1045. In *Abbott v. Macfie*, 2 Hurl. & C. 744, we have a somewhat peculiar case. A property owner had set up a shutter on his own premises, but without secure fastening, near where children were wont to play. A child tampered with the bolt, and the shutter, falling, injured both this child and another. The latter was permitted to recover damages, the court saying that, while the fastening was sufficient for ordinary purposes, yet, "having regard to the risks to which, in the locality where it was, it was exposed," the jury was authorized to find the owner negligent. The other child was not allowed to recover, because of its direct interference with the shutter,—a nice distinction, which, assuming both children to be too young to exercise care or prudence, few courts of this day would be willing to follow. The relaxation of the strict rule of the law in favor of children is again to be noted in *Jewson v. Gatti*, 2 Times Law R. 441. Here a little girl, loitering by the way, was looking into a cellar, where persons were engaged in scene painting. While thus engaged, a railing against which she leaned broke, and precipitated her into the area. In discussing the case the court uses the following language: "There was painting going on in the cellar, and it must have been known that painting would attract children; and then a bar was put up, ostensibly as a protection, against which children would naturally lean while looking down into the cellar. This was almost an invitation—certainly an inducement—to the children to lean against the bar." In *Harrold v. Watney*, 78 Law T. (N. S.) 788, decided by the

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English court of appeals in 1898, the doctrine of *Lynch v. Nurdin* is expressly approved; the court saying of it, "That case has never been overruled or questioned." The authority is there cited in support of the right of action for damages in a child who was injured by the falling of a rotten fence upon which it climbed by the road side, and, among other things, the court says: "When considering whether the nuisance was the cause of the accident, it is a good test to see whether what the child did was something which ought to have been present to the mind of the defendant as a possible and probable result of leaving the fence in a dangerous condition." But, whatever may be said as to the prevailing rule in England, the doctrine of *Lynch v. Nurdin* has been followed with very little dissent in this country. To this point we have the authority of Mr. Beach (see Beach, *Contrib. Neg.* 141) for the statement that the supreme judicial court of Massachusetts "is the only court in this country which has not affirmed *Lynch v. Nurdin*"; and our own investigation tends to confirm the assertion, although in some states the principle involved has been obscured by inconsistent decisions. *Birge v. Gardiner*, 19 Conn. 507, 50 Am. Dec. 261; *Brennan v. Railroad Co.*, 45 Conn. 284, 29 Am. Rep. 679; *Car Co. v. Cooper*, 60 Ark. 541, 31 S. W. 154, 46 Am. St. Rep. 216; *Harriman v. Railroad Co.*, 45 Ohio St. 507, 12 N. E. 451, 4 Am. St. Rep. 507, 32 Am. & Eng. R. Cas. 37; *Hydraulic Works v. Orr*, 83 Pa. 322; *Schilling v. Abernathy*, 112 Pa. 437, 3 Atl. 792, 56 Am. Rep. 320; *Kinchlow v. Elevator Co.*, 57 Kan. 374, 46 Pac. 703; *Price v. Water Co.*, 58 Kan. 551, 50 Pac. 450, 62 Am. St. Rep. 625; *Schmidt v. Distilling Co.*, 90 Mo. 284, 1 S. W. 865, 2 S. W. 417, 59 Am. Rep. 16; *City of Pekin v. McMahon*, 154 Ill. 141, 39 N. E. 484, 27 L. R. A. 206, 45 Am. St. Rep. 114; *Siddal v. Jansen*, 168 Ill. 43, 48 N. E. 191, 39 L. R. A. 112; *Coppner v. Pennsylvania Co.*, 12 Bradw. 600; *Young v. Harvey*, 16 Ind. 314; *Railroad Co. v. Pitzer*, 109 Ind. 183, 10 N. E. 70, 58 Am. Rep. 387; *Bramson's Adm'r v. Labort*, 81 Ky. 638, 50 Am. Rep. 193; *Railroad Co. v. Gastineau's Adm'r*, 83 Ky. 119; *Passameneck's Adm'r v. Railroad Co.*, 98 Ky. 205, 32 S. W. 620; *Mackey v. City of Vicksburg*, 64 Miss. 178, 2 South. 178; *Power v. Harlow*, 53 Mich. 514, 19 N. W. 257, 51 Am. Rep. 154; *Id.*, 57 Mich. 107, 23 N. W. 606; *Tully v. Railroad Co. (Del. Sup.)* 47 Atl. 1019, 82 Am. St. Rep. 425; *Westerfield v. Lewis*, 43 La. Ann. 63, 9 South. 52; *Railroad Co. v. McDonald*, 152 U. S. 262, 14 Sup. Ct. 619, 38 L. Ed. 434; *Railroad Co. v. Snyder*, 18 Ohio St. 399, 98 Am. Dec. 175; *Gunderson v. Elevator Co.*, 47 Minn. 161, 49 N. W. 604; *Biggs v. Barb Wire Co. (Kan. Sup.)* 56 Pac. 4, 44 L. R. A. 655; *Woods v. Trinity Parish*, 21 D. C. 540; *Hutson v. King*, 95 Ga. 271, 22 S. E. 615; *Barnes v. Ward*, 9 C. B. 420, 2 Car. & K. 661; *Lowe v. Salt Lake City (Utah)* 44 Pac. 1050, 57 Am. St. Rep. 708; *Morrow v. Sweeney (Ind. App.)* 38 N. E. 187; *Marble v. Ross*, 124 Mass. 44; *Daley v. Railroad Co.*, 26 Conn.

591, 68 Am. Dec. 413; *Kopplekom v. Cement Pipe Co.* (Colo. App.) 64 Pac. 1047; *Ricketts v. Village of Markdale*, 31 Ont. 610.

Some critics have sought to weaken the force of *Lynch v. Nurdin*, and to distinguish it from the line of cases to which we have referred, by saying that in the former the child was in the public street, and therefore the rule as to trespassers did not apply to it. The suggestion is fallacious and misleading. The cart was also on the public street. It was rightfully there; and the child, when he climbed into it without leave, was as much a trespasser in the eye of the law as it was possible that a child of its years could be,—as much, indeed, as if he had wandered across the boundary line of defendant's land. The defendant was held liable not because the plaintiff was not a trespasser, nor because the horse and cart were not rightfully upon the street, but because he knew, or, as a reasonable man, ought to have known, that in thus leaving his property exposed he was offering a dangerous temptation to the thoughtlessness of childhood, and used no care to prevent injury therefrom. None of the many precedents we have above cited are turntable cases and in nearly every instance the injured person was a technical trespasser. They unite, however, in giving vigorous expression to the rule that whether the attractive character of the danger and its unguarded condition are to be construed as an implied invitation to the child to enter upon the property of another, or whether such use of one's own property is a violation of the fundamental doctrine requiring the owner to have a care that his neighbor suffers no harm at his hands, no man, even upon his own premises, may rightfully expose to the approach of young children a temptation which is likely to attract them into danger, without using care to avoid their injury. It by no means follows that a property owner is an insurer of the safety of children who come upon his premises. His obligation is simply that which attaches to every member of society when he undertakes to exercise a personal right in a manner which may affect the welfare or safety of another member,—the obligation of reasonable care. Discharging that obligation, he has done his duty, and assumes no liability, whatever happens; but, failing therein, he is justly responsible for the effects of his negligence. In *Birge v. Gardiner*, supra,—a Connecticut case,—the defendant placed a heavy gate upon his own land on or near the border of a private lane, where children were wont to pass. A child took hold of the gate, and it fell upon him. It was held a proper case for the jury to say "whether such child ought to be chargeable with fault, so as to defeat its recovery, or whether the acts done by him were not the result of childish instinct, which the defendant might easily have foreseen." In *Hydraulic Works v. Orr*,—a Pennsylvania case,—the defendant was the proprietor of a factory within the limits of a city. For its private use it

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maintained an alley, closed with gates, upon which the words "Private" and "No Admittance" were conspicuously posted. In the alley was a heavy platform, so hinged as to be lifted and lowered for some purpose in connection with the business. The gate was sometimes left open, and on one such occasion several small children strayed into the alley, and were playing under the upraised platform, when it fell, crushing them with its weight. The court says: "It is true that, where no duty is owed, no liability arises; * * * but it has often been said duties arise out of circumstances. Hence where the owner has reason to apprehend danger, owing to the situation of his property and its openness to accident, the rule will vary. * * * Can it be righteously said that the owner of such a dangerous trap, held by no fastening, so often left open and exposed to the entry of persons on business, by accident or from curiosity, owes no duty to those who will probably be there? The common feeling of mankind, as well as the maxim, 'Sic utere tuo ut alienum non lædas,' say this cannot be true; that this spot was not so private or secluded as that a man may keep dangerous pits and deadfalls there without a breach of duty to society. On the contrary, the mind, impelled by the instincts of the heart, sees at once that in such a place, and under these circumstances, he had good reason to expect that some day or other some one—probably a thoughtless boy in the buoyancy of play—would be led there, and injury would follow; especially, too, when prompted by knowledge that a fastening was needed." In a later case (*Gramlich v. Woest*, 86 Pa. 74, 27 Am. Rep. 684), while holding the circumstances insufficient to entitle plaintiff to recover, the court say of *Hydraulic Works v. Orr*: "No case was ever more justly decided. * * * The children were trespassers certainly; but then they were children, and the defendants were bound to have regard to the reckless and thoughtless tastes and traits of childhood. The Kansas court (*Price v. Water Co.*, *supra*), applying the rule to the owner of a reservoir which was so constructed that a person falling into it or entering it could not easily escape, by reason of which a young boy was drowned, makes use of this language: "Without doubt the common law exempts the owner of private grounds from obligation to keep them in safe condition for the benefit of trespassers, idlers, and others who go upon them not by invitation, express or implied, but for pleasure, or through curiosity. The common law, however, does not permit the owner of private grounds to keep thereon allurements to the natural instincts of human or animal kind without taking reasonable precautions for the safety of such as may thereby be attracted to his premises. To maintain upon one's own property enticements to the ignorant or unwary is tantamount to an invitation to visit and inspect and enjoy, and in such cases the obligation to endeavor to protect from the dangers of the seductive instrument or place follows as

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justly as though the invitation had been express." The same principle was approved in a somewhat similar case by the supreme court of Illinois. *City of Pekin v. McMahon*, supra. The question engaged the attention of the Kentucky court in a case (*Bramson's Adm'r v. Labrot*, supra) where the defendant piled lumber upon his own land, where children were in the habit of playing. One of the piles, being negligently built, fell, killing plaintiff's young son. The rule is there expressed as follows: "As a general rule, the owner of land may retain to himself the sole and exclusive occupation of it; but, as property in lands depends upon municipal law for its recognition and protection, the individual use and enjoyment of it are subject to the conditions and restraints imposed by the public good and reasonable and humane regard for the welfare and rights of others. Hence, according to the maxim, 'Sic utere,' etc., a party may be made liable for the negligent use of his property whereby the person or property of another has been injured. It has been held that a party is guilty of negligence in leaving anything in a place where he knows it to be extremely probable that some other person will unlawfully set it in motion to the injury of a third person. * * * It is a reasonable and necessary rule that a higher degree of care should be exercised toward a child incapable of using discretion commensurate with the perils of his situation than one of mature age and capacity; hence conduct which, toward the general public, might be up to the standard of care, may be gross or willful negligence when considered in reference to children of tender age and immature experience. While, therefore, the owner of land is not bound to provide against remote and improbable contingencies resulting in injuries to children trespassing thereon, there is a class of cases which hold owners liable to children, although trespassing at the time, when, from the peculiar nature and exposed position of the dangerous defect or agent, the owner should reasonably anticipate such an injury to flow therefrom as actually happened." In a later case (*Railroad Co. v. Gastineau's Adm'r*, supra) the same court says: "Undoubtedly children of tender years should not be treated strictly as trespassers when, guided by childish instincts, they stray upon the tracks or into the yard of a railroad. * * * One may incur liability for an injury to a child of tender years by leaving machinery where it is accessible to him, although there would be no liability to an adult, or child of years of discretion, under like circumstances. * * * A child without discretion, although a trespasser, occupies a legal attitude to the company similar to that of an adult when not a trespasser. * * * Of course, we do not mean to say that a railroad company is an insurer against accidents to children for accidents to them which cannot well be foreseen; but, if they are of such tender years as to be devoid of discretion, then justice and the dictates of humanity require the exercise of reasona-

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ble care to prevent their being placed in danger, even though they may be technically trespassers." The Mississippi court, in the case of the death of a child by falling into an excavation, says (*Mackey v. City of Vicksburg, supra*): "Whether what was done was reasonably calculated to entice a child, following its instincts of curiosity or love of liberty, to escape from the yard, and enter upon the dangerous path, is determinable as a question of fact, and not of law. If the defendant, by the exercise of reasonable forethought, could have anticipated the probability of the child's action, it should have guarded against the danger. * * * If it failed so to do, it failed in a duty which rested upon it, even though the child was a trespasser in going upon the premises." In a Tennessee case (*Whirley v. Whiteman, 1 Head, 614*) the defendant was the owner of a mill standing upon his own premises and 20 feet away from the street. Upon the outer wall of the mill, near the ground, was some uncovered gearing. Children sometimes played in the space between the mill and street, and a child of three years, being attracted to the place, was caught in the wheels. Judgment for defendant in the trial court was reversed upon appeal, the court saying: "We are of the opinion that the verdict is against the evidence. According to the maxim of the common law, 'Sic utere,' etc., every person is held responsible in law for the consequences of his own negligence." The Indiana court speaks of the same doctrine (*Railroad Co. v. Pitzer, supra*) as follows: "This is a reasonable and humane rule, and any other would be a reproach to the law. But the law merits no such reproach, for throughout all its branches, whether tort or contract, there runs, like the marking red cord of the British navy, a line distinguishing children of too few years to have judgment or discretion from those old enough to exercise those faculties. This is a doctrine taught by every man's experience and sanctioned by law. A departure from it would shock every one's sense of justice and humanity." In the same court, *Penso v. McCormick, 25 N. E. 156, 9 L. R. A. 313, 21 Am. St. Rep. 211*. The defendants deposited ashes containing fire in their own mill yard, where children were in the habit of playing, and were held in damages to a young boy who was thereby burned. It is there said: "It is a well-recognized doctrine that persons are required to use greater care in dealing with children of tender years than with older persons, who have reached the age of discretion, and that greater care is required to avoid injury to them even when they are trespassers." This doctrine was also approved by the Michigan court (*Power v. Harlow, supra*) in an opinion written by Judge Cooley, the magnitude of whose fame and the weight of whose authority are unexcelled in modern jurisprudence. The defendant in that case had left a box of dynamite cartridges under an open shed on his own land, but near a path along which his tenant's young son had occasion to pass.

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The boy's attention being attracted to the box, he went to it, removed the cover, took out a cartridge, and was injured by its explosion. The court says: "Children, wherever they go, must be expected to act upon childish instincts and impulses; and others who are charged with a duty of care and caution toward them must calculate upon this, and take precautions accordingly. If they leave exposed to the observation of children anything which would be tempting to them, and which they, in their immature judgment, might naturally suppose they are at liberty to handle or play with, they should expect that liberty to be taken." On a second appeal of the same case Judge Cooley again pronouncing the opinion, the court approved the following instruction to the jury: "If, therefore, you find that the box containing these explosives was placed under the shed in question, and was placed there in such a manner that children who had the right to pass to and fro near it might, in following out their childish instincts, go to it, and get at its contents, I charge you it would be an act of negligence for which he [defendant] would be liable." In a late case in the United States supreme court (*Railroad Co. v. McDonald*, supra) this doctrine is again enforced against the owner of a coal mine, which deposited its slack in an open space near a path upon its own land, where it was permitted to burn, and a boy was injured by falling into it. In holding the defendant liable, the court quotes approvingly the language of Lord Denman: "If I am guilty of leaving anything dangerous in a place where I know it to be extremely probable that some other person will wrongfully set it in motion to the injury of a third, and if that injury be so brought about, I presume that the sufferer might have redress against both or either of the two, but unquestionably against the first. * * * In the present case there was no express invitation to the plaintiff to come upon the premises of the railroad company for any purpose, but, if the company left its slack pit without a fence or anything to give warning of its really dangerous condition, and knew, or had reason to know, that it was in a place where it would attract the interest or curiosity of passers, can the plaintiff, a boy of tender years, be regarded a mere trespasser for whose safety and protection, while on the premises, against the unseen danger referred to, the railroad company was under no obligation to make provision?" This question the court answered in the negative, and affirmed the judgment against the defendant.

This somewhat extensive citation of authorities, though but part of the many bearing in the same direction, we have thought necessary in view of the claim persistently put forth by those who reject the authority of the *Stout Case* that it is not in harmony with the general principles of the law, and holds railroad companies to a stricter measure of liability than is applied to natural persons. Taking up now the turntable cases proper, we find the pioneer case just referred to was

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tried at circuit before that distinguished jurist Judge Dillon. 2 Dill. 294, Fed. Cas. No. 13,504. From his charge to the jury, which was affirmed on appeal, we quote: "Now, the ground of complaint is that the turntable, as it was constructed, was of a dangerous nature or character when unlocked or unguarded; and that, being, as alleged, in a place much resorted to by the public, and where children were wont to go and play, it was the duty of the defendant to keep the same securely locked or fastened, so as to prevent it from being turned or played with by children, or to keep the same guarded so as to prevent injuries such as befell the plaintiff. The basis of the action, therefore, is that that defendant owed plaintiff a duty of this kind, and that defendant, in failing to discharge this duty, was guilty of negligence. * * * The machine in question is part of defendant's road, and was lawfully constructed where it was. If the company did not know, and had no good reason to suppose, that children would resort to the turntable to play, or did not know, or had no good reason to suppose, that they would be likely to get injured thereby, then you can find no verdict against it. * * * But if defendant did know, or had good reason to believe, under the circumstances of the case, the children of the place would resort to the turntable to play, and that, if they did, they would or might be injured, then if they took no means to keep the children away, and no means to prevent accident, they would be guilty of negligence, and answerable for damages caused to children by such negligence." This judgment, upon appeal (17 Wall. 657, 21 L. Ed. 745), was unanimously affirmed by the supreme court of the United States, and its authority is reaffirmed in *Railroad Co. v. McDonald*, *supra*. The authority of this precedent has had the express recognition of the courts of every state west of the Mississippi having occasion to pass upon a like question, as well as a large portion of the courts east of that line. Indeed, the courts of New Hampshire, Massachusetts, and New York, and more recently the courts of New Jersey and Michigan, are all that seem to be committed to the opposing view; and even in each of these states, unless we except New Hampshire and Massachusetts, the principle which underlies the Stout Case had often been applied to other than turntable accidents. In California (*Barrett v. Railroad Co.*, 91 Cal. 296, 27 Pac. 666, 25 Am. St. Rep. 186), the court, referring to *Frost v. Railroad Co.*, 64 N. H. 220, 9 Atl. 790, 10 Am. St. Rep. 396, a leading authority in opposition to the Stout Case,—says: "In our judgment, the rule, as broadly announced in that case, cannot be maintained without a departure from well-settled principles. It is a maxim of the law that one must so use and enjoy his property as to interfere with the comfort and safety of others as little as possible. This rule, which only imposes a just restriction upon the owner of property, seems not to have been given due consideration in the case referred to.

But this principle, as a standard of conduct, is of universal application, and the failure to observe it in respect to those who have a right to invoke its protection is a breach of duty, and, in a legal sense, constitutes negligence. * * * If the defendant ought reasonably to have anticipated that, leaving this turntable unguarded and exposed, an injury such as plaintiff suffered was likely to occur, then it must be held to have anticipated it, and was guilty of negligence in maintaining it in its exposed position. It is no answer to this to say that the child was a trespasser, and, if it had not inter-meddled with defendant's property, it would not have been hurt, and that the law imposes no duty on the defendant to make its premises a safe playground for children. In the forum of the law as well as of common sense a child of immature years is expected to exercise only such care and self-restraint as belongs to childhood; and a reasonable man is presumed to know this, and is required to govern himself accordingly." The rule was reaffirmed by the same court in *Callahan v. Railroad Co.*, 92 Cal. 89, 28 Pac. 104. In *Railroad Co. v. Fitzsimmons*, 22 Kan. 691, 31 Am. Rep. 203, the rule is thus stated: "No person has a right to leave, even on his own land, dangerous machinery, calculated to attract and entice boys to it, there to be injured, unless he take proper steps to guard against the danger; and any person who does thus leave dangerous machinery exposed without first providing against all danger is guilty of negligence. It is a violation of the beneficial maxim, 'Sic utere,' etc." In *Minnesota (Keffe v. Railway Co.)*, 21 Minn. 207, 18 Am. Rep. 393) the same result is reached on a full discussion of the principle largely independent of the Stout Case. The court says: "Now, what an express invitation would be to an adult the temptation of an attractive plaything is to a child of tender years. If the defendant had left its turntable unfastened for the purpose of attracting young children to play upon it, knowing the danger into which it was alluring them, it would certainly be no defense to an action by the plaintiff, who had been attracted upon the turntable and injured, to say that the plaintiff was a trespasser, and that his childish instincts were no excuse for his trespass. In *Townsend v. Wathen*, 9 East. 277, it was held unlawful for a man to tempt even his neighbor's dogs into danger by setting traps on his own land with strong-scented meat, by which the dogs were allured to come upon his lands and into his traps. In that case Lord Ellenborough asks: 'What is the difference between drawing the animal into the trap by his natural instincts, which he cannot resist, and putting him there by manual force?' And Grose, J., says: 'A man must not set traps of this dangerous description in a situation to invite his neighbor's dogs, and, as it were, compel them, by their instinct, to come to the traps.' * * * The defendant therefore knew that, by leaving this turntable unfastened and unguarded, it was not merely

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inviting young children to come upon the turntable, but was holding out an allurement, which, acting upon the natural instincts by which such children are controlled, drew them, by those instincts, into a hidden danger; and, having thus knowingly lured them into a place of danger without their fault (for it cannot blame them for not resisting the temptation it has set before them,) it was bound to use care to protect them from the danger into which they were thus led, and from which they could not be expected to protect themselves. We agree with the defendant's counsel that a railroad company is not required to make its land a safe playground for children.

* * * We merely decide that when it sets before young children a temptation—one which it has reason to believe will lead them into danger—it must use ordinary care to protect them from harm. What would be proper care must, in general, be a question for the jury upon all the circumstances of the case." In *Kolsti v. Railroad Co.*, 32 Minn. 134, 19 N. W. 655, 19 Am. & Eng. R. Cas. 140, cited by defendant in the present case, a judgment for the defendant was sustained, and an instruction to the jury that the company was not bound to so fasten its turntable as to make it impossible for children to unfasten it was sustained, the duty of the company being only to exercise reasonable care. In a later decision—*Twist v. Railroad Co.*, 39 Minn. 167, 39 N. W. 402, 12 Am. St. Rep. 626—the plaintiff was not permitted to recover, because he was evidently of sufficient age to exercise care and discretion for himself; but in announcing its decision the court expressly disapproves of the New Hampshire doctrine, which applies to a young child the rule that a trespasser cannot recover damages for injuries received, and adds: "Applied to one of sufficient mental capacity to be a conscious trespasser, this is undoubtedly a sound rule, but, if applied to children of tender years, strictly non sui juris, it would seem harsh and inhuman. Properly qualified, and limited in its application, the doctrine of the *Keffe Case* is, in our judgment, in accordance with the reason and the dictates of humanity." To the same effect is the opinion in *O'Malley v. Railroad Co.*, 43 Minn. 289, 45 N. W. 440, 45 Am. & Eng. R. Cas. 62.

Upon the strength of some of the language employed in the *Twist Case* it has been asserted that the Minnesota court has limited the application of the rule of the *Stout Case* to turntable cases alone. In *Stendal v. Boyd*, 67 Minn. 279, 69 N. W. 899, the court takes occasion to correct this error; saying: "We did not mean [by what was said in the *Twist Case*] that we would not apply the doctrine to any but turntable cases, but merely that we would not extend the doctrine to cases which, upon their facts, did not come strictly and fully within the principle upon which those cases rest." Sustaining the same doctrine, see *Ferguson v. Railroad Co.*, 75 Ga. 637; *Id.*, 77 Ga. 102; *Railway Co. v. Dunden*, 37 Kan. 1, 14 Pac. 501; *Koons v. Railroad Co.*, 65 Mo. 592; *Nagel v. Railroad Co.*, 75

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Mo. 653, 42 Am. Rep. 418; *Bridger v. Railroad Co.*, 25 S. C. 24; *Railway Co. v. Simpson*, 60 Tex. 103; *Railway Co. v. McWhirter*, 77 Tex. 358, 14 S. W. 26, 19 Am. St. Rep. 755; *Railroad Co. v. Bailey*, 11 Neb. 332, 9 N. W. 50; *Navigation Co. v. Hedrick*, 1 Wash. 446, 25 Pac. 335, 22 Am. St. Rep. 169.

The Illinois courts are sometimes quoted as being in line with those opposing the doctrine of the Stout Case, but this is a mistake. It is true that in a turntable case decided in that state (*Railroad Co. v. Bell*, 81 Ill. 76, 25 Am. Rep. 269) the plaintiff was not allowed to recover, but the refusal was expressly placed upon the ground that the turntable was shown to be so far removed from any public place, and was so secluded, that it could not properly be said to offer any temptation to children to trespass upon it. The same court, in a later case (*City of Pekin v. McMahon*, supra), takes occasion to approve the Stout Case, and cites the Bell Case as in effect so holding. Again, in *Siddal v. Jansen*, supra, and in *Coppner v. Pennsylvania Co.*, supra, the principle is expressly approved and followed.

The principal cases which are out of harmony with the cases we have cited are *Frost v. Railroad Co.*, 64 N. H. 220, 9 Atl. 790, 10 Am. St. Rep. 396; *Daniels v. Railroad Co.*, 154 Mass. 349, 28 N. E. 283, 13 L. R. A. 248, 26 Am. St. Rep. 253; *Walsh v. Railroad Co.*, 145 N. Y. 301, 39 N. E. 1068, 27 L. R. A. 724, 45 Am. St. Rep. 615; *Railroad Co. v. Reich*, 61 N. J. Law, 635, 40 Atl. 682, 41 L. R. A. 831, 68 Am. St. Rep. 727. A late case from Michigan—not a turntable case, however—also holds adversely to the doctrine of the Stout Case. *Ryan v. Towar* (Mich.) 87 N. W. 644. This decision was by a bare majority of the court, and, in our judgment, the dissenting opinion by Montgomery, C. J., is supported by the stronger reasoning and a greater weight of authority. These cases are founded upon the one unvarying proposition that, without regard to the age of the trespasser,—whether a mature adult or a creeping infant,—he is in law a wrongdoer, and the landowner owes him no duty except to refrain from his willful or wanton injury after discovering his intrusion upon the premises; and that, too, without regard to the temptations or enticements which the premises may offer to the childish mind. Hence, if a child too young to have any conception of right and wrong or of the ownership of property, is attracted across the boundary of an unfenced lot by a piece of dangerous and attractive machinery left there exposed without guard or fastening, and such child, led by an instinct as powerful and controlling as that which led the dog into the trap as hereinbefore referred to, is caught and mutilated in the machine, the owner is charged with no liability, although he well knew the habit of children to use the lot as a playground, and as a reasonable man must have known they would be tempted to play with the machine, and, if they yielded to the temptation, were

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sure to be injured. Not only this, but if one child is caught in the trap thus set, and another, seeing its peril, runs to its rescue, and in his work of mercy is also caught in the relentless machine and injured, he, too, is without remedy because, forsooth, he is a trespasser, and should politely have waited outside of the boundary until he had received due permission to enter and go to the relief of his playmate. That this is no exaggeration, see *Railroad Co. v. Reich* and *Ryan v. Towar*, above cited, in both of which cases the plaintiff was injured in attempting to save a younger child from the death to which the defendant's carelessness had exposed him, but was sent from the court without redress, because, in answering a call of duty as imperative as the voice of God, she had made herself a "trespasser"! If this be the law, it well merits the witty thrust which Mr. Beach administers the doctrine of imputed negligence: "On the one hand, it is held that the negligence of a person having charge of the child is the negligence of the child, and imputable to it when the child comes into a court of justice and asks damages for an injury negligently inflicted upon him by the defendant. *Waite v. Railway Co.*, *El. Bl. & El.* 719, and *Hartfield v. Roper*, 21 *Wend.* 615, 34 *Am. Dec.* 273. But per contra, where a donkey is carelessly run down in the highway, where it is negligently exposed, the defendant is held liable (*Davies v. Mann*, 10 *Mees. & W.* 546); and, though oysters are negligently placed in a river bed, it is an injury redressible in damages for a vessel negligently to disturb them (*Mayor, etc., of Borough of Colchester v. Brooke*, 7 *Q. B.* 377). It appears, therefore, that the child, were he an ass or an oyster, would secure a protection which is denied him as a human being of tender years in such jurisdiction as enforce the English or New York rule in this respect." Beach, *Contrib. Neg.* (Crawford's Ed.) 127.

Of the cases referred to as opposing the doctrine to which we adhere, one of the earliest and most often quoted is *Frost v. Railroad Co.*, *supra*. The writer of that opinion sees in the principle for which we contend great hardship for the landowner and a source of peril to him in every fruit tree, ladder, fence, and blueberry thicket upon his premises. This language is cited with approval by most courts following that decision, and, in addition thereto, *Ryan v. Towar* vividly depicts the woes which children inflict upon society in general. We quote: "There are no more lawless class than children, and none more annoyingly resent an attempt to prevent their trespasses. The average citizen has learned that the surest way to be overrun by children is to give them to understand that their presence is distasteful. The consequence is that they roam at will over private premises, and, as a rule, this is tolerated so long as no damage is done. The remedy which the law affords for trifling trespasses of children is inadequate. No one ever thinks of suing them, and an attempt to remove a crowd of boys from private premises

by gently laying on of hands, and using no more force than is necessary to put them off, would be a roaring farce, with all honor to the juveniles." If this sweeping indictment of boyhood and these gloomy prophecies are intended as a sober argument, they demonstrate a failure upon part of the author to fairly interpret the doctrine against which they array themselves; and, if intended as sarcasm, it is proper to observe that there is not a rule known to the law, no matter how sacred or universally recognized, which cannot, by an extreme and exaggerated application of its principle, be made to appear ridiculous. But what, in fact, are the workings of the doctrine thus strongly depreciated? For many years the rule of *Lynch v. Nurdin*, *Birge v. Gardiner*, *Stout v. Railroad Co.*, and *Harriman v. Railroad Co.* has been recognized as authority in a large majority of the states. Can it truthfully be said that youthful trespassers are any more annoying, or the ownership of property any more burdensome, in Connecticut, Ohio, Kansas, and Minnesota than in New Hampshire, New York, New Jersey, and Michigan? We think the question will receive a negative answer in every unprejudiced mind.

Returning to our quotation from the Michigan case, it is sufficient to say that the hoodlums there described find no immunity or protection in the law as we interpret it. Their mental acuteness is open to no discount or disparagement. They know the difference between right and wrong, and understand the meaning of trespass as well as the property owner. Ordinarily, they are at no loss to care for themselves. They disregard property rights from mere love of mischief, and take risks out of mere bravado, or in conscious defiance of moral and legal restraint. When a boy is thus injured, we may pity his folly, but justly say, as the law says, that, having intelligently assumed the risk, he ought not to recover damages. This has no application whatever to infants who are yet without judgment or discretion, and the argument built upon such circumstances is wholly irrelevant to the question in controversy. The majority opinion in the *Ryan Case* gives evidence that, while declaring fealty to what it believes the law, it recognizes the rule to which it adheres as being inconsistent with the spirit of civilization, of which law is, and ever must be, the foundation and framework. It says: "However Draconic the common-law rule may be considered, it is the province of the courts to enforce it until it is changed by the legislature." Draconic, indeed, if the interpretation given in that opinion is correct; but we prefer to believe, as we think a careful investigation justifies us in believing, that the common law does not deserve the reproach thus laid at its door, and that no act of legislature is required to make it reasonable and humane. *Montgomery, C. J.*, in his dissenting opinion, well says: "You may call the doctrine of these cases [turntable cases] the result of evolution of the law, or

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what you please. It is a humane doctrine. * * * And I do not feel justified in ignoring the overwhelming weight of authority which makes for this rule, as well as the expressions of our own court." It is noticeable that in the two cases last cited—*Ryan v. Towar* and *Railroad Co. v. Reich*—there is expressed a solicitude for the protection of a defendant in a case of this kind from "the risk of having the question of his negligence left to a sympathetic jury." Without for an instant denying or depreciating the inherent power of a court of record to direct a verdict when the case warrants it, or to set aside a verdict which is palpably wrong, we venture the opinion that it is not the province of the courts to stand between a defendant and a jury of his countrymen upon a fair question of fact in an action at law, nor to give the probable sympathies of a jury any weight or influence in determining the question of his liability.

The courts upon whose decisions appellants rely go also to the extent of holding that long, open, and notorious use by the public of a beaten path across a railroad track or a vacant lot, without objection from the owner, makes him who ventures to travel such a path none the less a trespasser, and imposes no duty upon the owner to consider his safety. In the language of *Ryan v. Towar*: "The pedestrians who insist upon risking their lives by making a footpath of a railroad track and others who habitually shorten distances by making footpaths across the corners of village lots are none the less trespassers because the owners do not choose to resent such intrusion." This court has already refused to follow such precedent. *Clampit v. Railroad Co.*, 84 Iowa, 71, 50 N. W. 673, 49 Am. & Eng. R. Cas. 468; *Thomas v. Railroad Co.*, 103 Iowa, 649, 72 N. W. 783, 39 L. R. A. 399. These cases, while not directly in point with the facts of the one now before us, have a legitimate bearing upon the principle involved, and indicate that the extreme theory of the law of trespass which obtains in those jurisdictions is not the law of this state. See, also, *Scott v. Railroad Co. (Iowa)* 83 N. W. 818.

It is profitless to discuss further the decisions of the courts. We have thus far referred only incidentally to the text writers, but the gravity of the question renders it proper to make some reference to the views of others of repute. This we do by direct quotation without comment: "It is negligent to leave a dangerous instrument in a place of public access, where persons are expected to be constantly passing and repassing, and where such persons are not required to be on their guard, or where children are accustomed to play." *Whart. Neg.* § 112. "It is no defense to a suit for negligence in leaving a dangerous machine in a place frequented by children that a child hurt in the machine was a trespasser." *Id.* § 343. "If the owner is aware that persons are in the habit of passing over his grounds, trespassers though they may be, he is liable if he leaves in their way dangerous instruments by which they are injured."

Id. § 824a. "The severity of the rule as to trespassers upon railroad property is essentially relaxed in the case of trespassers of tender years." Beach, Contrib. Neg. 204. "A well-grounded exception to the general rule is that one who artificially brings or creates upon his own premises any dangerous thing, which, from its nature, has a tendency to attract the childish instincts of children to play with it, is bound as a mere matter of social duty to take such precautions as the circumstances admit, to the end that they may be protected from injury while so playing with it or coming in its vicinity." Thomp. Neg. 1204. Referring to the rule which prevails in Massachusetts and New York, Mr. Thompson further says: "This cruel and wicked doctrine, unworthy of a civilized jurisprudence, puts property above humanity, leaves entirely out of view the tender years and infirmity of understanding of the child,—indeed, his inability to be a trespasser in sound legal theory,—and visits upon him the consequences of his trespass, just as though he were an adult." Id. § 1026. "The rule seems to be well settled that one who recklessly and without necessity leaves exposed dangerous things by meddling with which ignorant persons or infants may be injured, is liable for such injuries, although in so doing the injured person was a trespasser." Busw. Pers. Inj. § 75. "It is apprehended that this rule rests on the general principle * * * expressed in the maxim, 'Sic utere,' etc." Id. § 76. "But where dangerous instrumentalities, in their nature attractive to children, are left in an exposed and accessible place where children are likely to be, the law is well settled that the proprietor cannot shield himself in an action for injuries caused thereby to an infant by showing that the machine or article was not dangerous in itself, and would have done no harm if the plaintiff had not meddled with it." Barrows, Neg. p. 69. The turntable cases described as "settled law of the country." 1 Shearm. & R. Neg. (5th Ed.) 73. "The owner of land where children are allowed or accustomed to play, particularly if it is unfenced, must use ordinary care to keep it in a safe condition; for they, being without judgment, and likely to be drawn by childish curiosity into places of danger, are not to be classed with trespassers, idlers, and mere licensees." 2 Shearm. & R. Neg. (5th Ed.) 122." The owner of any machine which he knows to be dangerous to children too young to know the danger, and of too immature judgment and discretion to control their natural instinct to amuse themselves with anything that may attract them as a plaything, and which he knows or ought to know may attract them, and he knows that it is so placed that it does attract them to play with it, is under a duty to such children to exercise the degree of care which an ordinarily prudent person would use to prevent its injuring them. Whoever, therefore, does anything in or immediately adjacent to a public street, park, or locality where children may rightfully congregate and are accustomed to do

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so, calculated to attract children into danger which they cannot appreciate, or are too young and inexperienced to resist, owes them the imposed duty of protecting them against the temptation he places before them by suitably guarding the source of danger." 1 Ray, Neg. Imp. Duties, 28. "It is said that one owes no duty to a trespasser. Is this true as to a young child, known to be in danger of being injured? Is there not an active duty owing to protect the helpless child from known dangers on one's own land? If this duty exists, then the doctrine laid down in the New Hampshire cases cannot be true. * * * The real question is not whether the duty is owing the child which under the same circumstances would not be owing a grown person, but, putting the case personally, whether, knowing that an act of yours is liable to induce any one else to expose himself to danger, is it not your duty to anticipate such action on his part, and use care to avoid injuring him?" Id. 28. A railroad company "may incur liabilities for injuries to children by leaving dangerous machinery where it is accessible to them, although it would not, under the same circumstances, be liable to an adult." Pierce, R. R. 336. "The law requires of persons having in their custody instruments of danger that they should keep them with the utmost care." 1 Hilliard, Torts (3d Ed.) 127; Pol. Torts, 407. "The duties which men owe to each other are made greater by their greater needs." Bish. Noncont. Law, 589. "A child too young to be controlled by its reason, therefore not improperly led by its instincts, receives from the law the protection which its special nature requires. For example, a man who leaves on his own ground, open to a highway, or upon or beside any public place, a dangerous machine likely to attract children, will be liable to one injured while playing with it, if he neglected precautions against such an accident." Id. § 854. "There is a manifest tendency in the cases to recognize the duty of the owner of premises and instrumentalities to avoid doing harm to other persons, even though they be wrongdoers." 2 Jag. Torts, 890. "Extreme youth of a child is always an important fact bearing upon the question of negligence in the party by whose act or neglect he is injured." Cooley, Torts (2d Ed.) 822. "Leaving a tempting thing for children to play with, exposed where they would be likely to gather for that purpose, may be equivalent to an invitation to them to make use of it." Id. 356. "Children, being incapable, at a tender age, of exercising the same care and discretion as an adult, are entitled to more consideration, and the greater degree of care should be exercised to avoid injuring them." Harris, Dam. Corp. 436. Speaking of the turntable cases: "These cases have been the subject of some severe criticism, but we are inclined to think the doctrine finds support both in principal and authority. A man's dominion over his own land is not entirely absolute, but is qualified by that time honored maxim, 'Sic utere,' etc." 2

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Wood, Ry. Law, 1291. "A party's liability to trespassers depends on the former's contemplation of the likelihood of their presence on the premises and the probability of injuries from contact with conditions existing thereon. As a rule, a party will not be deemed to anticipate the commission of a willful wrong; yet where, under the circumstances, a technical trespass may reasonably be anticipated, the owner of premises will be liable for a failure to take reasonable precautions to prevent injuries to trespassers." *Wat. Dam.* p. 288. "The doctrine of the weight of authority seems to be that the owner of uninclosed premises of a situation and character calculated to attract children thereupon is liable in damages if such premises are maintained in a condition liable to cause injuries to infant trespassers, and injuries in fact result from such negligent condition." *Id.* 290.

There is an opinion in an early Ohio case (*Kerwhaker v. Railroad Co.*, 3 Ohio St. 172, 62 Am. Dec. 246), which is in itself a very learned and exhaustive commentary on some phases of the law of the case before us. It was called forth by the destruction of a farmer's trespassing pigs upon a railroad track, and we may therefore hope the law it announces is none too good to be invoked in behalf of children: "A maxim of the law, tested by the wisdom of centuries, exacts of every person in the enjoyment of his property the duty of so using his own as not to injure the property of his neighbor. It is in accord with this principle that it has been held that, though a person do a lawful thing, yet, if any damage thereby befalls another, which he could have avoided by reasonable and proper care, he shall make reparation. * * * The right of the defendant to the free, exclusive, and unmolested use of its railroad is nothing more or less than the right of every land proprietor in the actual use and occupancy of his lands, and does not exempt it from the duty imposed by law upon every person so to use his own property as not to do any unnecessary injury to another.

A doctrine which numbers among its adherents such names as Denman, Cockburn, Dillon, Harlan, Cooley, and the other distinguished jurists and law writers, whose opinions and works we have made reference to, is not to be easily discredited.

2. It is urged by the defendant that, its turntable is admitted to have been fastened, and therefore no negligence is shown upon its part. It is our opinion that, under the evidence, the question of the fastening was still a matter for the consideration of the jury. The exact description of the method employed is not shown in the abstract, and it is proven that it was unfastened by one of the little girls in the party with plaintiff. If there was any duty upon defendant to fasten or secure the table to prevent its being revolved by children, it must necessarily follow that the fastening employed should be

reasonably sufficient for that purpose, and such sufficiency is peculiarly a question of fact. Such, with one exception, seems to be the holding of all the courts which have passed upon this proposition. This does not require the company to furnish the best or most perfect fastening, or to make the table absolutely secure, but simply that it shall exercise the care of an ordinarily prudent and cautious person under the circumstances as they then existed. *Kolti v. Railroad Co.*, supra. "If the owner [of a turntable], instead of preventing such children getting to it, relies to prevent injury to them upon fastening it so as to prevent them playing with it, it is evident that the character of the means used for that purpose must be considered. * * * If such means have no tendency to prevent them so exposing themselves; if they are entirely futile, and leave the machine just as dangerous to such children as before,—it can hardly be said he has used the degree of care required of him. * * * Certainly the mere fact that it used some fastening would not, without regard to the character of it, absolve the company from liability." *O'Malley v. Railroad Co.*, 43 Minn. 289, 45 N. W. 440. In the same case it was said: "It may be taken as established by the evidence that the method adopted for fastening the turntable was that ordinarily used by railroad companies." But this fact was held not sufficient to permit the court to pass upon the sufficiency of such fastening as a matter of law. In *Navigation Co. v. Hedrick*, supra, the turntable was fastened or tied with a rope, which was cut or removed by children; and the question of defendant's care was held to be one for the jury. Such, also, was the holding in *Barrett v. Railroad Co.*, supra, where it is said: "The fact that the turntable was latched in the way such turntables are usually fastened, or according to the usual custom of other railroads, although a matter which the jury had a right to consider, * * * was not of itself conclusive of the exercise of due care." To the same effect, see *Callahan v. Railroad Co.*, supra. Further, to the effect that proof of the customary method of fastening is not conclusive. *Kelly v. Railroad Co.*, 28 Minn. 98, 9 N. W. 588.

3. Appellant also contends that plaintiff was guilty of contributory negligence, and therefore cannot recover. Whatever may have been the rule in earlier times, and whatever may be the holding still in a few states, it is now established beyond all question in this country that a child cannot be held to any greater degree of care than may reasonably be expected from its years, experience, and intelligence, and that it cannot be charged by imputation with the negligence of its parents or guardians. This doctrine is so reasonable, and so consonant with the spirit of justice which pervades the law, that it commands our respect and observance; and if, as claimed, there be precedents for holding infants of five to

seven years of age guilty of negligence as a matter of law, we have only to say they do not commend themselves to our reason or judgment. Whether the plaintiff was of sufficient age and intelligence to appreciate the danger to which she exposed herself in going upon the turntable was properly left to the jury. *Dowd v. Inhabitants of Chicopee*, 116 Mass. 93; *Plumley v. Bige*, 124 Mass. 57, 26 Am. Rep. 645; *Kay v. Railroad Co.*, 65 Pa. 269, 3 Am. Rep. 628; *Railroad Co. v. Becker*, 84 Ill. 483.

4. It is finally said that the negligence, if any, of the defendant, was not the primary cause of the injury complained of, and that no injury would have occurred had not a third person removed the fastening, and still another revolved the table. This contention is not supported by the authorities. In the very nature of things, a child cannot well be injured upon a turntable without the intervention of some other person to revolve the machine. In the very first of the leading cases we have cited—*Lynch v. Nurdin*—this element was presented and urged as a defense without avail. The company's negligence, if it exist, is in the leaving, without proper care, of a dangerous instrument, in a place where it might reasonably have expected children to resort and put it in motion to the injury of themselves or others. See *Railroad Co. v. McDonald*, *supra*; *Clark v. Chambers*, *supra*; *Masser v. Railroad Co.*, 68 Iowa, 602, 27 N. W. 776; *Nagel v. Railroad Co.*, *supra*.

The several questions discussed sufficiently dispose of other legal propositions raised by the appeal. The charge of the trial court to the jury was in substantial harmony with the opinions we have expressed, and the objections made thereto are not well taken. We are aware that the doctrine announced by this decision holds railroad companies to what may be thought an irksome responsibility. It is inevitable that in the rush and haste with which the business of railroading is performed, and the handling and care of ponderous machinery, the movements of which cannot be instantly controlled, accidents will happen, by which both old and young are maimed or killed, without any fault being justly chargeable to the company or its employees, and in such cases, of course, no action lies. But the very fact that the business and appliances are of such dangerous nature imposes a corresponding obligation to avoid casualties which reasonable care may anticipate and guard against. Reasonable care may, at times, seem to be a burden, but its enforced observance is never a wrong, whether applied to railroad companies or to individuals. If it be observed, no liability follows; if it be neglected, it is simple justice that reparation be made to one who is thereby injured.

The judgment of the district court is affirmed.

PECK *et al.* v. SCHENECTADY RY. CO.*(Court of Appeals of New York, April 1, 1902.)*

[63 N. E. Rep. 357.]

Electric Street Railways—Additional Servitude.*

The use of a city street for a surface railroad operated by electricity is an additional burden on the property rights of the owners of the fee, subject to the easement of the highway.

Same—Enjoining Construction—Discretion of Court.

The question whether an injunction restraining the construction of an electric street railway on a street, the fee of which is in abutting owners, shall restrict the construction of the railway until the payment of compensation, and denying a perpetual injunction if such damages are paid, or whether the injunction shall be made perpetual, leaving the railway company to its proceedings to condemn, is in the discretion of the court; and an order of the special term granting a perpetual injunction, affirmed by the appellate division, is not reviewable, as a question of law, by the court of appeals.

Parker, C. J., and Werner, J., dissenting.

Appeal from supreme court, appellate division, Third department.

Action by Katherine K. Peck and others against the Schenectady Railway Company. Certain street railroad companies intervened. From a judgment of the appellate division (73 N. Y. Supp. 794) affirming a judgment for plaintiffs, defendant appeals. Affirmed.

Marcus T. Hun, James A. Van Voast, Learned Hand, and James O. Carr, for appellant.

William F. Sheehan, Charles A. Collin, and John L. Wells, for interveners.

Edward Winslow Paige, for respondents.

MARTIN, J. The purpose of this action was to enjoin the defendant from building an electric railroad upon Washington avenue, in the city of Schenectady, N. Y., in front of the plaintiffs' premises, and upon land of which they were the owners, subject to a public easement for street purposes. That the plaintiffs were the owners in fee of the portion of Washington avenue described in the complaint, and that the defendant, without the consent, and obviously against the protest, of the plaintiffs, threatened and intended to construct and operate an electric railroad upon tracks laid upon the surface of that street, and to supply power therefor by the erection of poles and wires to conduct the electricity necessary for the operation of its road from its power house to and along such street, was, in effect, found by the trial judge, and unanimously affirmed by the appellate division. Therefore, in determining this appeal, those facts must be regarded as conclusively established.

*See 10 Am. & Eng. Enc. Law (2d Ed.) 884 et seq.; *State v. Trenton Passenger Railway Co.* (N. J.), 4 Am. & Eng. R. Cas., N. S., 392, and note, 400.

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The primary and the most important question involved upon this appeal is whether the use of a city street for the purposes of a street surface railroad operated by electric power imposes an added burden upon the property rights of the owners of the fee, subject to the public easement for street purposes. If this were an open question in this state, much could be said to sustain the contention of the appellant that the acquisition of the use, from the owner, of the land for a public street, includes the right to apply it to all the beneficial public uses for which it may be adapted, not only at the time of its acquisition, but such as may arise in future. It is strenuously claimed that an electric surface street railroad in a city, as constructed and operated at the present time, in its use by, and by reason of its necessity to, the people of the municipality, constitutes an essential feature not only of public use, but of street use, and that such means of transportation have largely superseded the former use of streets, and are now the methods by which a great portion of the people are transported, and, hence, as the street was originally established for the accommodation of the traveling public, the change in methods of transportation does not constitute a new servitude, but only a new and necessary method of accomplishing the purpose for which the street was originally intended, and does not entitle the owners of the fee to additional compensation. This contention is not without force, and there are not a few authorities in other jurisdictions which sustain it. In this state, however, the clear weight of authority is adverse to that contention. *Craig v. Railroad Co.*, 39 N. Y. 404, is an important and leading case upon the subject. The plaintiff in that action was the owner of a lot on East avenue, in the city of Rochester, extending to the center of the street. The defendant asserted the right to construct a horse railroad therein without obtaining the plaintiff's consent, or instituting proceedings to acquire the right to construct it across his premises. The trial court granted a perpetual injunction restraining the railroad company from building its road over the portion of the street of which the plaintiff owned the fee. The defendant appealed from the decision of the trial court to the general term, where the judgment was affirmed, and then appealed to the court of appeals, where the decisions below were also sustained. There, as here, it was claimed that the defendant possessed the right to construct its railroad through the streets of a city, by virtue of the consent of the common council, without making compensation for damages to the owners of lots along the street over which the railroad passed. It was there urged that the building of such a road was not an infringement upon the rights, or any injury to the interests, of the owner in fee of the land in the street, as it was only a mode of exercising the public right of passage with which he had parted, and not such an additional or further appropriation as entitled him to

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pecuniary remuneration. This court decided adversely to that claim, and held that establishing and running a horse railroad in a public street of a city was an imposition of an additional burden upon the land of an adjoining proprietor covered by such street, and that the latter could maintain a suit to perpetually enjoin the railroad company from laying down its track and from running its cars over the street. The same doctrine as to running steam cars upon a street or highway had been previously held in several cases (*Trustees of Presbyterian Soc. in Waterloo v. Auburn & R. R. Co.*, 3 Hill, 567; *Williams v. Railroad Co.*, 16 N. Y. 97, 69 Am. Dec. 651, 10 Am. & Eng. R. Cas., N. S., 147; *Davis v. Mayor*, etc., 14 N. Y. 506, 67 Am. Dec. 186; *Mahon v. Railroad Co.*, 24 N. Y. 658; *Carpenter v. Railroad Co.*, 24 N. Y. 655; *Wager v. Railroad Co.*, 25 N. Y. 526),—a doctrine which has since been so firmly established that it is not even controverted by the defendant (*Henderson v. Railroad Co.*, 78 N. Y. 423; *Uline v. Railroad Co.*, 101 N. Y. 98, 107, 4 N. E. 536, 54 Am. Rep. 661; *McGeen v. Railroad Co.*, 133 N. Y. 9, 15, 30 N. E. 647; *Coatsworth v. Railroad Co.*, 156 N. Y. 451, 457, 51 N. E. 301).

In the *Craig Case* the appellant insisted that there was a distinction between a railroad operated in the streets of a populous city by steam and one operated by horse power, and that the rule laid down in the former cases was inapplicable to the latter class of roads. This court, after examining the question, while conceding that there was a difference between a steam road and a horse railway, in the manner in which the road was constructed and the speed with which the cars were propelled, said, "But there is precisely the same exclusive appropriation of the track for the purposes intended in each case, to the absolute exclusion of all who may interfere with its mode of operation," and distinctly held that the building and operation of a horse railroad in the public streets of a city imposed an additional burden upon the land of an adjoining proprietor covered by a street, and that such a proprietor could maintain a suit to perpetually enjoin a horse railroad company from laying down its track in the street, and from running its cars over it. While the appellant contends that the *Craig Case* does not decide that the construction of a street surface railroad operated by horse power entitles the owner of the fee of the street to compensation or to the relief awarded in the case at bar, we think otherwise. Since the decision in the *Craig Case*, it has been regarded as an authority holding that doctrine, and has been followed with great unanimity by our courts. In *Gaslight Co. v. Calkins*, 62 N. Y. 386, 388, the question of the right of an owner of the fee of land in streets was again quite fully discussed, and it was there said: "The introduction of railroads in this state presented the question whether a railroad corporation could use a public highway for the purpose of constructing and running its road, and it was held that it imposed an additional burden upon the

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soil of the highway, besides what was included in the public easement; that the legislature had not the power to make such imposition, within the meaning of the constitutional provision which forbids the taking of property of the owner of the fee without compensation; and that the company can derive no title by any act of the legislature, or of any municipal authority, without the consent of the owner of the fee, or without the appraisal and payment of damages in the mode prescribed by law. *Fletcher v. Railroad Co.*, 25 Wend. 463; *Trustees of Presbyterian Soc. in Waterloo v. Auburn & R. R. Co.*, 3 Hill, 567; *Davis v. Mayor, etc.*, 14 N. Y. 506, 67 Am. Dec. 186; *Williams v. Railroad Co.*, 16 N. Y. 97, 69 Am. Dec. 651; *Wager v. Railroad Co.*, 25 N. Y. 526. These cases settle the law, beyond peradventure, as to the right of railroad corporations to appropriate public highways to their benefit without compensation. At a later day an attempted distinction was sought to be made in favor of horse railroads in cities, and the question as to the right of these corporations to use the streets of cities for their roads and cars was presented in *Craig v. Railroad Co.*, 39 N. Y. 404; and it was there decided, after full consideration by the court of appeals, that the running and establishing of such a road in the public streets of a city was an imposition of an additional burden on the land of the adjoining proprietor, for which compensation must be made." In *Forbes v. Railroad Co.*, 121 N. Y. 505, 515, 24 N. E. 921, 8 L. R. A. 453, this general question was discussed by Judge Peckham, who said that, under the decisions of the courts of this state, "to construct even a horse railroad in a city street is to place a new and additional burden upon the land, the right to do which does not exist by reason of the general right of passage through the street; but if the adjoining owner of land is not the owner of the fee in the streets, and the railroad company has obtained the proper authority, he has no right to compensation for such added burden, nor to complain of such use so long as it is not exclusive or excessive. The same reasoning applies, as we have seen, in the case of a steam surface railroad. Such a use of the streets would be an additional burden upon the land; and, of course, if the adjoining owner had title in fee to the center of the street, subject only to the public easement, he would have a right of action, as held by the *Williams* and other cases." The doctrine of the *Craig* Case was again recognized by this court in *Reining v. Railway Co.*, 128 N. Y. 157, 163, 28 N. E. 642, 14 L. R. A. 133, where Judge Andrews, upon reviewing the cases, said: "These latter cases, as will be observed, decide that neither a horse nor steam railroad can be authorized in streets, the fee of which is in the adjacent owner, without his consent, while the former cases hold that, where the fee is in the municipality, horse railroads may be authorized against the will of the abutting owner, and without making compensation. The distinction is made to rest

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on the location of the fee." In *Eels v. Telegraph Co.*, 143 N. Y. 133, 38 N. E. 202, 25 L. R. A. 640, this court held that the state can neither appropriate to its own exclusive use, nor can it authorize a corporation to so appropriate, any portion of a rural public highway, by setting poles therein for the purpose of supporting telegraph or telephone wires; and in that case the authority of the *Craig Case* was again recognized, and its principle applied. *Palmer v. Electric Co.*, 158 N. Y. 231, 235, 52 N. E. 1092, 43 L. R. A. 672, also recognizes the principle that the general purposes of a highway or street do not include the transportation of persons or property by railroads over them. The *Craig Case* has also been followed in *Thayer v. Railroad Co.*, 15 Abb. N. C. 52; *In re Gilbert El. R. Co.*, 38 Hun, 438, 447; *Spofford v. Railroad Co.*, 15 Daly, 162, 165, 4 N. Y. Supp. 388; *Edridge v. Railroad Co.*, 54 Hun, 194, 195, 7 N. Y. Supp. 439; *In re Rochester Electric Ry. Co.*, 57 Hun, 56, 60, 10 N. Y. Supp. 379; *In re The Terrace (Super. Buff.)* 15 N. Y. Supp. 775; *McCruden v. Railway Co.*, 5 Misc. Rep. 59, 61, 62, 25 N. Y. Supp. 114, affirmed in 77 Hun, 609, 28 N. Y. Supp. 1135, and 151 N. Y. 623, 45 N. E. 1133; *Clark v. Traction Co.*, 10 App. Div. 354, 41 N. Y. Supp. 1109, followed in 16 App. Div. 631, 44 N. Y. Supp. 1113; *Mangam v. Village of Sing Sing*, 11 App. Div. 212, 216, 42 N. Y. Supp. 950; *Syracuse Solar Salt Co. v. Rome, W. & O. R. Co.*, 67 Hun, 153, 161, 22 N. Y. Supp. 321.

The doctrine of the *Craig Case* has now become a rule of property, which this court cannot, in justice, overthrow. Although that case was decided by a divided court, yet it is obvious that the principle there stated has since been generally, if not universally, recognized as the law of this state, and been followed with great uniformity by its courts, as will be seen by reference to the cases to which we have already referred. Therefore, notwithstanding the fact that many jurisdictions have held a contrary doctrine, still a principle which has been so thoroughly ingrafted upon the law of our own jurisprudence should not be lightly disregarded. We are of the opinion that the contention of the appellant in this respect cannot and ought not to be upheld. The doctrine that a horse railroad invades the property rights of the owner of the fee in a public street, and imposes upon him a burden for which he is entitled to compensation, being firmly established, it obviously follows that the building and operation of an electric road must be controlled by the same principle. Assuming, as we must, in view of these authorities, that the defendant's entry upon the plaintiffs' property in the street would constitute a trespass upon their property rights, it follows that the judgment appealed from must be affirmed.

The defendant, however, insists that, if the proposed construction and operation of its railway would be an additional burden upon the plaintiffs' land, yet the only relief to which they are entitled is to compensation for the damages which

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they may thereby sustain, and therefore, as they have invoked the equitable powers of the court, it should compel them to accept just compensation as an alternative to the injunction. We think this court has no power to deal with that question. If it be conceded that the defendant has the right to exercise the power of eminent domain, and to condemn the plaintiffs' interest in the street by proceedings instituted for that purpose, and also that the trial court or appellate division had authority to render such alternative relief, still, as the power or discretion existed in the trial court to award the latter, or relegate the defendant to the former, whichever it should deem more proper, its adoption of the former, by omitting to render the alternative relief now sought, presents no question of law which this court can review. Although the courts of this state have often, in cases somewhat similar, awarded the defendant the alternative relief of paying an ascertained compensation as damages, and denying a perpetual injunction if such damages were paid, when it was clear that the right of condemnation existed in the defendant, still we think the question whether a court of original jurisdiction shall award to a defendant such alternative relief, or leave it to its proceedings to condemn, is one resting in the sound discretion of the trial court,—a discretion which may be reviewed by the appellate division, but which presents no question of law reviewable by this court, especially if there be a dispute or doubt as to the legal right of the defendant to acquire the title sought by condemnation proceedings. *Henderson v. Railroad Co.*, 78 N. Y. 423; *Pappenheim v. Railway Co.*, 128 N. Y. 436, 28 N. E. 518, 13 L. R. A. 401, 26 Am. St. Rep. 486. If the defendant had no legal right to acquire the property of the plaintiffs, a court of equity would not be required to grant to the defendant a right to which it was not legally entitled. If such is the case, obviously it cannot be held that the court below committed a legal error in not requiring the plaintiffs to transfer their property to the defendant, to which it had no legal right, and to which it could legally acquire no title by condemnation. Under the circumstances, we think the trial court was justified, in the exercise of a sound discretion, in leaving the parties to pursue such legal remedies as were necessary to enforce their respective rights, and was not required to decide in this action any disputed question as to the defendant's right of condemnation.

The judgment which was entered upon the decision of the trial court, and affirmed by the appellate division, provided that "the defendant, its agents and servants, be, and they are, perpetually enjoined from operating a railroad upon any of the said part of Washington avenue, and from doing any act tending thereto and thereabout, and from suffering any such act to be done in its or their name or behalf." It was evidently claimed at the appellate division that the provisions of this injunction were too broad, and would, in effect, re-

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strain the defendant from an entry upon the plaintiffs' land, even after a right to do so was acquired by condemnation. That court was satisfied that the judgment would have no such effect, and that, if so, it might be amended by application to that court. While we are disposed to think that the judgment would not have the effect claimed, still it may well be modified by providing that it shall not interfere with or restrain the defendant from instituting proceedings for condemnation of the plaintiffs' rights, and that when the rights of the plaintiffs shall be thus acquired, and the compensation awarded paid, it shall not be effective to restrain the defendant from entering upon such premises for the purposes for which they were condemned.

The judgment should be modified by adding thereto a provision that, if the defendant shall acquire a right to the use of the land in question for street railway purposes, the judgment shall not be regarded as effective to restrain it from entering upon such premises for the purpose of building, maintaining, and operating its railroad thereon; and, as so modified, the judgment must be affirmed, with one bill of costs to the plaintiffs.

PARKER, C. J. (dissenting). I do not disagree with my associates as to the scope of the decision in *Craig v. Railroad Co.*, 39 N. Y. 404, nor do they disagree with my contention that that decision was a mistake. If the question were now presented to this court for the first time, it would undoubtedly hold that the operation of a street surface railroad for the accommodation of passengers is a proper use, against which the owner of the fee to the center of the street has no legal ground of complaint; thus putting this court in line with the courts of other states in this country. But as the question comes now before us directly for the second time, the view of the majority is that, in obedience to the doctrine of *stare decisis*, we must follow the first decision, although we do not agree with it. That position furnishes a greater measure of respect for precedent than I am willing to accord, where the effect of it must be to injure in a great degree the public interest, which lies in the direction of speedy and cheap short-distance transportation. In such a situation the court should, in my judgment, first frankly admit the error of the former decision, and next proceed to place the law on the subject on a sound basis. And especially should this be done where, as in this case, no substantial injury will result to the abutting property owners along the line of the existing street surface railroads, as sufficiently appears by the fact that, out of the thousands of miles of such railroads in this state, the present is the first case where the claim of an abutting owner either for compensation or injunction has found its way into this court; and the instances are very few where the abutting owner has claimed—let alone, received—compensation for alleged injury to his fee in the street. Tested by the expe-

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rience of the past, therefore, no substantial injury will result to the abutting owner in the future by the decision I propose, while a contrary decision will be availed of to delay the construction of street surface railroads, and compel them to acquire a right, which is practically of no value, by expensive condemnation proceedings, the taking of which will, in addition, consume much time. In the practical working out, therefore, it will result that corporations which can afford it will, in order to save time and legal expenses, pay a substantial price for that which is worth practically nothing. And it will likely, also, result that corporations which cannot afford it will not undertake to build. Thus the development of the street surface railroad system of the state, which so greatly conveniences the public, will be retarded, if not prevented to some extent, notwithstanding the fact that the general purpose of such streets was from the beginning, and still is, for the accommodation of all the public who desire to pass over them, and not solely for that limited portion of the public who prefer to employ their own conveyances.

That it is the law in nearly all other jurisdictions that the building and operation of a street surface railroad upon an existing street of a city for the accommodation of local travel does not impose an added servitude upon the lands abutting upon the street, for which the owners of the fee are entitled to compensation, is supported by the following authorities: *Barney v. Keokuk*, 94 U. S. 324, 24 L. Ed. 224; *Taylor v. Railway Co.*, 91 Me. 193, 39 Atl. 560, 64 Am. St. Rep. 216; *Attorney General v. Railroad Co.*, 125 Mass. 515, 28 Am. Rep. 264; *Howe v. Railway Co.*, 167 Mass. 46, 44 N. E. 386; *Elliott v. Railroad Co.*, 32 Conn. 579; *Canastota Knife Co. v. Newington Tramway Co.*, 69 Conn. 146, 36 Atl. 1107; *Taggart v. Railway Co.*, 16 R. I. 668, 19 Atl. 326, 7 L. R. A. 205, 43 Am. & Eng. R. Cas. 208; *Hinchman v. Railroad Co.*, 17 N. J. Eq. 75, 86 Am. Dec. 252; *Halsey v. Railway Co.*, 47 N. J. Eq. 380, 20 Atl. 859, 46 Am. & Eng. R. Cas. 76; *Railway Co. v. Grundy*, 51 N. J. Eq. 213, 26 Atl. 788; *West Jersey Ry. Co. v. Camden, G. & W. Ry. Co.*, 52 N. J. Eq. 31, 29 Atl. 423, 1 Am. & Eng. R. Cas., N. S., 170, 322; *Kennelly v. City of Jersey City*, 57 N. J. Law, 293, 30 Atl. 531, 26 L. R. A. 281; *Roebeling v. Railway Co.*, 58 N. J. Law, 666, 34 Atl. 1090, 33 L. R. A. 129; *Lockhart v. Railway Co.*, 139 Pa. 419, 21 Atl. 26, 47 Am. & Eng. R. Cas. 57; *Rafferty v. Traction Co.*, 147 Pa. 579, 23 Atl. 884, 30 Am. St. Rep. 763, 50 Am. & Eng. R. Cas. 239; *Philadelphia, W. & B. R. Co. v. Wilmington City R. Co. (Del. Ch.)* 38 Atl. 1067, 9 Am. & Eng. R. Cas., N. S., 493; *Poole v. Railway Co.*, 88 Md. 533, 41 Atl. 1069; *Green v. Railway Co.*, 78 Md. 294, 28 Atl. 626, 44 Am. St. Rep. 288; *Koch v. Railway Co.*, 75 Md. 222, 23 Atl. 463, 15 L. R. A. 377, 50 Am. & Eng. R. Cas. 401; *Hodges v. Railway Co.*, 58 Md. 603; *Reid v. Railroad Co.*, 94 Va. 117, 26 S. E. 428, 36 L. R. A. 274, 64 Am. St. Rep. 708, 6 Am. & Eng.

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R. Cas., N. S., 792; Traction Co. v. Murphy, 98 Va. 104, 34 S. E. 982; Merrick v. Railway Co., 118 N. C. 1081, 24 S. E. 667; Louisville Bagging Mfg. Co. v. Central Pass. Ry. Co., 95 Ky. 50, 23 S. W. 592, 44 Am. St. Rep. 203; Smith v. Railroad Co., 87 Tenn. 626, 11 S. W. 709; Southern Ry. Co. v. Atlantic Ry. & Power Co., 111 Ga. 679, 36 S. E. 873, 51 L. R. A. 125; Birmingham Ry. & Electric Co. v. Birmingham Traction Co., 122 Ala. 349, 25 South. 192; Randall v. Railway Co., 19 Fla. 409, 17 Am. & Eng. R. Cas. 184; Cincinnati & S. G. A. St. Ry. Co. v. Incorporated Village of Cumminsville, 14 Ohio St. 523; Hobart v. Railroad Co., 27 Wis. 194, 9 Am. Rep. 461; Railway Co. v. Higbee, 107 Wis. 389, 83 N. W. 701, 51 L. R. A. 923; Chicago, B. & Q. R. Co. v. West Chicago St. R. Co., 156 Ill. 255, 40 N. E. 1008, 29 L. R. A. 485; General El. Ry. Co. v. Chicago & W. I. R. Co., 184 Ill. 588, 56 N. E. 963; Eichels v. Railway Co., 78 Ind. 261, 41 Am. Rep. 561; Railway Co. v. Whiting, 139 Ind. 297, 38 N. E. 604, 26 L. R. A. 337, 47 Am. St. Rep. 264; Same v. Hammond, W. & E. C. El. Ry. Co., 151 Ind. 577, 46 N. E. 999; People v. Ft. Wayne & E. Ry. Co., 92 Mich. 522, 52 N. W. 1010, 16 L. R. A. 752; Dean v. Railway Co., 93 Mich. 330, 53 N. W. 396; Neiman v. Railway Co., 103 Mich. 256, 61 N. W. 519; Newell v. Railway Co., 35 Minn. 112, 27 N. W. 839, 59 Am. Rep. 303, 24 Am. & Eng. R. Cas. 298; Elfelt v. Railway Co., 53 Minn. 68, 55 N. W. 116; Snyder v. Railway Co., 105 Iowa, 284, 75 N. W. 179, 41 L. R. A. 345; Jaynes v. Railway Co., 53 Neb. 631, 74 N. W. 67, 39 L. R. A. 751; Ransom v. Railway Co., 104 Mo. 375, 16 S. W. 416; Williams v. Railway Co. (C. C.) 41 Fed. 556; Brown v. Duplessis, 14 La. Ann. 842; McQuaid v. Railway Co., 18 Or. 237, 22 Pac. 899, 40 Am. & Eng. R. Cas. 308; Finch v. Railway Co., 87 Cal. 597, 25 Pac. 765, 46 Am. & Eng. R. Cas. 107.

How the text writers view the decisions of the courts of this country will appear from the following quotation from 1 Lewis, Em. Dom. (2d Ed.) § 115f: "It has been determined in numerous decisions, and without dissent, except in the state of New York, that the use of a street by a horse railroad constructed and operated in an ordinary manner falls within the purposes for which streets are established and maintained, and consequently that for any damages resulting from such use the abutting owner of property can recover no compensation, whether the fee of the street is in him or in the public." Other text writers are to the same effect. 2 Dill. Mun. Corp. (4th Ed.) § 722; Joyce, Electric Law, § 341; Cooley, Const. Lim. (6th Ed.) 683; Keasbey, Electric Wires (2d Ed.) § 145; Booth, St. Ry. Law, § 83.

While it may be conceded that the isolation of our courts upon this subject does not furnish sufficient grounds to justify the overthrow of a precedent of so long standing, and it may also be conceded that the interests of street surface railroad

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corporations do not require it, it cannot, it seems to me, be doubted that the interest of the public, and its right to enjoy the benefit of modern improvements in the methods of street travel, by which is insured to them a cheap, convenient, and rapid means of transportation over the streets of cities, and to adjacent villages and towns, do authorize a reconsideration of that decision, and a re-examination of the questions which led to the making of it, for the purpose of ascertaining whether the principles upon which it was based were correct and should be continued, or are incorrect, and therefore require a practical reversal of that decision. In making such an examination, we would have a vast advantage over our predecessors, who are responsible for the decision in the Craig Case, for the propelling of cars by electricity had not then been attempted, if it had been thought of, and no one imagined that the time would ever come when, in our cities and villages, street surface railroads would accommodate the great majority of the local traveling public, carrying them rapidly from one place to another; leaving the private conveyance to carry but an infinitesimal portion of that great public which daily and hourly traverse the streets of our rapidly growing cities. Had they been able to anticipate what we have witnessed, the arguments advanced to justify the holding that the rule of the Williams Case, 16 N. Y. 97, 69 Am. Dec. 651—a steam railroad case, and not a street case at all—was applicable to a street railroad operated for the convenience of those using the street would not have been made. That wide distinction which in fact obtains between those two classes of cases should be by law maintained, especially when only the correction of a manifest error stands in the way.

I advise a reversal of the order.

GRAY, O'BRIEN, VANN, and CULLEN, JJ., concur with MARTIN, J. WERNER, J., concurs with PARKER, C. J.

Judgment accordingly.

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(*Supreme Court of Washington, April 17, 1902.*)

[68 Pac. Rep. 882.]

Right of Way—Adverse Possession—Application of Statute of Limitations.*

2 Ballinger's Ann. Codes & St. § 4797, requires action to recover real estate to be brought within 10 years. Section 4807 provides that such section shall apply to actions brought in the name of the state, county, or any other public corporation, or for its benefit: *held*, that an action by a railroad to recover a part of its right of way from a person in

*As to whether title may be acquired against a railroad by adverse possession, see *Wilbur v. Cedar Rapids & M. R. Ry. Co.* (Iowa), 1 R. R. R. 648, and foot-note, 24 Am. & Eng. R. Cas., N. S., 648, and foot-note.

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adverse possession is subject to, and barred under, the statutes if not brought in 10 years.

Same—Same—Homesteader's Possession.

Where a railroad right of way is included in a homestead application, and possession is taken thereof by the homesteader, though the right of way was granted to the company prior to his application, and the company afterwards makes a forcible entry on a portion only of the right of way over the homestead, the homesteader, by a continued adverse possession of the remainder for 10 years before the company brings suit to recover the land, acquires title, under 2 Ballinger's Ann. Codes & St. § 4797, requiring action to recover real estate to be brought in 10 years.

Appeal from superior court, Kittitas county; John B. Davidson, Judge.

Ejectment by the Northern Pacific Railway Company against August Hasse and wife. From a judgment for plaintiff, defendants appeal. Reversed.

Pruyn & Semmons, for appellants.

B. S. Grosscup and A. G. Avery, for respondent.

REAVIS, C. J. Action in ejectment by the Northern Pacific Railway Company, plaintiff, against Hasse and wife, defendants. The complaint is in the ordinary form, and alleges the grant of a right of way of 400 feet, under the act of congress of July 2, 1864 (13 Stat. 365); that the defendants are in possession of portions of such right of way on each side of the constructed railway line, which have not been used by the company heretofore for its right of way, and that such possession is wrongful. The answer alleged title in the defendants by adverse possession. At the trial of the cause the facts were undisputed, and, in substance, as follows: That defendants settled upon the premises on May 27, 1883, under a homestead application, made final proof in the year 1888, and received a patent therefor on the 27th day of September, 1889; that prior to the year 1886 defendants had constructed substantial improvements, including their dwelling house, and a substantial portion of the tract was inclosed and cultivated; that in the year 1886 the plaintiff's predecessor, the Northern Pacific Railroad Company, constructed its line of road through the premises; that at the time of the entry of the company upon said premises for construction of its line of road it broke the inclosure of appellants, and entered upon cultivated land, during the temporary absence of defendants; that thereafter it erected crossings joining the exterior fences of appellants as the line ran through, and has since maintained such crossings; that appellants have maintained their complete inclosure of the premises, and farmed and cultivated all the land up to the constructed line, which has ditches upon each side of the track, until the commencement of this action in June, 1900; that defendants have paid the taxes on the entire premises without any deduction for right of way ever since final proof was made; and it is also shown that the railway company has paid taxes on its entire right of way. Upon

these facts, the superior court withdrew the cause from the jury, and determined, as a matter of law, that judgment must go for plaintiff. From such judgment in favor of plaintiff, defendants have appealed.

The error assigned is in entering judgment for defendants. It is urged by counsel for defendants that the plea of the statute of limitations should have been sustained, and this is the vital question in the controversy. It will be observed that defendants, in 1886, at the time the entry of the plaintiff was made upon the right of way through the premises, were in actual possession under a homestead application, with an inclosure and improvements. The manner in which plaintiff's predecessor entered was technically forcible. The fencing and improvements certainly belonged to the defendants. In *Railway Co. v. Gordon*, 41 Mich. 420, 2 N. W. 648, the court declared: "The improvements on the land are certainly his own, and if those, or any portion thereof, are appropriated, he is entitled to compensation." But the facts show that the company actually entered upon and has occupied only so much of the right of way as is in actual use for the operation of its line. The defendants have occupied and been in the open possession under a claim of right of the area of land now in controversy since 1883, and for over 10 years had a patent conveying title without reservation. The position assumed by counsel for plaintiff is that the statute of limitations does not run against the right of way granted to plaintiff. Upon this proposition the authorities do not seem to agree very well. Among those supporting the contention of plaintiff, as fairly illustrating its position, may be mentioned: *Railway Co. v. Kindred* (Kan.) 23 Pac. 112; *Slocumb v. Railway Co.* (Iowa) 11 N. W. 641; *Railway Co. v. Telford's Ex'rs* (Tenn.) 14 S. W. 776, 10 L. R. A. 855; *Noll v. Railroad Co.*, 32 Iowa, 66; *Southern Pac. Co. v. Hyatt* (Cal.) 64 Pac. 272, 54 L. R. A. 522. And it is insisted that the case of *Investment Trust v. Enyard* (Wash.) 64 Pac. 516, determined by this court, is decisive in favor of plaintiff. It is true that the expressions in the latter case give much force and color to the argument. We think, upon further review and consideration of the question, that the court went too far in its acquiescence in the reasoning of some of the authorities before it at the time. In that case it was said, upon the facts found by the trial court: "The uses for the right of way in connection with the operation of the railroad may be many. It may require a use for additional stations or side tracks. The company must so use its right of way as to reasonably prevent the communication of fires in the operation of its engines. Many of these uses, it will be observed, need not necessarily be made by the company when its line is first constructed. They must all be regarded, however, as in contemplation of the grant of the right of way. The clearing, cultivation, and fencing of a portion of the right of way not in use at the time would not seem

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to be inconsistent with the continuing rights of the company. We do not think the acts of possession of appellant's grantors were such as to notify the company of an adverse claim to the strip of land in controversy. Such occupancy and use by appellant may be regarded as permissive. We think, upon this ground alone, appellant has failed to show sufficient title to maintain its action. Arriving at this conclusion, it is not necessary to discuss some other important objections argued by counsel for respondents." But the facts in the case differ somewhat from those now under consideration. There the owners of the land granted 400 feet of right of way to the Northern Pacific Railroad Company. The company thereafter located its line of road across the premises, and continued to operate the same. Thus the entry in that case was by the consent of the grantor and it was observed: "It would seem, at any rate, to require some act upon the part of the owner of the servient estate which actually prevents the use of the right of way when required for the purposes of the railroad company, to give notice of adverse claim of right." In the present case the attitude of the parties has been hostile from the inception of the right. But we do not think, upon principle, and what we now regard as the better authority, that the right of way of a railroad company is excepted from the running of the statute of limitations in this state. The same contention was made in the case of *Railroad Co. v. Ely* (Wash.) 65 Pac. 555, 54 L. R. A. 526. It was there observed: "It is the contention of the appellant that the statute does not run against it, for the reason that the right of way is granted in the interest of the public, and that it would be against public policy to allow the company to alienate its right of way, thereby depriving it of the power to carry on the business in aid of which the franchise was granted, and that it must necessarily follow that, if the company could not alienate its lands, public policy would equally prevent an alienation through process of law; that the statute of limitations presupposes a grant by the true owner; and the appellant's successor having been the true owner, and the title to the land having been acquired by the defendants subsequent to the acquiring of title by the appellant, that no grant by the true owner had ever been made, and consequently that the statute of limitations did not apply. The statute of limitations, we think, is not based upon such a thought, but is purely and essentially a statute of repose, in the interest of the stability of titles and of good morals. One holding land adversely to the rights of another can be divested only by the action of the other, even with a better right, within the time prescribed by the statute of limitations; and this is true, even though he may have originally entered under a void grant or sale. But his claim ripens into a perfect title, and becomes absolute, if such possession is not disturbed within the time prescribed. As is said by 3 Washb. Real Prop. (4th Ed.) p. 164: 'The operation

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of the statute takes away the title of the real owner, and transfers it, not in form, indeed, but in legal effect, to the adverse occupant. In other words, the statute of limitations gives a perfect title. The doctrine is stated thus strongly, because it seems to be the result of modern decisions, although it was once held that the effect of the statute was merely to take away the remedy, and did not bind the estate or transfer the title.' That the statute of limitations is a statute of repose has been decided by all modern authority, including many decisions from this court. See *Wickham v. Sprague*, 18 Wash. 466, 51 Pac. 1055." See, also, *Railroad Co. v. O'Connor*, 154 Ill. 553, 39 N. E. 563; *Matthews v. Railroad Co. (Mich.)* 67 N. W. 1111; *Gregory v. Knight*, 50 Mich. 61, 14 N. W. 700; *Coleman v. Railroad Co.*, 64 Mich. 160, 31 N. W. 47, 29 Am. & Eng. R. Cas. 247; *City of Big Rapids v. Comstock*, 65 Mich. 78, 31 N. W. 811; *Donahue v. Railroad Co. (Ill.)* 46 N. E. 714; *Railroad Co. v. Houghton (Ill.)* 18 N. E. 301, 1 L. R. A. 213, 9 Am. St. Rep. 581. The statute for the recovery of real property or the possession thereof is section 4797, 2 Ballinger's Ann. Codes & St., as follows: "The period prescribed in the preceding section for the commencement of actions shall be as follows:—Within ten years,—1. Actions for the recovery of real property, or for the recovery of the possession thereof; and no action shall be maintained for such recovery unless it appear that the plaintiff, his ancestor, predecessor, or grantor, was seised or possessed of the premises in question within ten years before the commencement of the action." Section 4807, Id., is as follows: "The limitations prescribed in this chapter shall apply to actions brought in the name of the state, or any county or other public corporation therein, or for its benefit, in the same manner as to actions by private parties. An action shall be deemed commenced when the complaint is filed." It may be clearly observed that under this statute there is no exception in favor of the state or public rights saving them from the application of the statute.

The judgment is reversed, with direction to the superior court to enter judgment in favor of appellants dismissing the action.

WHITE, FULLERTON, HADLEY, ANDERS, MOUNT, and DUNBAR, JJ., concur.

BURNS v. SOUTHERN RY. CO.

(*Supreme Court of South Carolina, March 7, 1902.*)

[40 S. E. Rep. 1018.]

Whether Persons Riding on Railroad Trains at the Invitation of Trainmen Are Trespassers.*

A complaint alleged that plaintiff, at the invitation of the engineer

*See *Louisville & N. R. Co. v. Scott's Adm'r (Ky.)*, 17 Am. & Eng. R. Cas., N. S., 261, and note, 266.

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and conductor, went into the cab of a construction train, which was run out on a bridge and anchored on the track so high from the ground that he could not get out, and that a freight train ran into the cab and injured him. The complaint did not allege wanton injury: *held* that, as he was a trespasser, the complaint stated no cause of action.

Gary, A. J., dissenting.

Appeal from common pleas circuit court of Greenville county; Klugh, Judge.

Action by John Burns against the Southern Railway Company. From an order sustaining defendant's demurrer and dismissing the complaint, plaintiff appeals. Affirmed.

The following are the exceptions:

"(1) Because his honor erred in holding: 'The material train, from its nature and use, was not intended for the transportation of passengers; and the presumption is that the plaintiff, not an employee, was there without right.' This being a question of fact, and cannot be considered on demurrer.

"(2) Because his honor erred in holding: 'The presumption also attaches that the servants in charge of the material train were not authorized to invite or permit the plaintiff to ride upon said train.' This also being a question of fact, and not of law, and cannot be considered on demurrer. This being a defense, and can only be considered upon the whole case in a charge to the jury.

"(3) Because his honor erred in holding: 'That the conductor and engineer had no authority to so invite or permit the plaintiff to ride is presumed, and the complaint fails to rebut this presumption.' This, also, being a question of fact, and not one of law.

"(4) Because his honor erred in holding as follows: 'It follows that the plaintiff was not in a position to demand the exercise of care on the part of the defendant, and could only recover for a willful injury, which is not alleged.' This, also, being a question of fact, and not one of law, and cannot be considered on demurrer. His honor should have held that the complaint alleges that the plaintiff is a boy of tender age, and if unlawfully or lawfully upon defendant's train, with the knowledge and consent of the conductor and engineer, and they allowed him to remain there, and he was injured by the careless and negligent act of defendant's agents and servants, the master is liable, and that the complaint states a good cause of action, and should be sustained, and the demurrer overruled.

"(5) Because his honor erred in holding: 'It appears, also, that the invitation or permission to ride in the cab was not the proximate cause of the plaintiff's injury while he was in the cab upon the bridge. The collision occurred by the alleged negligence of the freight train in not stopping before running upon the bridge.' This, also, being a question of fact, and could not be determined on demurrer. And his honor should have held that the complaint alleges that the plaintiff was

ordered by the conductor and engineer to go into the cab, and there remain until they had finished eating, when buckets and dishes would be delivered to him, and while there waiting the said material train was backed upon the bridge at a point about sixty feet from the ground, and anchored to the main line; and the conductor and engineer, well knowing that a certain freight train was then due, did negligently and carelessly remain there, well knowing that the plaintiff, a boy of tender age, was in said cab and could not escape, and remained there until said freight train ran into the cab and caused the injury; the combined negligence of the two trains being alleged in two separate paragraphs, and that the complaint alleges and states a good cause of action, and his honor should have so held.

“(6) Because his honor erred in sustaining defendant’s demurrer upon the grounds therein alleged, when he should have held that the matters and things set out in defendant’s demurrer to plaintiff’s complaint were not germane to the issue, but could only be considered by way of defense to plaintiff’s cause of action upon the whole case after the testimony had been heard. That the demurrer raised no question of law that could be considered on demurrer, and that plaintiff’s complaint should have been sustained, and the demurrer dismissed.

“(7) Because his honor erred in holding ‘that the complaint does not show any actionable negligence on the part of the defendant.’

“(8) Because his honor should have held, and overruled the demurrer on the following grounds: (a) That the master is liable for the negligence or tortious act of the servant, if the servant acted not only without express authority to do the wrong, but in violation of his duty to the master. (b) That the basis for liability is that the one who employs another to do an act for his benefit, and who has the choice of the agent, must take the risk of injury to third persons. (c) That for the probable effect of misconduct, either because of the dangerous character of the implements intrusted to the servant or of the exacting nature of his duties, if he handles such implements in a careless and negligent manner, and third persons are injured, the master is liable. (d) That the master is liable where the servant misuses a dangerous machine which has been placed in his keeping, and injury is done to third persons. (e) That the act of a conductor or engineer is the act of the company, as he is a representative of the master, and that the act of the conductor or engineer in charge of a train, and there while in charge, is the act of the company, and, if third persons are injured by negligence, the company is liable, and that plaintiff’s complaint states a good cause of action. (f) That when the persons in charge of the train discover the peril, or are in a position where they ought to have discovered it (a position in which the circumstances, movements, or conditions of the

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persons injured would manifest to a vigilant observer that such person is unaware of his peril, or, if aware of it, is unable to extricate himself), a culpable omission to use the means to hand to prevent the accident will be regarded as reckless or intentional negligence; and his honor should have held that this was alleged in terms in plaintiff's complaint, the said complaint should have been sustained, and the demurrer overruled. (g) That, when negligence is alleged, it is a mixed question of law and fact, and must be submitted to the jury under proper instruction from the court, and therefore the demurrer should have been overruled. (h) That it is alleged in the complaint that the plaintiff is a child of tender age, and hence it follows in this class of cases that the railroad company owes a child incapable of realizing danger or caring for its own safety the same measure of duty, the same degree of care, that it owes to dumb animals astray on its track. This raises a question of fact, and the complaint should have been sustained, and the demurrer overruled. (i) That a railway company is bound to keep a reasonable lookout for trespassers upon its property, and is bound to exercise such care as the circumstances may require to prevent injury to them; and, the plaintiff having alleged that he was upon said train by permission, he was there as a licensee, and not a trespasser, and the defendant owed him higher rights than was due a trespasser; and that plaintiff's complaint must be sustained, and the demurrer overruled. (j) That a railroad company is liable in damages for an injury inflicted by it, when its negligence was the direct and proximate cause of the injury. If the direct and proximate cause of the infant's injury was the negligence of the defendant in failing to keep a reasonable lookout, and to discover the child in time to have prevented the injury, it is as much liable in damages as if the proximate cause of the injury had been its negligence after discovery. The plaintiff having alleged that he was an infant, and on defendant's train by invitation, and with the knowledge and consent of the conductor and engineer, the complaint should have been sustained, and the demurrer overruled."

C. J. Hunt, for appellant.

T. P. Cothran, for respondent.

POPE, J. (after stating the facts). The defendant demurred to plaintiff's complaint. The demurrer was sustained by his honor, Judge Klugh, and the complaint was dismissed. After judgment was entered, plaintiff appealed. To properly understand the case, the complaint must be embodied herein; also the grounds of demurrer, and the order of the circuit judge, and the exceptions also. The following is a copy of the complaint, omitting the caption:

"The plaintiff above named, by his guardian ad litem, L. E. Burns, respectfully shows to the court and alleges:

"(1) That the said defendant, Southern Railway Company,

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is a corporation duly incorporated by and under the laws of the state of Virginia, owning and operating railroads and running trains of cars over said railroads in state and county aforesaid, and having property and a place of business in said state and county, and entitled to sue and be sued in the courts of this state; that said defendant is a common carrier, and operates a railroad from the state of Virginia through Spartanburg and Greenville counties, state aforesaid, to the city of Atlanta, in the state of Georgia, running and operating passenger, freight, and other trains over said railroads as aforesaid for hire, and for accommodation of the public travel to and from the city of Atlanta, state of Georgia, to the state of Virginia, through South Carolina, by the city of Greenville, and through the counties of Greenville and Spartanburg, in said state.

“(2) That on the 30th day of December, 1899, and for some time previous thereto, the defendant was engaged in the construction and repair of a new bridge at and across South Tiger river, about one mile from Duncan's Station, in Spartanburg county, the same being a bridge owned and used in crossing the aforesaid river by defendant's main line of railroad; and at the same time and place the defendant was using a material or work train in said construction and repairs, whose custom it was to carry out over defendant's track, and upon said bridge across said river, heavy timbers and other material, and at a point some sixty feet high from the ground, by means of an engine, rope, block, and tackle, lowered and raised heavy timbers and other material used in the construction and repair of said bridge across said river, over which regular trains of cars of the defendant passed at regular hours, going and coming, carrying freight and passengers over said bridge on defendant's main line, which custom defendant's agents and servants well knew. That at about 2:30 o'clock in the afternoon, it was the custom of the defendant to run one of its freight trains, known as the 'north-bound fast freight,' over and along its track and over said bridge at South Tiger river; and the defendant's agents and servants in charge of said freight train well knew that said bridge across South Tiger river was then being repaired, and that said material train as aforesaid was being used at and upon said bridge on the main line of the defendant, and that it was the custom and the duty of defendant's agents and servants to stop said freight train on the main line at a point just south of said river and bridge before attempting to cross said bridge. That although the agents and servants of defendant in charge of said freight train well knew of the said work and dangerous condition of things surrounding said bridge across South Tiger river as aforesaid, and the use of a material train aiding in the construction and repair of said bridge on defendant's main line they, without taking the proper precaution to stop said freight train, did carelessly and negligently

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and recklessly run said freight train down the railroad track of the defendant at a high and reckless rate of speed, and instead of its being brought to a standstill on the south side of the bridge, as was the custom and practice since the new bridge has been under construction and repair, the said freight train dashed across the river and over said bridge at a high and reckless rate of speed, caused by the carelessness and negligence of defendant's agents and servants, and the said engine and train of cars went with a fearful crash into the material train, which was then on the main line, anchored and tied to the main track on the said bridge, then engaged in lifting heavy timbers and other material necessary in the construction of said bridge; and, while so anchored and on the main line as aforesaid, the said freight train ran into the cab of the said material train with terrific and murderous force, striking this plaintiff on the head and hips, and otherwise injuring him, from which said injury this plaintiff has never recovered.

"(3) That on the said 30th day of December, 1899, a short while before the accident occurred as aforesaid, this plaintiff went to the works at the said bridge across the South Tiger river for the purpose of carrying, and did carry, dinner to W. C. Crumley, conductor, and a Mr. Black, the engineer, of said material train then engaged in the construction and repair of said bridge. That this plaintiff, failing to find the aforesaid parties at the said bridge, proceeded with said dinner to Duncan's Station, about one mile away, where he found the aforesaid parties in charge of said material train, and then and there delivered dinner to the above named parties as per their order; they at that time taking meals with the plaintiff's mother. That at the same time and place the said conductor and engineer told this plaintiff to go into the cab of said material train, and there wait until buckets and dishes were delivered to him after they got through eating their dinner, and at the same time told this plaintiff that he could ride on the said material train; and, while this plaintiff was waiting in said cab for buckets and dishes, the said material train, without any warning to this plaintiff, backed down the railroad to the works at South Tiger, and out on the bridge at a point sixty feet from the ground, at a point on said bridge where this plaintiff could not get off of said material train, and was at this point tied or anchored to the main line, when the aforesaid freight train approached and ran into the cab, where this plaintiff was unable to escape by any possible means, and was forced to remain in said cab and take the consequences of the awful crash of the great engine plowing into said cab, striking this plaintiff on the head and hips, and otherwise injuring and bruising him about the body, from which said injury this plaintiff has never recovered. That although the said conductor, engineer, agents, and servants of the defendant well knew that the aforesaid freight train

was then about due, and would soon pass over said bridge, they did carelessly and negligently, and without having any regard for the plaintiff, run said material train out upon the aforesaid bridge, and did carelessly and negligently remain there upon the main line of the defendant until the said freight train was due, and was then approaching at a high rate of speed, before the said agents and servants of the defendant made any effort to get out of the way of said freight train; well knowing the dangerous and perilous position of this plaintiff.

“(4) That this defendant was upon said material train by the special permission of the conductor and engineer in charge of said material train, and that, in addition to the privilege granted this plaintiff by the agents and servants of the defendant aforesaid, this plaintiff bought apples and gave to said agents and servants, and, upon so doing, was told that he could ride at any time he saw fit to do so.

“(5) That this plaintiff is a boy of tender age, which was well known to the agents and servants of the defendant in charge of said material train, and, notwithstanding this, they did negligently and carelessly permit and allow this plaintiff to get upon said material train and ride, well knowing the dangerous and hazardous work the said material train and its crew was then engaged in, and well knowing that the aforesaid freight train was then about due; but, notwithstanding this, the said agents and servants of defendant did negligently and carelessly run said material train out and upon aforesaid bridge at a point about sixty feet from the ground, well knowing that this plaintiff was in said cab, and at a point where he could not escape; and while there the accident occurred as aforesaid, by the carelessness and negligence of the defendant's agents and servants.

“(6) That this action is brought by the plaintiff through his guardian ad litem, who was appointed by an order of the clerk of this court on the 27th day of February, 1901. That said action is brought for the sole benefit of this plaintiff. That the damages resulting to this plaintiff by reason of the aforesaid injury amount to \$1,995. Wherefore the plaintiff demands judgment against the defendant for the sum of \$1,995, and for the costs of this action.”

To this complaint the defendant interposed the following demurrer:

“The defendant demurs to the complaint of the plaintiff herein upon the ground that it does not state facts sufficient to constitute a cause of action, in that:

“(1) It appears upon the face of the complaint that the train upon which the plaintiff was permitted to ride was a material or work train, whose business it was to carry over defendant's track, and upon the bridge across South Tiger river, heavy timbers and other material, and said train was there to be used in the repair of said bridge; that said train

was not used in the transportation of passengers; that it does not appear from the complaint that the agents of the defendant in charge of said train were authorized to permit and encourage strangers to ride thereupon; that said agents were not so authorized; that therefore the defendant owed no duty to the plaintiff, except to refrain from wantonly injuring him, of which there is no allegation in the complaint, and is not liable for the negligence of its agents in the premises.

"(2) That the defendant company is liable for the tortious acts of its agents only when the act causing injury is done in the line of the servant's duty, and within the scope of his employment, and that the complaint is defective, not only in failing to set forth within this rule, but in stating facts showing that the injury resulted from the unauthorized acts of defendant's agents or servants.

"(3) That the complaint does not show any actionable negligence on the part of the defendant."

Upon hearing the demurrer, Judge Klugh passed the following order:

"The defendant interposed a written demurrer to the complaint upon the grounds therein stated. A plaintiff who grounds his action upon one allegation of negligence of the defendant must show not only that the conduct of which he complains was negligent in character, but that it was violative of some duty which was owing to him. The complaint alleges that the plaintiff was permitted by the conductor and engineer to ride in the cab of the material train which was employed in repairing a high bridge, and that, while in the cab of this train, it was run into by a freight train on the bridge. The material train, from its nature and use, was not intended for the transportation of passengers, and the presumption is that the plaintiff, not an employee, was there without right. The presumption also attaches that the servants in charge of the material train were not authorized to invite or permit the plaintiff to ride upon said train. The master is liable for the negligence of his servants only while he is acting within the scope of his agency. That the conductor and engineer had no authority to so invite or permit the plaintiff to ride is presumed, and the complaint fails to rebut this presumption. It follows that the plaintiff was not in a position to demand the exercise of care on the part of the defendant, and could only recover for a willful injury, which is not alleged. It appears, also, that the invitation or permission to ride in the cab was not the proximate cause of the plaintiff's injury. While he was in the cab upon the bridge, the collision occurred by the alleged negligence of the freight train in not stopping before running upon the bridge. For these reasons, and upon the grounds stated in the demurrer, it is ordered that the demurrer be sustained, and that the complaint be dismissed, with costs."

From this order of Judge Klugh, as before stated, the plain-

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tiff has appealed on numerous exceptions, which should be included in the report of this case. We will now dispose of them. It will be observed that all the exceptions are intended to show that the circuit judge committed reversible error in sustaining the demurrer, whose sole purpose was to show that the complaint failed to state facts sufficient to sustain a cause of action against the defendant. It must be borne in mind that the complaint does not allege that the plaintiff's injuries, received by him while in the cab of defendant, were the result of wantonness or willfulness on the part of the defendant to him. It appears that there was no contractual relation existing between the plaintiff and defendant. The plaintiff was not an employee of the defendant. He was not a passenger for hire on defendant's railroad train. In addition to this, it is not alleged that the defendant used this train upon which plaintiff rode for any other purpose than to carry material to its new bridge over the South Tiger river, and to hoist and lower the said material into its place in the construction of its said bridge. Nor does it appear in the complaint that the conductor and engineer of said material train were allowed or authorized by the defendant railroad to allow any one of the general public to ride upon said train. Indeed, the allegations of the complaint determined that the plaintiff well knew the object and character of defendant as to said material train. What relation, we may ask just here, did this plaintiff sustain to the defendant, if he occupied its cab attached to its material train, when he went into its cab by permission of the conductor and engineer of said material train, without the permission or authority of said agents to so invite the plaintiff into defendant's said cab? He was a trespasser. It is true, he could say in defense of such trespass that the same was with knowledge of defendant's agents. But when, as such trespasser, the plaintiff seeks to hold the defendant to answer in damages for any injuries received by him while occupying the cab attached to the defendant's said material train, he must stand or fall upon the question of the conductor's or engineer's power and authority to allow him to so occupy said cab. Was the power to allow the plaintiff to so ride within the agency existing between the conductor and engineer, on the one side, and the defendant railway, on the other side? There is no allegation in the complaint showing that any such agency existed. On the contrary, by its allegations, the complaint, when strictly construed, denied such agency. Then, if plaintiff was a trespasser upon the defendant's railway train, the only duty the defendant owed him was not to wantonly or willfully injure him. This doctrine of our law is well established, for in the case of *Darwin v. Railroad Co.*, 23 S. C. 540, 55 Am. Rep. 32, it is said: "But to a trespasser the company owes no such duty. The company is not bound to assume or even expect that trespassers will intrude themselves into dangerous places upon their trains, and is therefore

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under no obligations to provide for their safety by warning them of the danger of their unlawful and reckless acts." And also in the case of *Smalley v. Railroad Co.*, 57 S. C. 251, 35 S. E. 492, the same doctrine is upheld. Any other doctrine, it seems to us, would impose an unnatural care and responsibility upon railroads. They are organized for wise purposes, and should respond to the duty they owe the public, but to impose upon them the burden of a quasi guardianship of all infant trespassers who ride in cabs or other cars not intended for passengers to occupy is extending the rule too far.

The first exception must be overruled. It is the duty of the circuit judge, upon demurrer being interposed, to pass upon the sufficiency of the facts alleged in the complaint to sustain the plaintiff's alleged cause of action.

The second exception must be overruled. The circuit judge was brought face to face with the failure in the complaint to allege that the conductor and engineer of a material train, devoted, as alleged by the complaint, to specific purposes, had any authority from defendant to invite persons to take free rides in the cab attached to a material train. His duty was plain, and he met it.

The third exception is overruled, for the reasons just given.

The fourth exception must also be overruled. The circuit judge held that the allegations of fact in the complaint made the plaintiff a trespasser on defendant's train. He simply declared the law applicable to such facts.

The fifth exception is overruled. The circuit judge, in testing the question as to the cause of action of plaintiff as based upon the allegations of fact in the complaint, plainly saw, and so stated, that plaintiff's being in the cab by permission of conductor and engineer was not the proximate cause of his injuries.

The sixth exception must be overruled. A reading of the demurrer itself shows its aim was to point out the failure to state facts sufficient to sustain a cause of action. The circuit judge met this view, and sustained the demurrer.

The seventh exception is overruled. It is too general.

The eighth exception, in all its subdivisions, is overruled. It would be a monstrous doctrine to hold a railroad liable for injuries to trespassers, except upon the ground of wanton or malicious or willful disregard of the claims of humanity by such railroad. There are no allegations of fact in the complaint upon which to bottom either a wanton, willful, or malicious disregard of any duty owed by defendant to plaintiff. (a) This subdivision falls under the class of duties not owed by the defendant itself or by its agents. (b) The employee fails to come under this provision of the law. (c) There is no liability of defendant under this subdivision. (d) There is no application of this doctrine of the law to the facts in the complaint. (e) The act of an agent can only be imputed to the

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principal when such act falls within the scope of authority given the servant by the principal. In the case at bar no such responsibility by the master exists. (f) The allegations of fact in the complaint produce no such case as is set out in the subdivision. (g) The allegations of fact show no negligence—an entire absence of negligence—by the defendant. Hence this subdivision is unsupported. (h) The proposition of law stated in this subdivision is unsupported by the allegations of fact in the complaint. (i) There is no doubt but that the defendant owes some duty to trespassers upon its track or in its cars, but we have already indicated the extent of that duty. (j) The allegations of fact in the complaint fail to make out a case where the provisions of law set out in this subdivision can be made to apply.

It follows, therefore, from our examination of these exceptions, that they must all be overruled, and the demurrer sustained, as recommended by the circuit judge in his order.

It is the judgment of this court that the judgment of the circuit court be affirmed.

GARY, A. J. (dissenting). The principal is liable civiliter not only for the authorized acts of its agents, but likewise for those acts which he does in the exercise of the powers conferred on him. *Reynolds v. Witte*, 13 S. C. 5, 36 Am. Rep. 678; *Skipper v. Manufacturing Co.*, 58 S. C. 143, 36 S. E. 509. When the conductor told the plaintiff to go into the cab of the material train, he was in the exercise of his duties as conductor, and the defendant is responsible for his acts. The plaintiff is of tender years. He went to the railroad train for a lawful purpose, and entered the cab by permission of the conductor. Under these circumstances, he was not a trespasser. *Sims v. Steadman*, 62 S. C. 300, 40 S. E. 677. I therefore dissent.

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(*Supreme Court of Mississippi, April 7, 1902.*)

[31 So. Rep. 792.]

Killing Stock on Track—Negligence.*

In an action against a railroad company for negligently killing stock belonging to plaintiff at intervals during a period of two years, evidence examined in particular instances, and held to support a verdict for plaintiff.

Same—Remittitur.

Where there is no evidence in the record to support the verdict for plaintiff as to one particular item, judgment will be reversed unless he remits as to such item.

*As to the duty to look out for stock on track, see *Kansas City, M. & B. R. Co. v. Henson* (Ala.), 1 R. R. R. 674, and foot-note, 24 Am. & Eng. R. Cas., N. S., 674, and foot-note.

As to the duty of trainmen where stock is seen near track, see *Central of Georgia Ry. Co. v. Dumas* (Ala.), 23 Am. & Eng. R. Cas., N. S., 956, and foot-note.

Appeal from circuit court, Madison county; Robt. Powell, Judge.

Action by S. P. Tucker against the Illinois Central Railroad Company. Judgment for plaintiff as to certain items of stock, and defendant appeals. Conditionally affirmed.

There were 17 items sued for in the same suit. The evidence for plaintiff as to each item was substantially as follows:

Item 1. A mule. It was standing on the track. The train that struck it was going south, and the mule could have been seen for three-quarters of a mile. The train whistled twice, and the mule ran down the track 60 or 70 yards, and was caught and knocked off.

Item 3. The cow was going south down the track. Saw the cow when the train was 150 yards from her. It was in the daytime, and the track was straight for some distance. Did not hear any alarm given.

Item 4. Saw blood and hair on the railroad track, and saw the animal near the track, dead, on the east side, and bruised up.

Item 6. Saw train kill Jersey calf. It was running down the track, and the train knocked it off. Engineer made no effort to stop the train. Did not shut off steam. Could have seen it for over half a mile.

Item 7. Saw the train pass by, and found the cow dead near the track in a few minutes afterwards. The engineer could have seen the cow for half a mile. He gave no alarm of any kind.

Items 9 and 10. Two steers killed at the same time. The railroad company was fencing its tracks, but had not completed it. The cattle got inside the fence, and there was no way for them to get out. The track was straight for a considerable distance, and there was nothing at some places to keep cattle from getting on the tracks.

Items 11 and 12. The train was going north, and there were five or six cows on the tracks. The train approached, and they commenced running down the track, crossing from one side to the other. The engineer shut off steam, and they all left the track, but one. The engineer again put on steam, and knocked the steer off. The engineer could have stopped the train before it struck the steer.

Item 14. No eyewitnesses. Witness saw the trainmen taking the cow from under the train after she was killed. The cow was with other cattle, and they ran down the track of the railroad, as shown by their tracks on the railroad, 50 or 70 yards, and she was killed right at a bridge. The track was straight, and there was no obstruction to the view for about three-fourths of a mile.

Item 15. Witness saw bull in a few minutes after it was killed by the train going south. It was on the east side of the track, at south end of the bridge. Several witnesses

testified that the south end of the bridge was too low for cattle to get under it.

Defendant's witnesses testified, in substance, as follows:

Item 3. Engineer testified that he was running south about 18 miles an hour. When he first saw the cow, she was not on the track, but very near, and trying to cross from east to west, and went straight across. Under the circumstances, the accident could not be avoided.

Item 7. Engineer testified that as he was passing Vaughn station, going south, he struck something, and asked the fireman if he knew what it was, and the fireman said he was putting in coal at the time. Could not stop, and did not see what it was. Was keeping a lookout, but there was a curve there, and the cow came from the inside of the curve, attempting to cross. It was impossible to avoid the accident.

Item 11. Engineer testified that the animal ran from behind an embankment about 50 feet from the engine. "It turned and I went right down the track, and as soon as I saw it I shut off steam, and applied brakes, and sounded the stock alarm. Was running 35 miles an hour. It was about 150 yards from where I first saw it to where I struck it. The train was running down grade. I was looking out, and could not have seen it sooner, as it was behind an embankment. It was utterly impossible to avoid the accident."

Item 14. Engineer testified: That he was going south when he struck and killed the cow. That the cow was standing 40 or 50 feet from the track, on the west side, behind some brush, and when he came along, and got in about 200 or 300 feet, she ran up in the middle of the track. When he struck her, was running 50 or 55 miles an hour. Did all he could to save her after he saw her. Applied the air brakes and gave the stock alarm, but it was impossible to stop the train. He was keeping a lookout. The fireman testified that he was keeping a lookout and saw the cow, and testified substantially what the engineer did.

Item 15. The engineer testified that he struck the bull as he was going south. Did not see him until within 20 feet of him, as he came out from under the trestle. Was running about 18 miles an hour. Was keeping a lookout, and could not have seen the bull earlier, because he was underneath the trestle. As soon as he saw him, he applied the air brakes and sounded the stock alarm. There was no carelessness on the part of any one attached to the train.

The other items were uncontradicted. There were verdict and judgment for plaintiff for these items. Defendant's motion for a new trial was overruled, and it appeals.

Mayes & Harris, for appellant.

H. B. Greaves, for appellee.

PER CURIAM. In this case, of 17 items for stock killed over a period of more than two years, items 2, 5, 8, 13, and

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16 were excluded by the court below. As to the others, after careful examination of the evidence, we cannot, on the conflict, properly disturb the verdict of the jury. There is no evidence in the record in support of item 17, for \$15; and so the case must be reversed, unless appellee remits as to that, in which event we affirm. But in either case the appellee is to be taxed with the costs.

DELAWARE, L. & W. R. Co. v. DEVORE.

(Circuit Court of Appeals, Second Circuit, March 10, 1902.)

[114 Fed. Rep. 155.]

Positive and Negative Testimony—Weight—Instructions.

A requested instruction that positive testimony of witnesses that a whistle was blown and a bell rung is entitled to more weight than testimony of other witnesses that they did not hear the one or the other is too broad, without reference to the credibility of the witnesses in other respects.

Negligence of Parents—Imputing It to Child*—Drivers.

Negligence of the father, as well as of the mother, in not discovering a train, is imputable to a child, held in the arms of his mother, who was sitting by the side of the father, who was driving, as the father is not acting as a driver merely.

Personal Injuries to Child†—Damages.

A child made a mental and physical wreck may recover of the one by whose negligence it was caused, not only for physical suffering, but for loss of earning capacity.

In Error to the Circuit Court of the United States for the Southern District of New York.

Writ of error to review a judgment rendered by the circuit court for the Southern district of New York upon a verdict against the Delaware, Lackawanna & Western Railroad Company for the sum of \$10,000 in favor of the plaintiff in an action to recover damages for personal injuries sustained by him at a grade crossing known as "Hope Crossing," on the line of the defendant's railroad in New Jersey, on the evening of November 22, 1892.

Hamilton O'Dell, for plaintiff in error.

Walter K. Barton, for defendant in error.

Before WALLACE and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. At the time of the injury the plaintiff was about one year and four months old. His parents had been living at Wallpack, N. J. On the morning of November 22, 1892, they drove from their home with this child

*See this subject discussed in extensive note appended to *Ploof v. Burlington Trac. Co.*, 13 Am. & Eng. R. Cas., N. S., 702, giving both the affirmative and negative rule, with long citation of authorities. See also, *Railway Co. v. Kowolski*, 34 C. C. A. 4.

†As being a question of fact for the jury, see *Ploof v. Burlington Trac. Co.*, 13 Am. & Eng. R. Cas., N. S., 702, and note at end of case.

to Belvidere, N. J., a distance of about 26 miles from Wall-pack, and about 6 o'clock in the evening started to return home. On their way to Belvidere they had crossed the railroad track at Hope crossing, but Mrs. Devore (now Mrs. Heater) had never driven on that road before, and did not know that her husband had, and did not know the name of the railroad which they crossed. They were in a smoothly running top buggy, and had an old and gentle horse. The father drove the horse, and was seated on the right side of the buggy. The mother sat on the left side with the child in her arms. The evening was very dark and cloudy. "It was storming some,—a sort of hail, sleeting." The wind was on the right side of the buggy, and was blowing hard. The top part of the buggy was put down so as to prevent the wind from striking the baby. Hope crossing is about $2\frac{1}{4}$ miles from Belvidere, and as they approached it Mrs. Devore asked her husband if they were not near the crossing which they had crossed in the morning. He replied, "A ways ahead," and pulled the horse down to a walk. The horse continued to walk until the crossing was reached. Mrs. Devore, from the time the horse began to walk, looked both ways and listened for the noise of a train, and testified that her husband did the same, but that she neither saw nor heard anything; heard neither bell nor whistle, and saw nothing, until, "just as we got on the tracks, I saw the glittering of the rail, and that is all I saw." Mr. Devore was injured, and has since died, and the child was terribly injured, so that he is now, and will be permanently, a mental and physical wreck. He was previously a strong, healthy child. The train had left Bridgeville Depot, about a third of a mile to the right from Hope crossing, somewhat after 7 o'clock, and at the time of the disaster was going at the rate of 40 miles an hour. It does not appear that Mrs. Devore knew of the existence of this depot or of the time when trains might be expected to pass the crossing.

The issues were as to the negligence of the defendant in disobeying the statutory requirements as to bell or whistle; as to the contributory negligence of the parents of the child in omitting to take proper precautions when approaching a railroad crossing; and, in connection with the question of contributory negligence, the question was examined whether upon a very dark and stormy evening an approaching train could be seen or heard by the occupants of a buggy as it approached the crossing. A further issue was made in the pleadings and the testimony as to the especially dangerous character of the crossing, which should have compelled the defendant to take especial precautions, other than those provided by statute, to prevent casualties of the character encountered by the Devores.

Upon the question of obedience to the statute of New Jersey, which requires the ringing of a bell or the blowing of

a whistle before and until the engine of a railroad train has crossed a grade crossing, the witnesses differed; the majority in number being in favor of the defendant's compliance with the statute on the evening of the accident. The court did not charge, as requested by the defendant, as follows: "Upon the question whether the bell was rung and the whistle blown, positive testimony of witnesses that the one was blown and the other was rung is entitled to more weight than testimony of other witnesses that they did not hear the one or the other,"—and to this omission an exception was taken. The request asserts the proposition that positive testimony of witnesses is entitled to more weight than the negative testimony of other witnesses, and makes no discrimination in regard to the credibility in other respects of the two classes of witnesses. The positive class may impress the triers with lack of confidence in their trustworthiness, their disinterestedness, their accuracy; but the request establishes as a rule of law that positive testimony is entitled to superior credit whether other things are equal or not, and is, we think, a broader rule than a court should be called upon to give to a jury, without reference to the credibility of the witnesses in other respects. In reply to the following question put by the foreman of the jury: "Supposing the jury believe that the bell was rung and the whistle sounded, and suppose, at the same time, that Mrs. Heater used her best diligence in trying to see whether the train was coming or not, does that relieve the railroad from responsibility?" the court said: "If they rang the bell and sounded the whistle they are relieved from responsibility, unless you reach the conclusion that the crossing there was such a peculiarly hazardous one that it was necessary to adopt further precautions, for the reason that the sounding of bells and whistles could not be heard by travelers on the highway."

To that part of the instruction commencing "unless you reach" the defendant excepted for the reason that there was no proof before the jury showing, or tending to show, that the crossing was "a peculiarly hazardous one," or that "it was necessary to adopt further precautions, for the reason that the sounding of bells and whistles could not be heard by travelers on the highway." Much of the argument of the plaintiff in error is directed to an alleged entire or substantial absence of proof that the crossing was a peculiarly hazardous one. If peculiarly hazardous, the fact bore upon the question of the defendant's negligence. *Railroad Co. v. Ives*, 144 U. S. 421, 12 Sup. Ct. 679, 36 L. Ed. 485; *Railroad Co. v. Moore*, 45 C. C. A. 21, 105 Fed. 725. The traveled road from Belvidere as it approaches Hope crossing is a gradual ascent until the top of a hill or "rise" in the ground is reached. As the road descends there is a homestead on the right occupied by Mr. Emery, consisting of a house, barn, and other outbuildings. A few trees are in the yard. The view towards Bridgeville Depot is to some extent interfered with by these buildings.

The corner of the Emery fence nearest the crossing is about 70 feet from the first rail of the north-bound railroad track. The corner of the Emery house is 127 feet distant from that rail. At 735 feet from the crossing towards Bridgeville the railroad track enters a cut, which at 855 feet from the crossing is about 5 feet above the top of the rail, and at its extreme height is about 12 or 12½ feet above the top of the rail. A defendant's witness testified that in the daytime, from a point in the highway 47 feet from the crossing towards Belvidere, the whistling post, 1,460 feet away towards Bridgeville, could be seen through the cut. A civil engineer in the defendant's employment testified that "at a point 56½ feet from the center of the north-bound track I saw an engine 550 feet. Just an engine happened to come along there, and I made those measurements. I could see the whole engine. At a point 40 feet from the track I could see the Bridgeville depot very plainly, from the intervening road. At the same point, 56½ feet, I could see part of the depot."

This testimony was not contradicted by measurements made by the plaintiff's witnesses, who relied on the testimony of one McConnell and of Mrs. Heater. McConnell's testimony was of the most importance. He testified in chief as follows:

"I have often driven and walked over this wagon road at the crossing. I have driven from Belvidere to the crossing several times. It is a crooked and winding road all the way through, up and down hill. It is crooked and winding and up and down near the crossing." "Q. What view have you got of the railroad to the right, standing two or three hundred yards back from Hope crossing towards Belvidere? A. You can see the track at this end of the cut. Q. How much can you see? A. Just a little. You cannot see the crossing when you stand back a quarter of a mile or three hundred yards. Q. When you stand back 165 or 170 feet from the crossing, passing the Emery house towards Belvidere, at the top of the rise that exists there, can you see the crossing there? A. No. Q. How near must you be to the crossing to see? Where would you stand with reference to this house? There is a house in the angle formed by the railway and the highway, is there not? A. Yes, sir. Mr. Emery lives there in that house. He lived there at the time of the accident. Q. Where would you stand with reference to that house to see this crossing? A. About the end of his fence,—the dooryard fence. To the Court: The end towards the railroad. By Mr. Tyndall: Q. What is the reason the crossing cannot be seen before getting so close as that? A. There is a sort of a wind in the road. There are some grades too. When you stand in front of the Emery house,—directly in front of it, in the road,—or if you are seated in a buggy directly in front of the Emery house, nothing can be seen of this railroad track to the right. Mr. Emery's house and trees prevent. There are buildings in his plot of ground there besides the house. He has a barn and

chicken coop down below the house. When you get to the corner of the fence towards the railroad you can see the whole of the railroad there. By the Court: Q. Where is this place? Mr. Tyndall: At the corner of the fence nearest the railroad. The Witness: I mean by that 'see the whole of it' straight ahead. You can see the crossing,—nothing else. Q. Can't you see up and down the track a little ways? A. It might be a trifle; I couldn't say exactly as to that. To the Court: You could see a trifle towards the right. By Plaintiff's Counsel: Q. Can you see the cut from that point? Suppose you just got clear of the fence, and you are seated in a buggy or walking, how far down the track toward the Bridgeville Station can you see? A. I couldn't say exactly as to that. I never took particular notice how far I could see down. I could see down a ways,—a small distance. Q. Do you think you could see to the cut? A. I would not say as to that. When you are on the crest of the hill, on the Belvidere side of the house, you can see nothing of this railroad. Q. You can see nothing of the crossing, but can you see anything of the tracks in the distance? A. You can see just a little of the track next to the cut. What I have said in regard to seeing this railroad is said with reference to the daytime. You can't see anything if it is dark. If you stopped on the top of the hill back of the Emery house, you could not see anything at night, on a dark, cloudy night. You would have to be right on the track to see anything of them on a dark, cloudy night. I have been a railroad man, and I am familiar with the lights used on the locomotive as a headlight. These headlights throw their light straight ahead. It does not give much, if any, light to the side. I do not think that on a dark night approaching this crossing from Belvidere, and looking towards Bridgeville Station in a position of safety, say about the corner of the fence, that any headlight could be seen on a locomotive coming though the cut. I do not think I could see anything in the way of a light."

This testimony could not be ignored by the trial judge, and he could not properly have prevented an inquiry by the jury as to the credibility of Mrs. Devore's testimony that she did not see or hear an approaching train, though in the active exercise of attempts to discover whether she was in danger. Neither could he have properly prevented an inquiry as to the practicability of the sight of a moving train in a dark and rainy night by a stranger to the locality, who did not know of the existence of the cut, or the Bridgeville Depot, or of the Emery house, or of her distance from the crossing. A person familiar with a locality and its surroundings may be able to take a position in the highway in the daytime from which objects can be seen which would not be discovered in the dark by a stranger who knew nothing of the peculiarities of the road of any obstructions to sight.

The defendant requested the court to charge as follows:

"Even if the defendant's servants failed to blow the whistle or ring the bell as the train approached the crossing, the plaintiff's mother was not thereby relieved from the necessity of exercising proper care for her own safety and the safety of the plaintiff. She was bound to look and listen before attempting to cross the track. A railroad track is a place of danger. It can never be assumed that cars are not approaching on the track or that no danger is to be apprehended therefrom."

The court charged as follows:

"Should, however, you reach the conclusion that there was negligence on the part of the railroad in running its train silently and without proper warning down on the crossing, you then come to the second aspect of the case, was there any negligence on the part of the plaintiff contributing to the happening of the accident? * * * For an infant of tender age, in the custody and care of his mother at the time, there is to be imputed to him, when he asks damages from somebody else at whose hands he has been injured, whatever negligence may have been shown by his mother, who at that time had him in custody. So the next question for you to determine is whether Mrs. Heater was or was not negligent, and whether her negligence contributed in any way to the happening of the accident. The negligence, of course, with which she is charged, is negligence in failing to watch for or to discover the presence of this train in time to warn her husband (with whom conjointly, she says, she was looking out) to stop the horse, which she says was on a walk, and might easily have been stopped within five or ten or fifteen feet of the railroad track, if either of them had seen the train. * * * It will be for you, taking all the testimony and all the assistance you have from photographs and maps, to determine, in the first place, whether it was practicable for a person approaching that road on a walk, and keeping a careful lookout, to see that train coming in the nighttime, when a sufficient distance away from the track to avoid it by stopping. And, if you reach that conclusion, then it will be for you to determine whether, in view of that fact, despite her testimony here, Mrs. Heater, the guardian of the child, at the time was exercising reasonable care and prudence in approaching that crossing; because, of course, you all know that it is a rule of law that a railroad crossing—a grade crossing—is necessarily a place of danger, and persons approaching it are required to exercise a greater degree of care and caution than if they are walking or driving along a roadway, where there are no railroad trains to be met with."

The position of the defendant was properly and clearly presented to the jury.

It will be recollected that, on the return trip to Hope crossing, Devore, the father of the plaintiff, was driving, and the mother was holding the child in her lap. The court charged

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that, while any negligence on the part of the mother which contributed to the accident was imputable to the child, for any negligence on the part of the father, who for the moment was not so much his father as he was the mere driver of the vehicle, the child was not responsible, and he was not chargeable with the negligence of the driver. To this charge the defendant excepted. The rule of law that the negligence of the parent of a minor who is suing a third person to recover damages for an injury caused by negligence at the time of and which contributed to the injury, and while the minor was under the protection and control of the parent, is imputable to the minor, is now well settled. *Lapsley v. Railroad Co.* (C. C.) 50 Fed. 181; *Id.*, 2 C. C. A. 149, 51 Fed. 174, 16 L. R. A. 800; *Morris v. Railroad Co.* (C. C.) 26 Fed. 22; *Holly v. Gaslight Co.*, 8 Gray, 132, 69 Am. Dec. 233; *Little v. Hackett*, 116 U. S. 366, 6 Sup. Ct. 391, 29 L. Ed. 652.

The history of the general rule with respect to the effect of the negligence of a driver upon the right of a passenger to recover for an injury occasioned by the negligence of a third person is given by Judge Sanborn in the second *Lapsley* decision. In the present case the father was driving, and the mother was holding the child in her arms, and the court made a distinction which had been previously approved by the supreme court of the state of New York (*Hennessey v. Railroad Co.*, 6 App. Div. 206, 39 N. Y. Supp. 805; *Lewin v. Railroad Co.*, 52 App. Div. 72, 65 N. Y. Supp. 49), but has not as yet been considered by the New York court of appeals (165 N. Y. 667, 59 N. E. 301). We do not see any adequate reason for the distinction. The father was the natural protector of the child, and was bound to the exercise of prudence and care for his welfare. The child was also, if he could exercise thought on the subject, bound to yield himself to the protecting care and control of the father, whose care was his care and whose negligence was his negligence. The father was not acting as driver merely, but was also acting as father and caretaker of his child, and his negligence, if it existed, was as imputable as the mother's to the child. There is no evidence on the subject of the father's conduct except that which was given by the mother, but the exception was of importance, and for the error, though perhaps inconsequential, the judgment must be set aside.

Upon the subject of damages the court charged as follows:

"The child would be entitled, in the event of recovery, to compensation for the pain and suffering that it has endured, and to such reasonable and proper compensation as may make up to it the loss of earning capacity which it has sustained in consequence of the accident, if you reach the conclusion that the accident was the cause of the present condition of affairs. With regard to that, it is not a matter as to which any calculation of dollars and cents can be given to you. It

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has got to be intrusted to your discretion, and in such a matter you are required to be reasonable and just."

To this part of the charge the defendant excepted.

The complaint had alleged that by reason of the injury caused by the act of the defendant the plaintiff's life and prospects were ruined. If the collision was caused by the negligence of the defendant, there is no doubt of the truth of the averment. At the time of the trial he was about 10 years old, and it was apparent that his mental and physical capacity had been permanently ruined. We see no adequate reason why the loss of his earning capacity should not have been taken into account by the jury as well as his physical suffering.

The judgment is reversed, with costs, and a new trial is directed.

ADAMS v. WILMINGTON & N. ELECTRIC RY. CO.

(*Superior Court of Delaware, Newcastle, June 3, 1902.*)

[52 Atl. Rep. 264.]

Accident at Street Railway Crossing—Negligence—Burden of Proof.

Plaintiff in a street car crossing accident case has the burden of showing defendant's negligence by a preponderance of the evidence.

Same—Right to Use Street.

A street car company has a right superior to other travelers to the use of the portion of the street included within its track.

Same—Care Due from Company.*

A street car company must operate its cars at a reasonable rate of speed, and slow up, and stop, if necessary, when danger is imminent, and may, by the exercise of ordinary care, be seen or known in time to prevent an accident.

Same—Signals.

A street car, on approaching a crossing, must give proper warning.

Same—Care Due from Company.

The degree of care required in operating a street car in order to prevent accidents to persons on the streets increases with the increase of danger.

Same—Care Due from Person Approaching Crossing.

A person approaching a street car crossing with which he is familiar is bound to avail himself of his knowledge of the locality to prevent an accident to himself; and if he attempts to cross the track when his view is not obstructed, and fails to look for an approaching car, he is guilty of negligence.

Same—Damages.

A person injured in a street railroad crossing accident through the negligence of the company is entitled to damages which will compensate him for his injuries, including loss of time and wages, past and future suffering, and loss of earning power resulting from any permanent injury.

Action by Horace P. Adams against the Wilmington & Newcastle Electric Railway Company. Judgment for plaintiff.

*As to the care required of those in charge of street cars to avoid collisions with persons, animals or vehicles, see note appended to *Robinson v. Louisville Ry. Co.* (C.C. A.), 1 R. R. R. 838, 24 Am. & Eng. R. Cas., N. S., 838.

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Argued before LORE, C. J., and GRUBB and PENNEWILL, JJ.

Walter H. Hayes, for plaintiff.

Saulsbury, Ponder & Curtis, for defendant.

PENNEWILL, J. (charging jury). In this case the plaintiff, Horace P. Adams, seeks to recover from the Wilmington & Newcastle Electric Railway Company, the defendant, damages for personal injuries to himself, as well as for the loss of his horse, wagon, and harness,—all alleged to have been caused by the negligence of said company on the 2d day of July, 1900, resulting in a collision on the public highway along and upon which its tracks are laid at or near where the same is intersected by a road known as "Pyle's Lane," in this county. The plaintiff charges that the defendant was negligent—First, in running its car which caused the injuries at a high and dangerous rate of speed; and, second, in running said car without ringing a gong or bell, or giving any warning. The defendant company claims that it was not guilty of any negligence that caused the injuries to the plaintiff, but, on the contrary, exercised all reasonable and proper care to avoid the accident; and, moreover, insists that the accident was caused by the plaintiff's own negligence. The action is based, as you observe, on negligence, and it is proper that we should explain to you what negligence in legal contemplation is. It has been defined by this court to be the want of ordinary care; that is, the want of such care as a reasonably prudent and careful man would exercise under similar circumstances. What constitutes negligence is a question of law for the court, but whether negligence exists in the particular case is a question of fact for the determination of the jury. Your province, therefore, is to ascertain whether the injuries complained of were or were not caused by the negligence of the defendant. The plaintiff's right to recover is founded upon the negligence of the defendant, and the burden is upon the plaintiff to show such negligence to your satisfaction by a preponderance—that is, by the weight—of the evidence, or he cannot recover. Negligence is never presumed, but must always be proved, in order that the plaintiff may be entitled to recover. The defendant had a right to use the public highway at the place and time of the accident in common with other travelers and persons who saw fit to use it in vehicles drawn by horses or otherwise. The public, as well as the defendant company, were entitled to use said highway. The electric cars, of necessity, could use only those parts of it covered by their tracks, inasmuch as such cars move only upon their tracks within fixed limits. Within those lines the right of the company is superior to that of other users, and must not be unnecessarily interfered with or obstructed. *Brown v. Railway Co.*, 1 Pennewill, 332, 40 Atl. 936; *Price v. Charles Warner Co.*, 1 Pennewill, 462, 42 Atl. 699. In using the highway all persons are bound to the exercise of reasonable care to prevent col-

lisions and accidents. Such care must be in proportion to the danger of the peculiar risks in each case. It is the duty of the company to provide competent and careful motormen and servants; to see that they use reasonable care in operating the cars; that the cars move at a reasonable rate of speed; that they slow up, or stop, if need be, where danger is imminent, and could, by the exercise of reasonable care, be seen or known in time to prevent accident; and that proper warning be given of the approach of the car at a crossing on the public highway. There is a like duty of exercising reasonable care on the part of the traveler. The company and traveler are both required to use such reasonable care as the circumstances of the case demand; an increase of care on the part of both being required where there is an increase of danger. The right of each must be exercised in a reasonable and careful manner, so as not unreasonably to abridge or interfere with the right of the other. As was said by the court in the case of *Brown v. Railway Co.*: "We are not prepared to lay down any absolute rule as to what precise acts of precaution are necessary to be done or left undone by persons who may have need to cross electric railways. Such acts necessarily must depend upon the circumstances of each particular case. The degree of care differs in different cases. Greater care is necessary in crossing a road where the cars run at a high rate of speed and close together than where they run at less speed, and remote from one another. In like manner, where the view at the crossing is obstructed, or in a neighborhood where there is much noise and confusion, greater care is necessary than in places where the view is unobstructed, and with quiet surroundings. In like manner a railway company is held to greater caution in more thronged streets of the densely populated portions of the city than in the less obstructed streets in the open or suburban parts. From these illustrations, manifestly the care to be used depends largely upon the circumstances of each case. It would, therefore, be difficult, if not dangerous, to lay down any inflexible rules. The general rule upon this subject is that persons so crossing a railway track are bound to the reasonable use of all their senses for the prevention of accident, and also to the exercise of all such reasonable caution as ordinarily careful and prudent persons would exercise in like circumstances. This rule is plain and well-settled, and is to govern you in the determination of this case." A person approaching a railway crossing with which he is familiar is bound to avail himself of his knowledge of the locality, and act accordingly. If, as he approaches the crossing, his line of vision unobstructed, he is bound to look for approaching cars in time to avoid collision with them; and if he does not look, and for this reason does not see an approaching car until it is too late to avoid a collision, he is guilty of negligence, and could not recover therefor. *Price v. Charles Warner Co.* When the view at the crossing is obstructed, greater care is necessary than where the view is

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unobstructed. *Brown v. Railway Co.* As before stated, a person in crossing a railway track must use all his senses, and exercise such care as is proper and reasonable under all the circumstances to avoid accident. A pure accident without negligence on the part of the defendant is not actionable, and, if you should believe that the collision in this case was of such a character, this case would come under the head of unavoidable accident, and the plaintiff could not recover. *Ogle v. Railroad Co.*, 3 Houst. 267; *Ford v. Whiteman* (Del. Super.) 45 Atl. 543. With the evidence, gentlemen, the court have nothing to do. It is for you alone. You have heard the testimony, and we have no doubt will carefully consider it.

Taking the law as we have laid it down, it is for you now to determine whether it was the negligence of the defendant that caused the accident. If it was the negligence of the plaintiff that caused the accident, your verdict should be for the defendant; and, even though the defendant company may have been negligent, yet if the negligence of the plaintiff contributed to and entered into the accident at the time of the injury, your verdict should be for the defendant, as the plaintiff in that case would be guilty of contributory negligence. The law does not permit any one to recover damages from another for an injury if his own negligence has contributed thereto, or where, by the exercise of reasonable care, he could have avoided it. If you believe from the preponderance of the evidence that at the time of the accident the defendant company was not exercising ordinary care and diligence,—that is, all the care that an ordinarily prudent and careful man would have exercised under the circumstances,—and that the want or absence of such care was the cause of the injuries to the plaintiff, and shall also believe that the plaintiff himself was free from any negligence that contributed to his injuries, then your verdict should be for the plaintiff. But if you should believe that it has not been shown by the preponderance of the evidence that the negligence of the defendant company was the cause of said injuries, or if you should believe that the negligence of the plaintiff contributed thereto, your verdict should be for the defendant. If you should find for the plaintiff, your verdict should be for such sum as you believe, from the testimony, will reasonably compensate him for his injuries, including therein his loss of time and wages, his pain and suffering in the past, and such as may be in the future in consequence of the accident; and also such sum for any permanent injuries caused by the accident as you believe will cover his pecuniary loss from his impaired ability to earn a living in the future. If you should find for the plaintiff, he would also be entitled to recover such sum as would reasonably compensate him for the loss or damage on account of his horse, wagon, and harness, caused by the accident. If you should find for the defendant, your verdict should be simply for the defendant.

Verdict for plaintiff for \$500.

HOUSTON & T. C. R. Co. v. PHILLIO.

(Court of Civil Appeals of Texas, March 5, 1902.)

[67 S. W. Rep. 915.]

Assault on Female Passenger in Waiting Room*—Damages.

Where a carrier permits a person in a drunken condition to enter its waiting room, use indecent language, and, being armed with a knife, to make an assault on a female passenger, causing her to become nervous and sick from fright, a verdict for \$400 is not excessive.

Same—Defenses.

Where a carrier permits a drunken person to enter its waiting room, and use vulgar language, and with an open knife to assault passengers, it cannot shield itself from injuries to a female passenger, resulting from the fright, on the ground that the agent in charge of the room merely regarded the matter as a joke.

Appeal from district court, Falls county; S. R. Scott, Judge.

Action by Steve Phillio against the Houston & Texas Central Railroad Company. There was a judgment in favor of plaintiff, and defendant appeals. Affirmed.

A. P. McCormick and Frank Andrews, for appellant.

E. T. Johnson, T. N. Graham, and N. J. Lewellyn, for appellee.

FISHER, C. J. This is an action by the appellee, Steve Phillio, against the railroad company, to recover damages for injuries sustained, arising from the following state of facts, which are as substantially alleged in his petition: Plaintiff and his wife went to the depot of the appellant's road in the town of Calvert for the purpose of procuring a ticket for his wife to the town of Marlin. She at the time was sick, and in feeble condition. While waiting in the waiting room of the depot for the train, and after the ticket had been purchased and the baggage checked, the defendant permitted one Allen, who was alleged to be a strong, active, and robust white man, and, being in a drunken and rowdy condition, sang vulgar and indecent songs, and used vulgar and indecent language in the presence of plaintiff and his wife, and, being armed with a pocket knife, open, in his hand, made an unjustifiable assault upon the plaintiff and his wife, by which the plaintiff and his wife were greatly intimidated, causing them to become frightened, and causing plaintiff's wife to become very nervous and sick. There are further allegations to the effect that the agent of the plaintiff at the depot at that time was present, and witnessed the assault and wrongful conduct, as alleged, inflicted upon the plaintiff and his wife by Allen, or was in a position to see the same, and that no steps were taken by the agent to prevent the assault or the wrongful conduct com-

*As to the duty to protect passengers from strangers, see *Exton v. Central R. Co. of New Jersey* (N. J.), 14 Am. & Eng. R. Cas., N. S., 240, and note, 249 et seq.; *Louisville & Nashville R. Co. v. McEwan* (Ky.), 2 Am. & Eng. R. Cas., N. S., 438, and notes, 444 et seq.

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plained of. Upon trial of the case below verdict and judgment were in favor of the plaintiff for the sum of \$400. We find that the evidence in the record substantially sustains these averments, and the judgment and verdict below are supported by the evidence found in the record.

Complaint is made that the verdict is excessive. There is no merit in this assignment. In our opinion, the evidence would have justified a verdict for a much larger sum.

We do not think any error is shown by the ruling complained of in the third assignment of error. In view of what is stated by the court in qualifying the bill of exception, the argument of appellee's counsel was not improper. The authorities of this state justify the charge of the court complained of in the fourth assignment of error.

The charge complained of in the fifth assignment of error was proper. The jury had the right to infer from the facts proven that the wife of the plaintiff sustained the injuries complained of. Our ruling upon the facts disposes of the sixth assignment of error. The seventh assignment of error is without merit. So far as the plaintiff and his wife are concerned, there is no theory that arises from the facts that would justify the conclusion that the desperado Allen did not intend the consequences that would likely result from his conduct, and that he was merely joking when inflicting the outrages complained of. The appellant could not shield itself upon the theory that it appeared to its agent that Allen was merely joking in the conduct complained of. Allen may have enjoyed the situation, and it may possibly have afforded merriment to the agent of the appellant, but all the evidence in the record clearly indicates that it was a serious matter, so far as the plaintiff was concerned; and there was nothing in the conduct complained of that would justify the conclusion that the plaintiff enjoyed the matter, or was participating in the amusement and fun afforded Allen and the spectators.

We find no error in the record, and the judgment is affirmed. Affirmed.

STODDARD v. NEW YORK, N. H. & H. R. Co.

(*Supreme Judicial Court of Massachusetts, Suffolk, May 22, 1902.*)

[63 N. E. Rep. 927.]

Carriers—Injury to Passenger—Postal Clerk—Negligence of Another Corporation.

A railroad company, having contracted to transport the mails and a postal clerk in accordance with United States postal regulations, is not liable for an injury to such clerk while remaining in the postal car, which had been switched onto a side track in a union depot at the termination of its journey, by reason of the negligence of the servants of another corporation in backing another car onto such track.

Exceptions from superior court, Suffolk county; John H. Hardy, Judge.

Stoddard v. New York, etc., R. Co

Action by William J. Stoddard against the New York, New Haven & Hartford Railroad Company. Judgment for defendant, and plaintiff brings exceptions. Exceptions overruled.

G. M. Palmer and F. B. Livingstone, for plaintiff.

John L. Hall, for defendant.

HOLMES, C. J. This is an action for personal injuries. The plaintiff was a United States postal clerk running from Boston to New York, and paying no fare. Rev. St. U. S. § 4000. At the time of the accident his mail car had reached the New York Station and, after remaining there five or six minutes, had been placed upon a side track and had been there ten minutes. By the negligence of a servant of the New York Central and Hudson River Railroad, a car which should have been shunted to another track was turned onto the side track and ran into the postal car. The plaintiff was in the postal car, unloading the mail, and was hurt. At the trial the judge directed a verdict for the defendant, and the case is here on exceptions.

We are of opinion that the direction was right. Assuming for the purposes of decision that the plaintiff originally and still had the rights of a passenger, the facts disclose no breach of duty on the part of the defendant. The injury was caused by the servant of an independent company, over whom the defendant had no control. So far as appears, the New York Central road may have had a right to use the station, which was quite independent of the New York, New Haven and Hartford company. But even if its right to be present depended on a contract with the latter, it would make no difference in our judgment. The liability of a carrier to a passenger is based upon fault, however high the criterion of duty may be placed. It is said that the defendant's duty was to provide a safe station. It did so. Its duty did not extend to insuring the plaintiff against the wrongful acts of third persons while he might be there, whether those acts took the form of a willful assault and battery or of a negligent bringing of force to bear upon his person. *Brooks v. Railroad Co.*, 168 Mass. 164, 46 N. E. 566. Short of such a general duty of insurance the defendant cannot be held. For although the accident occurred in the running of a car upon a railroad track, no way appears in which the defendant could have prevented it.

There have been suggestions in some cases looking in the direction of the defendant's liability. *Railroad Co. v. Barron*, 5 Wall. 90, 104, 18 L. Ed. 591; *Murray v. Railroad Co.*, 66 Conn. 512, 34 Atl. 506, 32 L. R. A. 539. But even if it were shown, as it is not, that the defendant had done an act which in a remote sense made the accident possible, such as making some contract of letting or hiring with the New York Central road, to our mind it confuses all principles of liability based upon fault when such an act is relied upon as a sufficient

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ground of responsibility. Remote acts of a defendant always can be shown without which the accident would not have happened. But the question is whether they are near enough to be regarded as the cause. A lease does not make either party the servant of the other in fact, and there seems to be no ground for resorting to fiction. The contract of carriage is interpreted as applying to the instrumentalities of carriage even when belonging to others, so far as to make the carrier answerable for their negligence but the liability still stands on fault and the best considered cases agree that there is no reason for extending it to the incursions of other carriers not under the defendant's control. *Wright v. Railway Co.*, L. R. 8 Exch. 137; *Sprague v. Smith*, 29 Vt. 421, 70 Am. Dec. 424. See *Daniel v. Railway Co.*, L. R. 5 H. L. 45.

Exceptions overruled.

ST. LOUIS, I. M. & S. RY. CO. v. JACOBS *et al.*

(*Supreme Court of Arkansas, May 3, 1902.*)

[68 S. W. Rep. 248.]

Injury to Cattle in Transit—Damages—Opinion Evidence.

A witness should not be allowed to give his opinion as to the amount cattle were damaged, but instead data should be given from which the jury can determine the damages.

Same—Notice of Claim—Waiver of Condition.

Provision in contract of shipment that the shipper give immediate written notice of injury is waived by the proper agents of the carrier acting on verbal notice, and making all investigation desired, without demanding written notice.

Appeal from circuit court, Pulaski county; Jos. W. Martin, Judge.

Action by W. H. Jacobs & Co. against the St. Louis, Iron Mountain & Southern Railway Company. Judgment for plaintiffs. Defendant appeals. Reversed.

This suit was brought against appellant and other carriers to recover for injuries done certain cattle during transportation. The complaint, after setting up the relation of carrier and shipper, alleged: "Defendants, not regarding their duty as common carrier, * * * so carelessly and negligently kept, and so negligently and unskillfully carried and delivered, and so carelessly and heedlessly delayed the transportation of, said cattle, that when the same were delivered to the consignee at Little Rock two were so badly bruised, trampled upon, and wounded as to be in a dying condition, and had to be killed, two others were so badly bruised and damaged as to render them of little or no value, and thirteen others were seriously and materially injured, resulting in damage to plaintiff in the sum of \$240." The action was dismissed except as to appellant. Appellant answered, and admitted the contract of carriage, but denied "that it had carelessly or negligently handled said cattle, or that it had delayed the handling or

transportation of same, or that same were badly bruised or damaged, in the sum of \$240 or any other sum"; denied "that it was responsible or liable for any injuries from any negligence on its part to said cattle while en route from Texarkana to Little Rock, Ark."; and pleaded as affirmative defenses: First. "That, if said cattle were injured, the same was through the innate viciousness of said cattle in horning and trampling upon each other in said car." Second. "The clause of the contract of shipment which provides: 'The shipper shall furnish reports, signed by himself and all parties in charge of said cattle, to the conductor of the train at the end of each division of carrier's line, as to the condition of cattle, and the shipper shall be estopped from denying the truth of such reports, and his or their failure to furnish such reports shall be conclusive evidence that cattle were in good condition. The shipper further expressly agrees that as a condition precedent to his right to recover any damages for any loss or injury to said cattle resulting from carrier's negligence as aforesaid, including delays, he will give notice in writing to the conductor in charge of the train, or the nearest station or freight agent of the carrier on whose line the injuries occur, before said cars leave that carrier's line, or before the cattle are mingled with other cattle or removed from pens at destination. In his notice he shall state place and nature of the injuries, to the end that they may be fully and fairly investigated, and said shipper shall, within ninety days after the happening of the injuries complained of, file with some freight or station agent of the carrier on whose line the injuries occurred his claim therefor, giving the amount. Shipper's failure to comply with the requirements of this section shall absolutely defeat and bar any cause of action for any injuries resulting to said cattle as aforesaid, and no suit shall be brought against any carrier, and only against the carrier on whose line the injuries occur, after the lapse of ninety days from the happening thereof, any statute or limitation to the contrary notwithstanding, and no damages can be recovered except those set forth in the required notice and claim.'" There was a verdict and judgment for \$125.

Dodge & Johnson, for appellant.

T. N. Robertson, for appellees.

WOOD, J. (after stating the facts). 1. There was evidence to support the verdict on the question of negligence. As to who had the burden under the evidence was properly submitted to the jury.

2. As to whether or not the cattle were injured by reason of their own viciousness, or the negligence of the carrier, was also properly submitted to the jury under full and fair instructions.

3. It is contended that there is no evidence of the value of the stock injured, and consequently nothing to show the

extent of plaintiff's damage. Paul Probasco testified that he was a cattle herder, shipping and preparing cattle for market; that he had been so engaged for five years; that on the 2d day of November, 1899, he was engaged in handling cattle for W. H. Jacobs & Co. in and near Little Rock; that he inspected plaintiff's cattle that had been shipped from Vernon, Tex., on the morning of their arrival; that he found the cattle in a bad and injured condition; that he found all of the cattle more or less injured; that one of them was disemboweled and killed, one died shortly afterwards, four were crippled and rendered wholly unfit for market, and the balance were injured in various ways to such an extent that they could not be prepared for market; that one bull was in such a reduced condition that care could not bring him out; that of the entire lot there was but one steer—a yearling—that ever recovered sufficiently to prepare for market; that from his experience in shipping cattle the cause of the injury to the cattle was the delay in transportation, rough handling of the cars in which they were confined, neglect to water and feed them properly, recklessly allowing them to get down in the car and be trampled upon by one another; that the weaker ones, when thrown down by rough handling of the cars, were permitted to remain down until they were trampled upon, and thus injured; that the cattle were what are termed "feeders," that is, cattle ready to be fed and prepared for market to be sold for beef and slaughter house purposes; that, judging from his experience in marketing cattle and his knowledge of the market at the time, and the extent and character of the injuries, he would say that these cattle were damaged to the extent of \$300. Specific objection was made to the last part of the above testimony. There was no proof of the market value of "feeders," as these cattle were designated,—nothing to show the value of such cattle at the time they were received by the appellant for transportation, nor at the time they were delivered to appellees. A simple statement of the market value of such cattle in good condition would have enabled the jury to properly estimate the damage which had accrued to appellees by reason of the negligent handling of the cattle in transportation. The details of the manner in which the cattle were handled were before the jury, and the nature and extent of the injuries which they had received. As was said by this court in *Railway Co. v. Law*, 68 Ark. 223, 57 S. W. 260: "The jury should have been left to determine the damages according to the facts, uninfluenced by the opinions of interested witnesses." The proper criteria for determining the amount of appellees' damages were not before the jury, and we cannot know to what extent the verdict was influenced by the opinion of the witness Probasco. The data upon which he based his opinion should have been given, rather than the opinion itself. This point is ruled by *Railway Co. v. Law*, *supra*.

4. The provisions of the contract required that the shipper

give written notice of the place and nature of the injuries to the conductor in charge of the train, or the nearest station or freight agent of the carrier, and that suit shall not be brought after 90 days from the injury were waived by appellant. The object of requiring notice of the place and nature of the injuries is to give the carrier an opportunity for a full and fair investigation of such injuries when and where it will be most certain, easy, and expeditious. *Railway Co. v. Ayers*, 63 Ark. 336, 38 S. W. 515. The notice is required to be in writing, so that the nature of the shipper's grievance may be definitely and clearly stated. But where it is shown that the proper agents had verbal notice, upon which they acted, promptly making all the investigation desired, and without demanding any written notice, it will be taken as a waiver of the written notice. The provision is for the benefit of the carrier, and he may waive it if he chooses. The court properly instructed the jury on this point. *Rice v. Railway Co.*, 63 Mo. 314. See, also, *Western Railway Co. v. Harwell*, 91 Ala. 347, 8 South. 649.

The questions as to whether or not the provision was reasonable and fair, requiring suit to be brought within 90 days after the injury, and whether or not such provision had been waived by appellant, were submitted to the jury upon the evidence at the request of appellant. Appellant, therefore, cannot now complain of the verdict on these questions.

We find no error in any of the instructions. For the error indicated, the judgment is reversed, and the cause is remanded for a new trial.

LOUISVILLE & N. R. CO. v. WATHEN *et al.*

(*Court of Appeals of Kentucky, Feb. 19, 1902.*)

[66 S. W. Rep. 714.]

Liability for Injuries to Live Stock.*

A carrier of live stock is not liable for injury to the stock unless it is shown that the injury was caused by his negligence, but when negligence on his part, causing an injury, is shown, the extent of that injury is a question for the jury.

Same—Instructions.

Where the evidence was conflicting as to whether the disease from which horses died was caused by injuries which they received while being carried by defendant railroad company, or by other causes, the court properly instructed the jury that they could not find any damages against defendant for any injury to or depreciation of the stock that was not due to the negligence of defendant; and this is as far as it was proper for the court to go.

Origin of Disease.

There being proof that such injuries as the horses received were liable to cause pneumonia, which was the disease from which they died,

*As to whether a carrier of live stock is an insurer, see foot-note to *Louisville & N. R. Co. v. Harned* (Ky.), 1 R. R. R. 115, 24 Am. & Eng. R. Cas., N. S., 115.

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and that the horses injured in the same way all had pneumonia, the jury was authorized to conclude that the disease resulted from the injuries received; and therefore a second verdict for plaintiffs will not be set aside as against the evidence.

Appeal from circuit court, Marion county.

Action by John W. and Ed. Wathen against the Louisville and Nashville Railroad Company to recover damages for breach of a contract to carry live stock safely. Judgment for plaintiffs, and defendant appeals. Affirmed.

W. C. McChord and Edward W. Hines, for appellant.

J. P. Thompson, for appellees.

HOBSON, J. This is the second appeal of this case. For opinion on the former appeal, see *Railroad Co. v. Wathen*, 49 S. W. 185, where the facts of the case are fully stated. On that appeal a judgment in favor of the appellees for \$800 was reversed on all the testimony on the ground that it was against the evidence. On the return of the case to the lower court, it was tried again, and there were a verdict and a judgment in favor of the appellees for \$650, and the railroad company has again appealed.

The proof, in the main, seems to be very much the same on this trial as the last, except that appellees introduced some additional evidence, and perhaps brought out the facts a little more clearly than on the first trial.

A carrier of live stock is not liable for injury to them unless it is shown that the injury was caused by his carelessness or negligence. But when negligence on his part is shown, causing an injury, the extent of that injury is a question for the jury; and the court properly refused to instruct the jury peremptorily that they could not find anything for appellees on account of the death of the three horses. The court properly told the jury that they could not find any damages against appellant for any injury or depreciation of the stock that was not due to the negligence of appellant, and this is as far as the court should have gone.

It is earnestly insisted that the evidence does not warrant a finding against the appellant for the loss of the three horses. There have been two verdicts for appellees. The evidence is largely circumstantial, and a jury of 12 men are peculiarly qualified to pass on such questions as the cause of the death of these horses. There was proof from which the jury might have inferred that the pneumonia from which the horses died was not the result of appellant's negligence. There was also proof that such injuries as the horses received were liable to cause pneumonia. The jury may reasonably have concluded that the pneumonia in one or more of the horses was due in part to both the causes. The three horses that had pneumonia stood facing the same way. By the violence of the blow against the car in coupling, they were thrown with such force against the oak railing, two inches thick, in front of them, as to

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break it down and throw them on the floor of the aisle of the car. That these three horses all had pneumonia is a circumstance from which the jury might have inferred that the disease was due in part, at least, to the same cause; there being expert testimony that such treatment was likely to produce the disease. The sixteen horses were loaded in good order, and apparently with great care. They reached their destination—all of them—in very bad condition. Appellees proved damages much larger than were allowed by the jury, and in view of the fact that there have been two trials of the case, both resulting in the same way, before juries composed, no doubt, largely of men with practical knowledge of stock, we are unwilling to disturb the verdict.

Judgment affirmed.

GLOVER v. CAPE GIRARDEAU, B. & S. R. CO.

(*Court of Appeals at St. Louis, Mo., May 27, 1902.*)

[69 S. W. Rep. 599.]

Carriers—Delivery of Goods—Charges.*

Where, on delivery of goods to a carrier, no instructions are given it as to the route of carriage, and it sends them over a connecting line by a circuitous route, so that the charges are in excess of what they would have been if sent by the most direct line, the delivering carrier is entitled to the freight paid by it to the initial carrier.

Appeal from circuit court, Stoddard county; Jas. L. Fort, Judge.

Action by Griff Glover against the Cape Girardeau, Bloomfield & Southern Railroad Company. From a judgment for defendant, plaintiff appeals. Affirmed.

J. R. Young, for appellant.

Kitchen & Woody, for respondent.

BLAND, C. J. Plaintiff replevied from defendant one box weighing 24 pounds, and containing one set of single harness. The package was marked, "From Englewood, Illinois, to Griff Glover, Bloomfield, Mo." It was delivered by the consignor at Englewood (which is in the corporate limits of Chicago) to the Adams Express Company. It was carried by that company to Kansas City, Mo., and there delivered to the American Express Company, who carried it to Cape Girardeau, Mo., and there delivered it to a carrier having connection and a joint traffic contract with the defendant. These carriers carried the package to Bloomfield. The charge of the Adams Express Company for carrying it to Kansas City was 90 cents, which the American Express Company paid, and charged \$1.10 for carrying the package to Cape Girardeau. The connecting carrier at Cape Girardeau paid these express charges, amounting to \$2, and charged 35 cents for carrying the package to Bloomfield. The undisputed evidence is that,

*See *Pierce v. Southern Pac. Co. (Cal.)*, 7 Am. & Eng. R. Cas., N. S., 564, and note, 573.

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had the package been shipped by direct line, the total charge, according to schedule rates from Chicago to Bloomfield, would have been \$1.10. Plaintiff tendered this amount to the defendant, and demanded the package. Defendant refused the tender, and demanded \$2.35 in payment of all the freight charges. The evidence is that the Adams Express Company had an office in the city of St. Louis and one at Cape Girardeau, and that the nearest and most direct route from Chicago by rail to Bloomfield is by way of St. Louis and Cape Girardeau, and it is conceded that the Adams Express Company misrouted the package by sending it by way of Kansas City. There is no evidence that any special directions were given, either by the consignee or consignor, as to the route by which the package should be shipped. The issues were submitted to the court without a jury. Plaintiff, at the close of the evidence, offered an instruction in effect that under the law and the evidence plaintiff was entitled to recover, which the court refused. No other instructions were asked or given. The court found the issues for the defendant. After taking proper steps to have the rulings of the court reviewed by an appellate court, plaintiff appealed.

It is conceded by appellant that a carrier who receives freight to be forwarded by it from a connecting carrier may pay the reasonable freight charges of the initial carrier, and have a lien on the goods for the payment of both the advance and its own freight charges. The contention is that the advance freight charges paid by the defendant were not the reasonable and customary charges for carrying a like package from Chicago to Cape Girardeau, and that what defendant paid in excess of schedule rates was at its own risk, and that it should have no lien on the goods for more than the usual and schedule charges. The consignor is ordinarily the agent of the owner of the goods, and may stipulate the terms of the shipment; but where no terms are made, and the bill of lading is silent upon the question, the initial carrier is regarded as the agent of the owner, and is impliedly authorized to select the connecting carrier when the place of destination is beyond its own line, and that it may forward the goods to the place of destination by any of the ordinary routes thereto. 8 Am. & Eng. Enc. Law (1st Ed.) p. 970. In *Briggs v. Railroad Co.*, 6 Allen, 246, 83 Am. Dec. 626, Briggs delivered flour to the Racine & Mississippi Railroad Company, taking a receipt, in which the railroad company agreed to forward and deliver the flour to Franklin Foster at Williamstown, Mass. By mistake the agents of the railroad company directed the flour to Wilmington, a freight station on defendant's road. The flour was carried by the Racine & Mississippi road to the end of its line, and delivered to the carrier next in succession, and then forwarded by successive carriers until it reached the defendant's line at Groton. The defendant paid all the freight earned by the preceding carriers, and carried the flour to Wilmington, and deposited it in their freight

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house. Diligent search and inquiry was made for Foster, the consignee. He could not be found, as he did not reside at Wilmington, and had no business place there. After keeping the flour for over two months, and being unable to find the owner, the flour becoming sour, defendant sold it, and received the proceeds of the sale, and retained them. Plaintiff contended that, as Williamstown was the place of destination, defendant had no right to receive the flour, and was guilty of a conversion. In the discussion of this contention the court held that the initial carrier was of necessity invested by the consignor with authority to give requisite and proper directions to each successive carrier to whom in due course of transportation the flour should pass over for the purpose of being forwarded to its ultimate destination, and that, as a result of this implied authority, when the owner delivers goods to be carried over successive lines to reach their destination, he makes the initial carrier his forwarding agent, and, if several successive carriers carried the goods according to the direction of the initial carrier, the "last carrier will be entitled to a lien upon the goods, not only for the freight earned by him on his own part of the route, but also for all the freight which has been accumulated from the commencement of the carriage until he receives them, which, according to a very convenient custom, which is now fully recognized and established as a proper and legal proceeding, he has paid to the preceding carriers." If the law and custom were otherwise, great inconvenience and hardship would often result to both the owner and the carrier. When goods are shipped to be carried over more than one line of transportation to reach their ultimate destination, the owner cannot accompany the shipment. In the absence of a contrary showing, the law wisely assumes that the owner has stipulated terms with the carrier to whom he delivers his goods for shipment, and justly treats this initial carrier as the agent of the owner in giving directions to connecting carriers; and if his goods are by the fault of the initial carrier (his agent) forwarded to a wrong destination, and he loses them, or if the initial carrier selects a circuitous route, by reason of which the freight charges are more than they should be or would have been if he had selected a shorter and more direct route, the fault is the fault of the shipper's agent, and not of the connecting carriers, and his remedy is against the initial carrier.

The judgment is affirmed.

BARCLAY and GOODE, JJ., concur; the former on the authority of *Wells v. Thomas*, 27 Mo. 17.

On Rehearing.

(June 10, 1901.)

In the motion for rehearing appellant contends that the case of *Briggs v. Railroad Co.*, 6 Allen, 246, 83 Am. Dec. 626, cited

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and followed in the main opinion, is not in point. It is true that the flour in the Briggs Case was marked to a wrong destination by the agents of the initial carrier. Nevertheless, it was held that the connecting carrier had a right to assume that the shipper and the initial carrier had stipulated the terms of shipment, or, if not, that the initial carrier was to be deemed the agent of the shipper, and the connecting carriers had a right to so assume and to act on his directions. On this assumption it was ruled that the last carrier, who had paid the charges of all the preceding carriers, had a lien on the flour for the advance charges as well as for the freight earned by it. It is not the custom, nor does the law require a connecting carrier to whom goods are offered by another carrier to be forwarded, to delay the reception or the forwarding of the goods until he can ascertain whether or not the shipper and the initial carrier stipulated the terms of shipment, and, if so, what those terms are, and whether or not all the preceding carriers had fulfilled them; or, if no terms were stipulated, then whether or not the initial carrier had in all things faithfully and honestly discharged his duty as the implied agent of the shipper in forwarding the goods. The law is that when a shipper delivers goods to a carrier to be carried over successive routes beyond the route of the first carrier he makes the first carrier his forwarding agent, and his acts in directing the shipment of the goods over succeeding routes are the acts of the owner. Wells v. Thomas, 27 Mo. 17, 72 Am. Dec. 228; Moses v. Railroad Co., 5 Wash. 595, 32 Pac. 488; Sumner v. Railroad Ass'n, 7 Baxt. 345, 32 Am. Rep. 565; Bird v. Railroad, 72 Ga. 655; Mallory v. Burrett, 1 E. D. Smith, 234; Railroad Co. v. Kirkwood, 45 Mich. 51, 7 N. W. 209, 40 Am. Rep. 453; Wolf v. Hough, 22 Kan. 659; Price v. Railway Co. (Colo. Sup.) 21 Pac. 188; Patten v. Railway Co. (C. C.) 29 Fed. 590; Schneider v. Evans, 25 Wis. 241, 3 Am. St. Rep. 56 Hutchinson on Carriers (section 108) states the law as follows: "When goods are delivered to the carrier for the purpose of being carried to a point beyond the terminus of its route, and for that purpose to be delivered by him to a connecting carrier in order to continue the carriage, or where it becomes necessary for that purpose to make successive deliveries from one to another upon a continuous line or succession of carriers, the first and each succeeding carrier becomes the agent of the owner of the goods to make delivery to the next carrier; and it is incumbent upon him to do so not only to relieve himself from further liability, but because it is a duty which he owes to the owner, and which he has assumed with the acceptance of the goods. He is the party in charge of them, and the only one with whom the succeeding carrier can make the necessary arrangements, and stands towards them for this purpose in the position of an owner." Where the last carrier acts in good faith, and in the usual

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course of business, his right to a lien for advance charges and for his own freight bills cannot be defeated on account of any special contract between the first carrier and the shipper of which he did not have notice, nor for any mistakes made by the first or any intermediate carrier in giving directions for the forwarding of the goods. *Wells v. Thomas* and *Briggs v. Railroad Co.*, *supra*. The shipper's remedy is against the first carrier for a wrong direction of the goods or for charges (if they are the customary or schedule ones) in excess of a through rate agreed upon by the shipper and the first carrier. *Railway Co. v. Smith*, 53 Ark. 275, 13 S. W. 929; *Railroad Co. v. McKenzie*, 43 Mich. 609, 5 N. W. 1031; *Schneider v. Evans*, *supra*; *Sumner v. Railroad Co.*, *supra*; *Wells v. Thomas*, *supra*; *Moore v. Henry* (K. C.) 18 Mo. App. 35. On this point the law is stated as follows at pages 406, 407, 5 Am. & Eng. Enc. Law (2d Ed.): "The better doctrine is that this lien is not affected by the fact that the last carrier received them by mistake, or through some error or wrongdoing on the part of one of the previous lines, provided the carrier claiming the lien has itself been free from wrong. If its receipt of the goods in violation of the directions of the shipper is due to any wrongful act on its own part, or any improper agreement with a connecting line, it can claim no lien for any charges whatever." There is no evidence that any stipulations were entered into between the shipper and the Adams Express Company (the first carrier) as to the routing of the shipment. The bill of lading, if any was issued by the Adams Express Company, was not put in evidence. It is therefore impossible to ascertain from the abstracts whether or not a route was agreed on between the Adams Express Company and the shipper. In the absence of such proof we must assume that the shipper impliedly, if not expressly, authorized the Adams Express Company to route the shipment, and that as between the connecting carriers and the owner the latter is bound by the route selected by his agent, the Adams Express Company, and to look to it for compensation for the overcharges occasioned by the erroneous routing.

CENTRAL R. CO. OF NEW JERSEY v. MACCARTNEY *et al.*

(*Supreme Court of New Jersey, June 9, 1902.*)

[52 Atl. Rep. 575.]

Freight Charges—Liability of Consignor.

Where the consignor of goods on his own account contracts with a common carrier for their transportation, such consignor is *prima facie* liable to pay the charges of transportation; and the mere fact that the charges are left unpaid by the consignor, and are to be collected from the consignee at destination, does not discharge the consignor from liability to the carrier.

Central R. Co. of New Jersey *v.* MacCartney**Same—Liability of Consignee.**

The mere existence of the relation of carrier and consignee is not enough to establish a liability on the part of the latter to pay the freight charges. There must be an agreement by the consignee, express or implied, in order to create such a liability.

Same—Same—Waiver of Lien.

Where a common carrier upon delivery of goods at destination waives its lien for unpaid freight charges, and permits the consignee to remove the goods, and the consignee, with knowledge of the fact that freight charges, to a certain amount, remain unpaid, and that the carrier is giving up a lien thereon for his benefit, accepts the goods and removes them, such acceptance and removal are cogent evidence from which to imply an agreement on the part of the consignee to pay to the carrier the known amount of the freight charges.

Same—Same—Same.

But the mere acceptance and removal of goods by the consignee, with knowledge that the carrier is giving up for his benefit a lien upon the goods for a stated amount, does not create an obligation on the part of the consignee to pay charges beyond the amount stated.

Same—Same—Estoppel.

Certain goods were sold upon terms requiring their transportation to destination at the expense of the seller, and a contract of shipment was thereupon made between the seller and a common carrier, by which the latter was to transport the goods to destination, consigned to the purchasers. By the terms of this contract, the transportation charges were not to be paid in advance by the consignor, but were to be collected by the carrier from the consignees at destination, and then charged by the consignees against the consignor when making payment to the consignor for the goods. The carrier at the same time had notice of the fact that by the terms of sale the consignor was to bear the entire charges for transportation, and that payment was to be made in the first instance by the purchasers merely as a matter of convenience, so that, both as between consignor and carrier and as between consignor and consignees, the consignor was liable to pay the charges of transportation. The common carrier delivered the goods to the consignees at destination, at the same time rendering to them statements of the charges for transportation, which statements, through gross negligence on the part of the agents of the carrier, were made out for sums considerably less than the just and correct amount of transportation charges. The consignees accepted and removed the goods, at the same time receiving the bills for transportation charges. About the same time the consignor rendered to the consignees a bill for the goods, having deducted therefrom transportation charges agreeing precisely in amount with those stated by the common carrier to the consignees. The consignees had no knowledge of the bargain made for freight charges, and no means of ascertaining the correct amount, except through the carrier, and had no notice that the bills of charges were incorrect. A few days after receipt of the goods, the consignees, in the ordinary course of business, paid to the carrier the amount of the transportation charges, and took the carrier's receipts upon the bills as rendered. Shortly thereafter the consignees, in the ordinary course of business, remitted to the consignor the balance due for the goods, after deducting the transportation charges as paid by them. Thereafter the carrier, for the first time, discovered the error in the amount of the charges as stated and collected. The carrier then called upon the consignees to pay the difference, and, upon being refused, brought this action against them. In view of the above facts, and it appearing that the consignor is a foreign corporation, whose ability to pay is unknown, *held*, that the plaintiff is estopped from recovering from the consignees the difference between the amount of charges as stated by it to the consignees and the amount which, except for the gross negligence of the plaintiff's agents, would have been stated.

(Syllabus by the Court.)

Central R. Co. of New Jersey *v.* MacCartney

Certiorari to court of common pleas, Somerset county.

Action by the Central Railroad Company of New Jersey against John F. MacCartney and Joseph A. McElroy. Judgment for plaintiff, and defendants bring certiorari. Reversed.

Argued February term, 1902, before FORT, HENDRICKSON, and PITNEY, JJ.

Pierre P. Garven, for plaintiff.

Willard P. Voorhees, for defendants.

PITNEY, J. This writ of certiorari brings before us for review a judgment of the court of common pleas rendered on appeal from a judgment of the court for the trial of small causes. The action was brought by the railroad company to recover an unpaid balance of transportation charges upon goods consigned and delivered to the defendants. The judgment in the common pleas was in favor of the plaintiff. The facts of the case, as certified to us, are as follows: From July, 1897, to July, 1898, the defendants MacCartney, McElroy & Co. were constructing a street railway between Bound Brook and Dunellen, in the county of Somerset. On July 2, 1898, they contracted with one Phelan, agent of the Seaboard Tie & Lumber Company of Virginia, to purchase from that company 3,000 railroad ties at a certain net price, delivered at Bound Brook, and 3,000 other ties at a certain net price, delivered at Dunellen. The ties at the time of purchase were at Brooklyn, in the state of New York. The court found that the shipper of the ties was the Seaboard Company; the ties being lightered from Brooklyn to Jersey City, and there placed on board the cars of the plaintiff. The Seaboard Company, through its agent, Phelan, contracted with one Saville, who was in the lighterage business, and was also an agent of the plaintiff, to lighter the 6,000 ties from Brooklyn to the plaintiff's terminus at Jersey City for 3 cents each, amounting to \$180 for the entire number of ties. This agreement was made prior to the shipment of the ties. Accordingly the ties were lightered by Saville to Jersey City, and were there loaded on the cars of plaintiff, and sent forward upon its railroad, consigned to the defendants,—3,000 to Bound Brook and 3,000 to Dunellen,—for which the plaintiff charged, besides the lighterage, the customary rate of freight, computed upon the weight of the ties. The court found the custom in the shipping and carrying of ties to be for the receiver (in this case, MacCartney, McElroy & Co., the defendants) to pay the freight charges in the first instance, and to deduct the amount thereof from the invoice rendered by the shipper for the ties, and to remit to the shipper the balance only. This was "the custom existing between shippers and carriers," and the court found that "the freight in this instance, by the custom among shippers and carriers, was to be deducted from the amount due for the ties, and the balance remitted to the seller." One lot of 3,000 ties was delivered to the defendants

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at Dunellen about July 9th, and at the same time the plaintiff's agent at that station delivered to the defendants a bill for freight, including lighterage and other charges thereon, amounting to \$86.01. The remaining 3,000 ties were delivered to defendants at Bound Brook about July 11th, and at the same time the agent of plaintiff at that station delivered to the defendants a bill for freight, lighterage, and other charges thereon, amounting to \$94.26. About July 9, 1898, the defendants received from Phelan a bill, in his handwriting, made out in favor of the Seaboard Tie & Lumber Company, for the entire 6,000 ties, amounting at the agreed price to \$1,534.99, upon which bill there were deducted freight charges of \$86.01 and \$94.26, leaving a balance due of \$1,354.72. On July 14th the defendants paid to the railroad company the Dunellen freight bill of \$86.01, and on July 26th paid to the company the Bound Brook freight bill of \$94.26. On August 12, 1898, the defendants paid to the Seaboard Tie & Lumber Company the balance due upon the bill for ties rendered by Phelan, amounting to \$1,354.72. Each of these bills appears to have been paid in the ordinary course of business, and receipts were duly taken upon the several bills as rendered. Up to this time there was no knowledge on the part of defendants as to the rates of freight to lighterage agreed upon between their consignors and Saville or the plaintiffs; nor had they received any communication from Phelan or any other person as to such rates, or any notice on the subject, aside from what was conveyed to them by the freight bills as rendered by the Dunellen and Bound Brook station agents, confirmed by the credit entered by Phelan upon the bill of the Seaboard Company for the ties. In fact, the bill clerk in the freight office of the plaintiff at Jersey City, whose duty it was to make out waybills, committed an error in preparing the waybills for the ties in question; entering the lighterage on each bill at \$9, instead of \$90. From these waybills the agents at Dunellen and Bound Brook, respectively, made out the freight bills, which were delivered to the defendants with the ties, as above mentioned, and thereby perpetuated the bill clerk's errors. The Dunellen freight bill, instead of \$86.01, should have been \$167.01, and the Bound Brook bill, instead of \$94.26, should have been \$175.26. On each of these freight bills there was a column headed "Freight Unpaid," in which were plainly set down, in dollars and cents, the freight, the lighterage, and a charge for staking; and then in the final column at the right, under the head "To be Collected at Destination," was set down, in dollars and cents, the sum total of the former items. In other columns, at the left side of the sheet, were set down successively the name of the consignor, the place from which the goods were consigned, the description, "3,000, R. R. ties," the weight in pounds, and the rate at which the railroad freight charges were computed, which was not the rate per pound or per 100 or per 1,000 pounds, but the rate per ton of 2,000

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pounds. In the column entitled "Rate" there was also, opposite an abbreviation of the word "lighterage," the figure "3," but nothing to show whether it was intended to mean 3 cents or \$3. These bills, before they were paid, were checked by one of the defendants, but he did not observe the errors. The court below did not find, as matter of fact, that the freight bills contained upon their face anything sufficient to charge notice upon the defendants that there was an error in the computation; nor can we so find.

It appears from the facts as certified that the defendants had no understanding or communication with the railroad company regarding the freight rates. The contract was made solely between Phelan, as agent of the consignor, and Saville, as representative of the railroad company. The error in making up the charge for lighterage was discovered by the railroad company a month or six weeks after the ties had been delivered and the bills rendered. It was not discovered until after the defendants had paid the freight bills, and had also paid to the Seaboard Tie & Lumber Company the balance due for the ties. It appears that the railroad company paid Saville for the lighterage in two payments, "the first being \$18, and afterwards the second being \$162." It does not appear when these payments were made, but it is a necessary inference that the latter sum was paid to Saville after the discovery of the error in the freight bills. The railroad company having notified the defendants of the error, and called upon them to pay the difference of \$162 between what was charged and what should have been charged, and the defendants having declined to make such payment, this action was brought, and resulted in a judgment in favor of the plaintiff for \$162, with interest. The question is, can this judgment be legally sustained, upon the facts as found by the trial court?

It will be observed that while the findings of fact are clear upon the point that the agreement for transportation was made wholly between the consignor and the plaintiff, and that defendants had no notice as to the rates or amounts to be charged until they actually received the ties, yet there is no finding either pro or con upon the question whether defendants had notice of and assented to the custom requiring transportation charges to be paid in the first instance by the consignee. It is found that such a custom existed "between shippers and carriers," but the defendants were neither. Nor does it appear that they had ever received ties or other freight on those terms before. The court also found that the freight in this instance, by the custom, was to be deducted by the purchasers from the bill for ties, and the balance remitted to the seller. Whether this was the arrangement made simply between the consignor and the plaintiff, or whether the defendants assented thereto, is not distinctly certified. What inference is properly to be drawn upon this point from the facts

that are found is a matter of some doubt. We will therefore discuss the case in both aspects.

In the first place, therefore, supposing nothing had occurred to bind the defendants prior to their receipt of the ties, it is not perceived that they have made any promise or undertaking such as to subject them to liability in any amount beyond the sums specified upon the freight bills that were rendered at the delivery of the ties. The amounts thus specified they have already paid. In the absence of some agreement on the part of defendants, either express or implied, there is, in our opinion, nothing to support the present action. The mere existence of the relation of carrier and consignee is not enough to establish an obligation upon the latter to pay the transportation charges. *Prima facie*, the consignor of freight, who contracts with the carrier for its shipment, is liable to pay the charges of transportation. It is by him that the engagement is made with the carrier. It is for him that the service is performed. The question of his liability, however, is in each instance dependent upon the terms of the agreement actually made between him and the carrier. Whether the consignor is shipping for his own account, or as agent of another; whether he is owner of the goods; whether by the agreement between him and the consignee the title to the goods passes to the latter at the time of delivery to the carrier, or upon delivery to the consignee,—these and other like circumstances have been discussed in the adjudicated cases as evidential upon the question of consignor's liability to the carrier for the freight. In the present case the facts leave no room to doubt the consignor's original liability. Not only did the Seaboard Company, through its agent, engage the transportation, and agree with the plaintiff's agent about the terms thereof; not only was this done without the knowledge or participation of the defendants; but by the very terms of sale the ownership of the ties was to remain in the consignor until their delivery at Dunellen and Bound Brook, respectively; and of this the carrier had notice, as will be shown presently. The freight charges being unpaid in advance by the consignor, the carrier was, of course, entitled to a lien upon the goods for the amount of the freight. It was not obliged to make delivery to the consignees until these charges were paid. In such a case, if the lien is waived, and the goods delivered to the consignee, accompanied with notice to him of the amount of the charges remaining unpaid, the decisions hold that acceptance of the goods under such circumstances either amounts to an agreement to pay the freight, or at least is evidence from which such an agreement may properly be inferred. But acceptance by the consignee, although accompanied by an undertaking to pay the charges, does not discharge the consignor from liability to the carrier. The two contracts are held to be independent, and not inconsistent one with the other.

The above propositions, so far as they affect the consignor's liability, were fully discussed in the case of *Grant v. Wood*, 21 N. J. Law, 202, 47 Am. Dec. 162. Upon the general question the following additional decisions may be referred to: *Cock v. Taylor*, 13 East, 399; *Shepard v. De Bernales*, 13 East, 565; *Wilson v. Kymer*, 1 Maule & S. 157; *Sanders v. Van Zeller*, 4 Adol. & E. (N. S.) 260; *Wegener v. Smith*, 15 C. B. (80 E. C. L.) 285; *Barker v. Havens*, 17 Johns. 234, 8 Am. Dec. 393; *Merrick v. Gordon*, 20 N. Y. 93-97; *Davis v. Pattison*, 24 N. Y. 317; *Dart v. Ensign*, 47 N. Y. 619; *Davison v. Bank*, 57 N. Y. 81; *Elwell v. Skiddy*, 77 N. Y. 282; *Railroad Co. v. Whitcher*, 1 Allen, 497; *Finn v. Railroad Corp.*, 112 Mass. 524, 17 Am. Rep. 128; *Railroad Co. v. Wilder*, 137 Mass. 536; *Railroad Co. v. Winkley*, 159 Mass. 133, 34 N. E. 91, 38 Am. St. Rep. 398; 55 Am. & Eng. R. Cas. 695.

Upon reason, as well as by the great weight of authority, it seems entirely clear that the liability of the consignee to pay to the carrier the freight upon the goods transported, in a case such as is here presented, depends not upon any general legal duty resting upon a consignee simply because he is consignee, but upon some agreement or undertaking made by the consignee. Where one accepts delivery of goods from a common carrier, receiving at the same time a statement plainly setting forth the amount of freight charges thereon, with knowledge that the carrier is giving up for the benefit of the consignee a lien upon the goods for the amount so stated, such conduct by the consignee is, of course, cogent evidence, and, standing unexplained and uncontradicted, is sufficient evidence of an implied promise to pay the amount of the stated charges. Such an undertaking was undoubtedly made by the defendants in this case. That undertaking has been performed by them. But we fail to see in the facts, as certified to us by the trial court, anything to support a finding that the defendants, by anything that transpired at or after the delivery of the ties, undertook and promised to pay freight charges indefinite in amount, or any sum beyond that which was stated on the bills as rendered. If the plaintiff, the railroad company, instead of waiving its lien, had insisted upon retaining the ties until payment of the freight, at the same time rendering to defendants the freight bills as in fact they were rendered, and if the defendants had thereupon paid the bills in order to secure the ties, could a further liability be imposed upon them simply on the ground that the bills, as rendered, did not include the entire charges? We think not. In such case the plaintiff would have been left to its action against the consignor, as the party on whose engagement the service was performed.

But, secondly, whether the defendants were or were not originally cognizant of the terms of shipment, so as to be bound in the first instance to pay the just amount of trans-

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portation charges, the plaintiff is, in our opinion, estopped from demanding any greater sum than was demanded when the ties were delivered. As already mentioned, the facts show a custom between shippers and carriers, in view of which the agreement was made between Phelan, the agent of the shipper, and Saville, the agent of the carrier; he at the same time appearing to have contracted as an individual with respect to the lighterage charges. The agreement was, in effect, that payment of the lighterage charges should not be exacted of the shipper in advance, but that they should be added to the charges for transportation over the railroad, and collected by the railroad company from the consignees at destination; and the consignees were then to deduct the charges thus paid by them from the amount due to the consignor for the ties, and remit the balance to the consignor. It will be observed that, by the very terms of the agreement, notice was conveyed to Saville, and through him is imputable to the plaintiff, to the effect that the consignor was the seller of the ties, and was bound by the terms of sale to bear the entire charges of transportation; payment being made in the first instance by the purchasers merely as a matter of convenience to all parties. At the same time it was a matter of entire indifference to the defendants, as consignees and purchasers, whether the transportation charges were greater or less, provided they were notified of the correct amount prior to their closing the account with their consignor. They were entitled to charge the freight against the agreed price of the ties, as so much money paid for the use of the consignor, and at its request. Aside from this, there is nothing to show that the defendants had any authorization from the consignor to pay money for its account. The whole situation was such as to render it, in common fairness, quite essential that the railroad company should furnish correct freight bills at the time of delivery of the ties, if they desired to hold the defendants personally liable for the freight. The error in the freight bills was the result of gross negligence on the part of the agents of the plaintiff. Can the defendants be made to suffer for it?

The doctrine of equitable estoppel, although the creature of equity, and depending upon equitable principles, is recognized and enforced alike by the courts both of law and of equity. Pom. Eq. Jur. § 802. For an ample discussion of its principles and their application, reference may be had to Mr. Pomeroy's treatise (sections 801-821): Bigelow, Estop. (5th Ed.) p. 570 et seq.; and 11 Am. & Eng. Enc. Law (2d Ed.) p. 385, tit. "Estoppel." The courts of this state have been called upon to deal with the doctrine in all of its phases. Among other cases, the following may be mentioned: Den v. Baldwin, 21 N. J. Law, 395-403; Martin v. Righter, 10 N. J. Eq. 510-526; Philhower v. Todd, 11 N. J. Eq. 312; Bank v. Fulmer, 31 N. J. Law, 52-55, 86 Am. Dec. 193; Campbell v. Nichols, 33 N. J. Law, 81-87; Kuhl v. Mayor,

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etc., 23 N. J. Eq. 84; Swayze v. Carter, 41 N. J. Eq. 231, 3 Atl. 706; Insurance Co. v. Norris, 31 N. J. Eq. 583; Hart v. Kennedy, 47 N. J. Eq. 51-61, 20 Atl. 29; Perkins v. Turnpike Co., 48 N. J. Eq. 499-505, 22 Atl. 180; Ruckelschaus v. Oehme, 48 N. J. Eq. 436, 22 Atl. 184; Oehme's Adm'r v. Ruckelschaus, 49 N. J. Eq. 340, 24 Atl. 547; Robeson v. Robeson, 50 N. J. Eq. 465, 26 Atl. 563; Lawson v. Carson, 50 N. J. Eq. 370, 25 Atl. 191, s. c. on appeal Lawson v. Nicholson, 52 N. J. Eq. 821, 31 Atl. 386; Ruckelschaus v. Borchering, 54 N. J. Eq. 344, 34 Atl. 977; Magie v. Reynolds, 51 N. J. Eq. 113, 26 Atl. 150; Mott v. Hospital, 55 N. J. Eq. 722-733, 37 Atl. 757; Van Marter v. Lucas, 64 N. J. Law, 182, 44 Atl. 865.

The essential elements which must unite in order to create an equitable estoppel by conduct may be stated, with approximate accuracy, as follows: (1) That the party against whom the estoppel is urged has on a previous occasion, by words or conduct, made a representation or concealment of material facts, inconsistent with the facts forming the basis of his present claim; (2) that such party either knew the facts to be otherwise than represented, or, except for gross negligence, would have known, or that he pretended to know the facts when he knew that he did not know them; (3) that such representation or concealment was made either with the intent to influence the conduct of another, or else was made under such circumstances that a reasonably prudent man would suppose it was intended to be acted upon as true; (4) that the party to whom it was made was ignorant of the facts, and had no convenient opportunity to ascertain them; (5) that the latter party in good faith relied upon the representations or conduct of the other party, and thereby was led into such a course of conduct that he will now be substantially prejudiced if the other party be permitted to repudiate his former action or representation. In short, an equitable estoppel prevents one from rectifying his own grossly negligent mistake at the expense of another who has, without negligence, been misled thereby. The facts of the present case make it in all respects a typical case for estoppel. The agents of the plaintiff, the Central Railroad Company, by rendering to defendants bills made out in regular form, represented the amount of all freight charges, including lighterage, to be \$86.01 and \$94.26, respectively. The agents of the plaintiff, of whom Saville was one, and the bill clerk in Jersey City another, either knew, or except for gross negligence would have known, the correct charges to be \$81 greater in each case. As to the intent, the certificate of facts found by the court of common pleas sets forth that "no intention to influence or mislead the defendants was proved." Of course, there was no intention to mislead. The error was a sheer mistake, in the sense of being unintentional. But the facts specifically found evince an intent to "influence" the defendants to pay to the plaintiff the freight and other charges as stated, and to settle with

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their consignor on that basis. As already appears, the railroad company was charged with notice that the freight, etc., was to be paid by the defendants simply as a matter of accommodation; the party really liable being the consignor. Any reasonably prudent man in the position of the plaintiff would have known that the defendants would accept the freight bills as accurate and reliable for the purposes of a settlement with their consignor; and any reasonably prudent man, in the position of the defendants, would have done what they did,—that is, pay the bills, and charge them up to the consignor in the settlement. The defendants, of course, had no means of ascertaining the freight charges, except from the railroad company. They had nothing to do with making the bargain for transportation, or with fixing the rate; nor does it appear that, until arrival of the ties and receipt of the freight bills, they knew the weight of the ties, or knew that lighterage was to be charged separately from railroad charges. About the time they received the freight bills from the railroad company, they received from the Seaboard Company, through Phelan, a bill for the ties, with the amount of the freight bills deducted. The amounts of these agreed exactly with the bills as rendered by the railroad company, showing to the defendants that Phelan must have secured his information from the railroad company. It is quite possible, as argued in behalf of the plaintiff, that Phelan knew the true amount of the charges. Of course, he knew the agreed lighterage charge, at least. But Phelan was not acting for the defendants in any way. And when the defendants received from him, as representative of their consignor, a statement which agreed precisely with that rendered by the railroad company, the defendants were entitled to act upon them as correct, in the absence of notice of the error; and such notice they did not have. They themselves were not concerned as to the amount of the freight bills; being, with respect to them, merely stakeholders. And when the party entitled to payment and the party chargeable with the payment agreed in their statements as to the amount payable, there was nothing to put the defendants on their guard. By means of the representations of the plaintiff the defendants were led to change their position. Not that payment of the freight bills would have completed the estoppel. But when the defendants, in reliance upon the correctness of the freight bills, after paying them and receiving the plaintiff's receipts therefor, proceeded in good faith to close accounts with their consignor, deducting the freight bills as agreed, and paying over the balance due for the ties, the estoppel was complete. For it appears that thereby the defendants parted with the very fund against which alone they had a right to charge the freight. The case does not show that they could now recover over against the Seaboard Company the amount of the judgment in this suit, if forced to pay it. At least, their right of action is far from clear. More-

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over, the Seaboard Company is a foreign corporation, and its responsibility is unknown. If it can be compelled to pay the unpaid lighterage, pursuant to its original agreement with the plaintiff, it is quite proper, under the circumstances, for the plaintiff to be left to make that collection by direct proceeding and at its own expense.

Let the judgment below be reversed, and final judgment be entered in favor of the defendants, with costs.

GEORGIA R. CO. v. IVEY.

(*Supreme Court of Georgia, July 22, 1902.*)

[42 S. E. Rep. 382.]

Railroads—Personal Injury—Contributory Negligence—Improper Recovery.

The evidence did not show any negligence on the part of the agents or employees of the defendant company, and the injury was the result of accident, or a want of care on the part of the deceased. A verdict in favor of the plaintiff was therefore without evidence to support it, and should have been set aside.

(Syllabus by the Court.)

Error from superior court, Warren county; E. L. Brinson, Judge.

Action by Othello Ivey against the Georgia Railroad Company. From a judgment for plaintiff, defendant brings error. Reversed.

Jos. B. & Bryan Cumming, for plaintiff in error.

E. P. Davis, for defendant in error.

PER CURIAM. Judgment reversed.

LEWIS, J., absent on account of sickness.

CHICAGO & E. R. CO. v. SHAW.

(*Circuit Court of Appeals, Seventh Circuit, May 6, 1902.*)

[116 Fed. Rep. 621.]

Railroads—Injuries to Licensees—Contributory Negligence.*

Plaintiff, employed by a grain shipper to superintend the transfer of grain from loaded to empty cars on adjacent tracks, found cars so situated that he supposed they were set for that purpose. Not seeing the switch engine in sight, he stepped between the cars where the work was to be done, and was struck and injured by an empty car, which had been kicked forward by a shunted car. The switch crew had given no warning: *held*, that plaintiff was not guilty of contributory negligence.

Same—Duty to Warn.*

A switch crew, knowing that the employees of a grain shipper in-

*See foot-note appended to *King v. Illinois Cent. R. Co.* (C. C. A.), 3 R. R. R. 875, 26 Am. & Eng. R. Cas., N. S., 875.

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tended to transfer grain from loaded to empty cars, were charged with a duty to warn them of their approach, and the danger likely to arise from cars being shunted on the tracks where they were at work.

In Error to the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

W. O. Johnson and John Stirlen, for plaintiff in error.

James C. McShane, for defendant in error.

Before JENKINS and GROSSCUP, Circuit Judges, and BAKER, District Judge.

PER CURIAM. The plaintiff in error was the defendant below in an action by the defendant in error (plaintiff below) to recover for personal injuries received in the switch yards of the plaintiff in error. The substantial facts in the case may be stated as follows: The plaintiff in error, the Chicago & Erie Railroad Company, owns and operates a railroad from the city of Chicago to points east, and maintains, in the vicinity of Fifty-First street, switch yards, consisting of a number of tracks, running north and south, and parallel with each other. The north end of four of these tracks, numbered 15, 16, 17, and 18 (track 18 being elevated, and known as the "hill" track), was reserved by the plaintiff in error for the use of Joseph Gregg and others, grain shippers on the board of trade in Chicago, in the transference of grain from cars coming to Chicago from the west into cars bound for the east. This grain was transferred from the western cars into the eastern cars, either in bulk or in sacks; the plaintiff in error placing immediately opposite the loaded cars a corresponding number of empty cars upon the adjacent track, for the purpose of receiving the grain. The defendant in error, Shaw, had been for several years an employee of Gregg, and acted in the capacity of superintendent over the several crews employed by Gregg for the above-named work. March 8, 1898, the morning of the accident out of which this action grew, Shaw was engaged in superintending the transfer of grain that had arrived in the yards of the plaintiff in error, in bulk, from the west, and the sacking and loading of the same into empty cars bound for the east. There was evidence sufficient to go to the jury tending to show that, on the morning referred to, Shaw arrived at the yards of the railroad company, and proceeded, in the execution of what he supposed were his orders, to the north end of the tracks reserved for the transfer of grain. Here he found loaded and empty cars so situated on tracks 17 and 16 that he supposed they were set for the transference of grain from the loaded cars into the empty cars. Having so informed his men, he proceeded with them along track 18, or the "hill" track, toward the cars in view, until a point at the south end of the cars was reached, when, looking in the direction in which the switch engine and crew had last been seen, and not seeing their approach, he stepped down from the "hill" track to cross track 17, and thus reach the point

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between the cars where the work, as he supposed, was to be done. At this moment the switching crew of the plaintiff in error shunted several loaded cars in upon track 17, at a speed sufficient to drive or kick the empty cars there standing southward, one of which struck Shaw, threw him under the train, and inflicted the injuries for which he sued. The evidence was sufficient to go to the jury to show that no warning of the intention of the train crew had been given to Shaw or his workmen.

This evidence, if believed by the jury (and the verdict must be accepted as the result of such belief), was sufficient to show that Shaw, on the morning of the accident referred to, was acting in the line of his duty, and with his men had approached the scene of their labors with as much care and diligence as a reasonably prudent man, under similar circumstances, would have exercised.

The evidence is sufficient to show, also, that the crew of the plaintiff in error was aware of, or was chargeable with knowledge of, the intention of Shaw and his men to work at that particular point on that day, and, in view of this and other circumstances, were charged with a duty to do these men no injury. This made it incumbent upon the crew to furnish to Shaw and his men proper signal of their approach, and the danger likely to arise, and this was not done.

Upon this consideration of the evidence and the verdict, Shaw was neither a trespasser not guilty of contributory negligence, and the railroad company was guilty of the negligence that brought about the injury. The judgment of the circuit court must be affirmed.

LOWE v. ALABAMA & V. RY. CO.

(*Supreme Court of Mississippi, Oct. 20, 1902.*)

[32 So. Rep. 907.]

Injuries to Stock—Negligence—Burden of Proof—Injuries "Inflicted by the Running of the Locomotive or Cars."

Ann. Code, § 1808, provides that, in actions against railroad companies, proof of injury "inflicted by the running of the locomotive or cars," shall be the *prima facie* evidence of want of reasonable skill and care by the servants of the company. A horse at the foot of an embankment on which a train was running became frightened, and ran parallel with the track until it came to a ditch running thereunder. Instead of crossing the ditch, the horse, startled by an emission of steam from the engine, wheeled and jumped into the ditch, thereby breaking its neck: *held*, that the injury, not being "inflicted by the running of locomotives or cars," did not fall within the provisions of the Code, and the burden of proof of negligence rested on plaintiff.

Same—Negligence—Willfulness or Wantonness.

The killing of the horse under such circumstances did not establish willfulness, wantonness, or lack of reasonable care on the part of the engineer.

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Appeal from circuit court, Lauderdale county; G. Q. Hall, Judge.

Action by Mrs. M. C. Lowe against the Alabama & Vicksburg Railway Company. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

A train of railway cars was passing along defendant's track upon a fill or dump 10 or 12 feet high, when plaintiff's horse became frightened, and ran along parallel with the track at the foot of the dump until it came to a ditch which passed under the track. There was a ford or path across the ditch, where the horse might have crossed with safety. The horse, when it reached a point near the ford, suddenly wheeled and fell or jumped into the ditch, and broke its neck. The locomotive or cars of defendant did not strike it, but plaintiff showed that the engineer opened the cocks on his engine and allowed steam to escape, and thereby startled the horse and caused it to jump into the ditch, to its destruction.

F. V. Brahan, for appellant.

McWillie & Thompson, for appellee.

CALHOON, J. This case does not fall within the provisions of Ann. Code, § 1808, in reference to injuries "inflicted by the running of locomotives or cars." The horse was not killed by such running, but was off the track, and, from fright, left its path of safety, fell in a ditch, and broke its neck,—a curious result, which no one could have foreseen or reasonably apprehended. Railroad Co. v. Weathersby, 63 Miss. 581; Railroad Co. v. Thornton, 65 Mich. 256, 3 South. 654; Railroad Co. v. Holt, 62 Miss. 170.

Since Ann. Code, § 1808, cannot be invoked by the plaintiff, the burden of proof was on her to show willfulness, wantonness, or lack of such reasonable care on the part of the engineer as the position of the horse apparently demanded to prevent obvious danger. This we think she has not done. The horse was at the foot of an embankment, 10 or 12 feet below the moving engine, and in a perfectly safe pathway, with a safe egress, when the steam was emitted. It cannot be assumed, and especially in the face of evidence to the contrary, that the emission had reference to the animal. It is not even shown that the ditch was of such dimensions as to indicate danger. The cul-de-sac cases have no bearing, because here there was a plain mode of escape, and the killing was not done on the track. Surely a railroad cannot be held liable for emitting steam in the usual management of an engine, because it frightened a horse 10 feet below, from which fright it jumped in a ditch and broke its neck.

Affirmed.

HERRELL *v.* CHICAGO, M. & ST. P. RY. CO.*(Supreme Court of Wisconsin, May 19, 1902.)*

[90 N. W. Rep. 1071.]

Injury to Stock—Defective Cattle Guard—Circumstantial Evidence.

Circumstantial evidence in an action against a railroad company for killing a horse, tending to shew that the horse crossed on to the right of way over a defective cattle guard, and was run over and killed while on the right of way, considered, and *held* sufficient to show a killing within the right of way, which could be attributed to defendant's negligence in failing to maintain a proper cattle guard.

Same—Same—Contributory Negligence—Leaving Gate Open.

The fact that a pasture gate on a highway a mile and a quarter from a railroad crossing, and between the crossing and the owner's barns, is opened when horses having no known tendency to escape are in the pasture, 70 rods away, and allowed to remain open for half an hour, with knowledge that a cattle guard at the railroad crossing is defective, cannot be said, as a matter of law, to be contributory negligence precluding a recovery for the killing of a horse escaping and getting on the railroad right of way over the defective cattle guard.

Same—Same—Defenses.

The fact that horses trespass on a railroad right of way by passing thereon over a defective cattle guard is not a defense to an action for their negligent killing, in view of Rev. St. 1898, § 1810, providing that a railroad shall be liable for all damage to stock occasioned by its failure to maintain sufficient fences and cattle guards.

Appeal from circuit court, Lafayette county; Geo. Clementson, Judge.

Action by D. H. Herrell against the Chicago, Milwaukee & St. Paul Railway Company for the negligent killing of stock. From a judgment for plaintiff, defendant appeals. Affirmed.

Action for loss of a horse by negligence of defendant. The evidence tended to prove the following state of facts: Plaintiff lived on a farm about a mile and a quarter west of a highway crossing known as "Fox Crossing," on the defendant's right of way. On the 6th of November, 1900, at about 4 o'clock in the afternoon, his brother opened the gates of a pasture near the house, and drove certain cows up to the barnyard to be milked, and returned them after milking,—an interval of about half an hour,—leaving the gate open meanwhile. When the cows were let out, three horses or colts were grazing at the further side of the same pasture. They had been pastured all summer, and were quiet horses, never breaking out. The next morning one of the three horses was killed on the south side of the highway crossing aforesaid, about eight feet east of the track, apparently by collision with a train. Tracks of all three horses were observed from the gate of plaintiff's pasture above mentioned to this crossing. On the north side of the crossing the cattle guard was defective, and had been for a long time, to the knowledge of the plaintiff, and, as the jury found, to the knowledge of the defendant. The tracks of a single horse were found crossing the cattle guard, and making their way several hundred feet

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northward, within the railroad right of way, and then returning along the center of the track. They indicated that the horse was running, and terminated so near the cattle guard that another jump would have reached it. Horse hair appeared upon the cattle guard and along the crossing. Splinters, claimed to be fragments of the pilot of an engine, were found near the cattle guard, both north and south of it. About an hour and a half after the time of opening the pasture gate a special cattle train of the defendant passed over the crossing, southward. The night was foggy, so that the headlight illuminated only about a car's length of the track ahead of the engine. As the engine reached the crossing, two horses suddenly rushed across it from west to east. Neither of the engine force testifies that one of these horses was struck, though one said that he thought so, and the pilot was found broken upon examination. They deny presence of any horse on the track north of the crossing. The complaint seeks recovery from the defendant by reason of the defective condition of the cattle guard, charging no negligence in the operation of the train. After a motion for nonsuit and to direct a verdict, a special verdict was taken, in which it was found that the horse which was killed had gone into the right of way over the defective cattle guard and that the train came along and struck him while he was in there; that he was not on the highway crossing when struck; that the cattle guard was defective, and had been so for a long time, and that defendant's employees had knowledge of its condition; and that plaintiff's brother was guilty of no want of ordinary care in leaving the pasture gate open while milking the cows, knowing the horses to be loose in there. A question whether such negligence on the part of plaintiff's brother contributed was not answered. After the verdict the defendant moved, first, to change the answer to the question as to contributory negligence from "No" to "Yes," and to answer the question as to whether it contributed in the affirmative, and to render judgment thereon. This being overruled, defendant moved to set aside the verdict and grant a new trial, which was also overruled, and judgment entered for the plaintiff for damages and costs, from which the defendant appeals.

Orton & Osborn, for appellant.

Wilson & Martin, for respondent.

DODGE, J. (after stating the facts). Appellant's first position involves the contention that there was no evidence justifying the inference of the jury that the horse which was killed was, at the time of being run down, within the right of way of the defendant, so that the event could be ascribed to the defective condition of the cattle guard. After a careful perusal of the evidence, we are unable to concur in this view. The rule has been many times declared in this court that if there is any credible evidence, which, if believed by

the jury, might support their conclusions, it is not for this court, upon appeal, to set them aside. In this case the evidence is circumstantial, but there is evidence which, if believed, tends to prove that a horse did cross into the right of way over the defective cattle guard; that he came onto the track some 1,200 feet north, and thence ran toward the crossing; that horse hairs were found upon the cattle guard; and that the plaintiff's horse was killed. These facts might justify the inference that the horse so killed, having strayed up the right of way and sought to escape the fast-running train, was run down just before he reached the cattle guard, although there was evidence from other witnesses which, if believed, made that fact impossible. Appellant further insists that the evidence conclusively establishes contributory negligence in the plaintiff. The facts as to the conduct of the plaintiff's brother, acting for him, are substantially undisputed. The only one upon which negligence can be predicated is the leaving open of a pasture gate a mile and a quarter from the railway during a half hour, while the cows were being milked at the closely adjoining barnyard. While it has been held that it is contributory negligence, in law, to allow horses or cattle to run at large adjoining an unfenced or defectively fenced railroad track, no case justifies, or at any rate requires, an inference of negligence from so slight an act as this. We cannot say that the jury might not, as reasonable men, having knowledge of the custom amongst farmers, decide that such an act as the evidence discloses here was within the care customarily exercised by ordinarily careful persons under like circumstances. The horses were some 70 rods away from the gate, quiet and gentle, with no known tendency to escape from the pasture. Their barns were in the opposite direction from the railroad, and no evidence discloses anything likely to attract them in the direction of the latter. We must hold that the inference as to negligence from such conduct was within the province of the jury, and that we cannot set aside their decision thereon.

Appellant's third assignment of error, as argued in its brief, is based upon the contention that the horses, being astray upon the highway, were, in legal effect, trespassers thereon, and that defendant owed to them no active duty of care. This contention rests upon the well-known rule that one maintaining a dangerous place by the common law owes a duty of care to prevent injury thereby only to those lawfully or by his invitation subjected to the peril. It, however, overlooks the consideration that the duty and the liability of railroads with reference to fences and cattle guards are not merely such as the common law imposes, but are regulated and increased by statute. Section 1810, Rev. St. 1898. The duty to exercise care in maintaining such structures is absolute, and is due to all persons. Liability for breach of that duty is also absolute, except for contributory negligence on the part of the person

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suffering injury. Hence the fact that animals are trespassers on the land whence they come in contact with a defective railroad fence or cattle guard in no wise exempts the company from the liability imposed by the statute, which contains no such exception. *McCall v. Chamberlain*, 13 Wis. 637; *Dunnigan v. Railway Co.*, 18 Wis. 28, 86 Am. Dec. 471; *Pitzner v. Shinnick*, 39 Wis. 129; *Curry v. Railway Co.*, 43 Wis. 665, 684.

We find none of the errors which are argued by appellant well assigned.

Judgment affirmed.

NEW YORK, C. & ST. L. R. CO. v. KISTLER.

(*Supreme Court of Ohio, May 13, 1902.*)

[64 N. E. Rep. 130.]

Negligence—Pleading.

In an action founded upon negligence,^{*} the petition should state the acts of commission or omission which the plaintiff claims to have caused the injury; and, that statement being made, it is sufficient to aver that such acts were carelessly or negligently done or omitted.

Same—Speed in the Country.

In the absence of a statute regulating the rate of speed of railroad trains, it is not negligence for a railroad company to run its trains, in the open country, at such rate of speed as those in charge of the same may deem safe to the transportation of passengers and property, unless there are facts and circumstances which, when taken in connection with a high rate of speed, would make such speed an element or factor in constituting negligence; and in such cases such facts and circumstances should be pleaded.

Crossings—Right of Way.*

As between a person about to cross over a railroad at a crossing and a train of cars approaching such crossing, the train has the right of way. This is so because the person can stop within a few feet and the train cannot.

Accident at Crossing—Stop, Look, and Listen.†

The looking required before going upon a crossing should usually be just before going upon the track, or so near thereto as to enable the

^{*}See *Richmond, etc., R. Co. v. Garthright*, 92 Va. 627; *Bass v. Norfolk Railway & Light Co.* (Va. 1901), 7 Va. Law Reg. 632.

[†]See notes, 12 Am. & Eng. R. Cas., N. S., 317; 20 Am. & Eng. R. Cas., N. S., 793; 19 Am. & Eng. R. Cas., N. S., 320; 12 Am. & Eng. R. Cas., N. S., 444; 10 Am. & Eng. R. Cas., N. S., 467, 489, 504. See also, *Ayres v. Pittsburgh, etc., Ry. Co.* (Pa.), 1 R. R. R. 206, 24 Am. & Eng. R. Cas., N. S., 206; *Louisville & N. R. Co. v. Cooper* (Ky.), 1 R. R. R. 230, 24 Am. & Eng. R. Cas., N. S., 230; *Cleveland, etc., Ry. Co. v. Heine* (Ind.), 1 R. R. R. 948, 24 Am. & Eng. R. Cas., N. S., 948; *Chisholm v. Seattle Electric Co.* (Wash.), 1 R. R. R. 635, 24 Am. & Eng. R. Cas., N. S., 635; *Burian v. Seattle Electric Co.* (Wash.), 1 R. R. R. 218, 24 Am. & Eng. R. Cas., N. S., 218; *Hecker v. Oregon R. Co.* (Ore.), 23 Am. & Eng. R. Cas., N. S., 33; *Cook v. Los Angeles & P. E. R. Co.* (Cal.), 23 Am. & Eng. R. Cas., N. S., 69; *Merritt v. Foote* (Mich.), 23 Am. & Eng. R. Cas., N. S., 43; *Gahagan v. Boston & M. R. R.* (N. H.), 23 Am. & Eng. R. Cas., N. S., 141; *Chicago, etc., R. Co. v. Hoover* (Ind. Ter.), 23 Am. & Eng. R. Cas., N. S., 73; *Cowden v. Shreveport Belt R. Co.* (La.), 23 Am. & Eng. R. Cas., N. S., 355; *Kallmerten v. Cowen*,

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person to get across before a train within the range of his view of the track, going at the usual rate of speed of fast trains, would reach such crossing.

Same—Lookout—Care Due Persons Seen near Track—Presumptions.†

It is the duty of a locomotive engineer to keep a lookout on the track ahead of the train. If, while so doing, his eye takes in a person approaching the track, he may assume that such person will keep away from the track until the train passes, but when it becomes evident that such person will not keep off the track it becomes the duty of such engineer to use ordinary care to prevent injury to such person; his first and highest duty, however, being for the safety of the passengers and property in his charge for transportation.

Same—View Obstructed by Objects Not on Right of Way.

As a railroad company has no control over the trees, weeds, brush, shrubbery and the like not on its right of way, it is not required to take such things into consideration when approaching a crossing.

Imputed Negligence.

While the doctrine of imputed negligence does not prevail in this state, yet, where two or more persons take an active part in a joint enterprise, the negligence of each, while so actively engaged, must be regarded as the negligence of all.

Lookouts.

Whatever a locomotive engineer, and those with him on the engine, would see while in the proper discharge of their respective duties, they are chargeable with having seen.

(Syllabus by the Court.)

Error to circuit court, Sandusky county.

Action by Annie Kistler against the New York, Chicago & St. Louis Railroad Company. Judgment of the court of common pleas in favor of plaintiff was affirmed in the circuit court, and defendant brings error. Reversed.

On the morning of June 2, 1892, Annie Kistler, defendant in error, and her father were driving west on the county-line road between Seneca and Sandusky counties, in a buggy drawn by two quiet farm horses, the side and rear curtains being down, the latter being loose at the bottom. Her father was very deaf, and it was his custom to take one of his children along to hear for him, and he had taken Annie along that morning for that purpose. He was aged 57 years, strong and in good health. The county-line road crossed over the track of the New York, Chicago & St. Louis Railroad at grade and at an acute angle, the railroad running a little south of west and the wagon road running east and west. As the father and

(C. C. A.), 23 Am. & Eng. R. Cas., N. S., 352; Tacoma Ry. & Power Co. v. Hays (C. C. A.), 23 Am. & Eng. R. Cas., N. S., 58; Olson v. Northern Pac. Ry. Co. (Minn.), 23 Am. & Eng. R. Cas., N. S., 352; Stafford v. Chippewa Val. Elec. R. Co. (Wis.), 23 Am. & Eng. R. Cas., N. S., 364; Kelly v. Wakefield & S. St. Ry. Co. (Mass.), 23 Am. & Eng. R. Cas., N. S., 67; Born v. Philadelphia & R. R. Co. (Pa.), 22 Am. & Eng. R. Cas., N. S., 723; Traver v. Spokane St. Ry. Co. (Wash.), 22 Am. & Eng. R. Cas., N. S., 759; Fairbanks v. Bangor, O. & O. Ry. Co. (Me.), 22 Am. & Eng. R. Cas., N. S., 756; Cummings v. Chicago, R. I. & P. Ry. Co. (Iowa), 21 Am. & Eng. R. Cas., N. S., 470; Elston v. Del. L. & W. R. Co. (Pa.), 21 Am. & Eng. R. Cas., N. S., 354; McCusker v. Pa. R. Co. (Pa.), 21 Am. & Eng. R. Cas., N. S., 351. See also, note, 2 R. R. R. 66, 25 Am. & Eng. R. Cas., N. S., 66.

†See note, 2 R. R. R. 66, 25 Am. & Eng. R. Cas., N. S., 66.

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daughter were on the crossing they were struck by a freight train composed of an engine, four cars, and a caboose, going southwest at a speed of from 20 to 40 miles an hour. The father was killed and the daughter badly injured, and this action was brought by her against the railroad company for the recovery of damages. At a distance of 216 feet east of the crossing, a road known as the "Ridge Road" crosses the county-line road and, running in a northeast direction, crosses the railroad at a point 346 feet from the crossing of the county-line road over the railroad. At a distance of 89 rods east of the crossing is the west line of a tract of 15 acres of woodland, lying between the county-line road and the railroad. Just east of the ridge road, and partly on the right of way of the railroad and partly on the land adjoining on the south, there stood a wild cherry tree, which the evidence tended to show to be 8 to 12 inches in diameter, 30 feet high, with a broad bushy top from 25 to 30 feet in diameter, and the branches coming within 3 to 8 feet of the ground. Along the east side of the ridge road, and about 20 feet south of the cherry tree, there was a locust tree about the same size as the cherry, with some sprouts around it from 4 to 12 feet high. There were also some weeds 3 or 4 feet high along the ridge road, and along at that place there was a small cut 2 to 3 feet deep, and thence to the crossing where the accident occurred the county road and railroad were on a level. There were no other or further obstructions. She had often passed there, and knew the situation. The county road was sandy, and it had rained a little the previous night, and the air was clear with a slight breeze from the northeast. The father sat on the right side and drove the team, and as they passed the woods he told her that they were nearing the railroad and requested her to look and listen for trains, which she did by raising the rear curtain some three times before reaching the ridge road. After passing that road she remembers nothing, but within 100 feet of the crossing the father was seen to bend forward and look out toward the railroad. The team was going on a slow trot until it passed over the ridge road, and then it went faster, one horse trotting and the other galloping till they reached the crossing, but whether the driver was urging them ahead to get over the crossing ahead of the train, or whether he had partly lost control of them, is left in doubt by the evidence.

There was no slacking of the speed of the train and the engineer did not see them before the collision, but the evidence tends to prove that the fireman and a brakeman on the engine and the conductor, brakeman, and foreman on the caboose saw them when the team was within about 100 feet of the crossing. It is conceded that the whistle for the crossing was given, but she claims that it was not given at the proper place, and that it was not given until after passing the ridge road, and that it scared the horses and caused them to increase

their speed. The evidence as to the signal by whistle is conflicting. The bell seems to have been rung.

The petition avers that the railroad company negligently and carelessly approached and crossed said highway with said locomotive and train of cars at a high, immoderate, and dangerous rate of speed, and negligently and carelessly omitted to give proper and sufficient signals or warning of the approach of said locomotive and train to said crossing and of the existence of said crossing, and negligently and carelessly allowed and maintained obstructions to a proper view of its said train, locomotive, and railroad, and negligently and carelessly operated and handled its said locomotive and train of cars. The railroad company filed a motion to compel her to make her petition definite and certain as to the acts of negligence charged, and particularly to state the facts in regard to the defendant negligently and carelessly operating and handling said locomotive and train, and to strike out the words "at a high, immoderate, and dangerous rate of speed." The court of common pleas overruled the motion, to which the defendant below excepted. The answer was a general denial as to the negligence charged and a plea of contributory negligence on her part. She denied the contributory negligence in her reply. She recovered a judgment on the first trial, which was reversed by the circuit court, and upon another trial she again recovered a verdict. A motion for a new trial was overruled and judgment entered on the verdict. Proper exceptions were taken throughout the case. The circuit court affirmed the judgment, and thereupon the railroad company came here seeking to reverse the judgments of the courts below.

C. P. & L. W. Wickham and John H. Clarke, for plaintiff in error.

Finch & Dewey and King & Guerin, for defendant in error.

BURKET, J. (after stating the facts). Section 5088, Rev. St., provides that: "When the allegations of a pleading are so indefinite and uncertain that the precise nature of the charge or defense is not apparent, the court may require the pleading to be made definite and certain by amendment." This means that the court shall in a proper case require the pleading to be made definite and certain. It is not a mere matter of discretion. It is a substantial right to a party to have the pleading against him so definite and certain as to enable him to know what he has to meet and to prepare his evidence accordingly.

The charge of negligence against the company that it "negligently and carelessly approached and crossed said highway with said locomotive and train of cars at a high, immoderate, and dangerous rate of speed," and "negligently and carelessly operated and handled its said locomotive and train of cars," gave no definite or certain notice to the company as to what

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acts of commission or omission claimed to be negligent would be attempted to be proved or relied upon at the trial, and therefore the petition should have been required to be made definite and certain by stating the acts of commission and omission claimed to have caused the injury, so as to advise the company as to the facts claimed to have been negligently done or omitted, and to enable it to meet the same. Upon the trial the evidence should be confined to the acts of negligence so specifically and definitely averred in the petition. This is in accordance with the rule of pleading laid down in *Davis v. Guarnieri*, 45 Ohio St. 470, 15 N. E. 350, 4 Am. St. Rep. 548. It was there held that, the fact claimed to have caused the injury being averred, it was sufficient to state that it was negligently done. But to say that the company "negligently and carelessly operated and handled its said locomotive and train of cars" avers no fact as causing the injury, and does not aver that any fact causing the injury was carelessly done or omitted. It is a general averment at large of negligence, and the court erred in overruling the motion to make definite and certain.

The court also erred in refusing to strike out the words "at a high, immoderate, and dangerous rate of speed." As the general assembly has the power to reasonably regulate the speed of trains, not only in cities, but also in the country, and has failed to exercise that power as to speed in the country, such failure is an implied warrant to railroad companies to run their trains in the open country at such rate of speed as those in charge of the same may deem safe to the transportation of passengers and property; such safety, however, being the paramount consideration. As there are road crossings in the country every few miles, it is inconsistent with proper speed of transportation that trains should slack up for such crossings. Safety is secured to persons at such crossings by the observance of the statutory signals, and, such signals being given, the train is not limited as to speed. It has sometimes been held, and correctly, that a high rate of speed, when taken in connection with other facts and the surrounding circumstances, may become an element or factor in constituting negligence, but when such is the case the facts constituting such surrounding circumstances should be pleaded, so that the court can judge from the pleadings whether the high rate of speed is a proper factor in constituting negligence, because a high rate of speed alone cannot constitute negligence as a matter of law. Elliott, R. R. § 1160, says: "In the absence of any statute or ordinance upon the subject, no rate of speed is negligence per se." The same doctrine is laid down in *Thomp. Neg.* § 1873. The petition shows no fact making this crossing dangerous or other than the usual country-road crossing and no fact or circumstance which, when combined with a high rate of speed, would constitute negligence. The court should therefore have stricken out

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those words as to speed. The case of *Railroad Co. v. Lawrence*, 13 Ohio St. 66, 82 Am. Dec. 434, is instructive as to the question of speed of trains. The injury in the case of *Schweinfurth v. Railway Co.*, 60 Ohio, 215, 54 N. E. 89, occurred at a street crossing in a city where there was an ordinance regulating the rate of speed, and it was there held that under the circumstances of that case a high rate of speed, contrary to the provisions of the ordinance, might constitute an element in determining the question of negligence; but at road crossings in the country, where there is no law regulating the rate of speed, the rule does not prevail.

At the close of the evidence, and before argument, the court, upon request of counsel for plaintiff below, gave to the jury the following charge: "The jury are instructed that the defendant railroad company had, at the time of the collision complained of, the same right to use that portion of the public highway over which its track passed at the point of collision that the public had. Its rights and those of the plaintiff were mutual and reciprocal, and the railroad company and the plaintiff were bound to have due regard each for the safety of the other." This charge was too strongly in her favor. While in law she had the same right to use the crossing that the railroad company had, the different modes of such use constitute a difference in right. As she could stop with her team within a few feet, and the train could not stop short of many rods, it follows of necessity that, when both were approaching the crossing at the same time, the train had the right of way, and it was her duty to stop and let the train pass before attempting to cross. *Thomp. Neg.* 1611; *Improvement Co. v. Stead*, 95 U. S. 161, 163, 24 L. Ed. 403. Such would be the conduct of all men of ordinary care under such circumstances. To rush ahead and attempt to pass, knowing the train to be close at hand, is not the conduct of ordinarily prudent persons, but is gross negligence.

To drive upon a crossing without first looking for passing trains is also negligence. The looking should usually be just before going upon the crossing, or so near thereto as to enable the person to get across in safety at the speed he is going before a train within the range of his view of the track, going at the usual speed of fast trains, would reach the crossing. There should be such looking before going upon the track even though there was a looking farther away when no train was seen approaching. A train at the usual speed will go quite a distance, while a team on a walk or trot will go a much shorter distance. The care to be taken in such cases should correspond with the danger.

The court in the special charges given at the request of plaintiff's counsel, in speaking of the duty of those in charge of the train to use care in discovering the plaintiff as she approached the crossing and using means to prevent injury to her, includes all the trainmen without explaining the duties

of any of them, but puts upon all the duty of caring for her so as to prevent injury. Three of the trainmen were in the caboose, away from the engine, and without means of immediate communication with the engineer, and yet they are included in the instruction as to trainmen, when they could do nothing to prevent the accident. The engineer also is a trainman, and the charge imposes upon him, along with the other trainmen, the duty of seeing her danger and being careful to shield her as she approached and drove upon the crossing. It is the duty of an engineer on a train to keep a lookout on the track ahead of him, and he is not expected to see anything on the sides of the right of way farther than his eye may take in objects within the range of vision while looking ahead along the track. Elliott, R. R. §§ 1159, 1205; Thomp. Neg. § 1592 et seq. In *Railroad Co. v. Elliott*, 4 Ohio St. 474, 476, this court held that "the paramount duty of a conductor of a train is to watch over the safety of the persons and property in his charge." The same is true of an engineer. His paramount and first duty is to watch over and guard the safety of the persons and property in his charge, and that is most effectually done by keeping a strict lookout ahead along the track, so as to see any obstruction at the earliest moment, and thus be prepared to avert danger to his train. So important is this duty of the engineer to keep a lookout ahead of his train that in some of the states it is required and regulated by statute. His duty being to look ahead, it cannot be his duty to look at the same time to the sides. If, however, while so looking ahead, his eye takes in a person approaching the track at a crossing or elsewhere, he is then bound to use ordinary care to prevent injury, his first care, however, being for the safety of his passengers and property on board for transportation. He may presume that such person will keep away from the track until the train passes, but when it becomes evident that the person cannot or will not keep away from the track, then he must do all he reasonably can to prevent injury. Upon the trial of this case it was urged by counsel for plaintiff that she was discovered by the trainmen in the act of going upon the crossing in time for the engineer to have so slowed down his train after such discovery as to have prevented the injury. The railroad company claimed that she was not seen by the engineer until the collision occurred, and that it did not become evident to the brakeman and fireman on the left-hand side of the engine that she was about to drive upon the crossing until the very moment of the collision, and that it was then too late to notify the engineer. It was with reference to these different claims that the special charges were given. It has often been held by courts that when a person suddenly finds himself in a position of imminent peril or danger he cannot be held to a strict account as to the course of conduct to be by him pursued to avoid injury. *Railroad Co. v. Mowery*, 36 Ohio St. 418, 38 Am. Rep. 597; Elliott,

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R. R. § 1173; *Railroad Co. v. Snyder*, 55 Ohio St. 342, 45 N. E. 559, 60 Am. St. Rep. 700. While engineers of locomotives are expected from their training, experience, and the nature of their duties to be equal to almost any emergency in the management of their trains, yet it must be remembered in their favor that they have mind and nerves the same as other people, and that when they are suddenly and unexpectedly confronted with imminent peril or danger to themselves or to the persons and property in their charge, by obstructions on the track or about to go thereon, they cannot be held to a strict course of conduct to prevent injury to persons or property not connected with the train, so that the action taken is in good faith and at the time believed to be the best. When a person or animal is seen approaching the track, and it becomes evident that he or it will not stop but attempt to cross, it is sometimes safer to slow down or stop the train and sometimes safer to increase the speed and get the train across first. The course to be pursued must be instantly determined by the engineer at the peril of himself and the persons and property in his charge, and the course selected by him and carried out in good faith in the face of such peril, and in view of the surrounding circumstances, cannot constitute negligence on his part, even though others might be able to suggest and point out afterwards that a different course would have been less liable to result in injury. As to the persons and property in his charge, the engineer must use the greatest care, but as to persons and property not connected with the train he must use only ordinary care. He must therefore be allowed to determine for himself in good faith, upon the spur of the moment and in view of the peril before him, the course to be pursued for the safety of the persons and property in his charge, without being called to a very strict account by those to whom he owes only ordinary care. What was said by this court in *Express Co. v. Smith*, 33 Ohio St. 511, 31 Am. Rep. 561, at page 519, is applicable to such cases: "There is an ex post facto wisdom which, after every thing has been done without success, can suggest that something else should have been attempted, but this is a sagacity much more astute than ordinary human foresight, and can hardly furnish a fair rule by which to determine the propriety of what has been done in good faith and with judgment exercised under the best light afforded." At the request of the plaintiff below, the court also charged the jury in different forms, before argument, to the effect that the jury must determine from the evidence under the instruction of the court whether plaintiff in approaching the crossing used such care as persons of ordinary care and prudence would use under like or similar circumstances. Sometimes the word "evidence" was left out. These charges were all defective at least in this: the question was put as to approaching the crossing, instead of going onto the crossing. She may have been ever

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so careful in the approach, and yet extremely negligent in driving upon the crossing in the face of a rapidly approaching train. If she was negligent in going upon the crossing in front of a rapidly approaching train, thinking that she could cross in safety, and the engineer after seeing her was negligent in not slowing down or stopping his train, thinking that she would get across in safety, the proximate cause of the injury was the miscalculation and negligence of both, and there could be no recovery unless the engineer, after he saw her and realized her danger, had time to so slow down or stop as to prevent the injury. Or if the fireman and brakeman riding on the left side of the engine saw her, and saw and realized her danger in time to notify the engineer in time to enable him to so slow down or stop the train as to have prevented the injury, and failed to so notify the engineer, such failure would be such negligence as would sustain a recovery; but if, after it became evident to them that she was about to drive upon the crossing, there was not time to notify the engineer and then time for him to so slow down or stop the train as to prevent the injury, there could be no recovery. When the fireman and brakeman saw her driving toward the crossing they had a right to rely that she would use due care and not go upon the crossing, and it was only when it became evident that she was going upon the crossing that the duty devolved upon them to notify the engineer, and if there was then time to save her she should have been saved, but if it was then too late to save her the injury was, as to the railroad company, an inevitable accident, and for such there can be no recovery. If, on her part, it was a race to beat the train over the crossing, the injury was her own fault and there could be no recovery. It is urged that there was a deep ditch on one side of the road and a fence on the other, and that she could not turn her team around. But no effort is shown to turn the team, and besides it is always safer to run into a fence or even a deep ditch than onto a railroad crossing in front of a fast train. There were no facts or surroundings pleaded or proven which, when taken in connection with a high rate of speed, would make such speed an element or factor in negligence, and therefore what was said as to such high rate of speed in the charge was error. Whatever the engineer and those on the engine with him would see while in the proper discharge of their duties they are chargeable with having seen, but they are not required to neglect their duties on the train to look outside of the right of way for approaching persons or animals not within the range of vision while looking ahead along the track. After argument the court charged the jury as follows: "The defendant had the right to run the train at the time and place of this collision at any speed consistent with the safety which was necessary in the conduct of its business in the usual and ordinary manner, taking into consideration, however, all the circumstances, surrounding that crossing, affecting the

traveling public, and having a due regard for the safety of the public using the crossing." From what has already been said as to the speed of trains, it will readily be seen that the latter part of this charge, all after the word "manner," is erroneous.

The court also charged the jury that if trees, shrubbery, or weeds presented an obstruction to view, it required care and caution on part of plaintiff and defendant according to their respective rights as explained by the court. The inclusion of the defendant in this charge was error. The trees, shrubbery, and weeds outside of the right of way imposed no care or caution upon the company in running its train. The court also charged the jury as follows: "While it is true that the railroad company is not responsible for weeds or bushes growing outside of its right of way, even though they obstruct a view by travelers upon the highway, yet if you find from the evidence such weeds or bushes to have existed in such manner in this case it is a circumstance which the jury should consider in determining whether or not the railway company was guilty of negligence in approaching this crossing of the county line at the rate of speed at which it approached the same with its train upon this occasion." This charge was clearly error, because the weeds and brush in question were not a circumstance to be considered by the jury in determining the question of negligence.

The court also, in charging as to the duty of the company and its servants after seeing her danger, included the trainmen. This was too broad, as it included those in the caboose, who could do nothing to avert the injury. The court also charged the jury that the question of negligence was wholly for the jury to determine from the evidence. He should have added, "under the instructions of the court." The court also charged the jury that the negligence, if any, of the father, was not imputable to the daughter. While it is true that the doctrine of imputed negligence does not prevail in this state, that doctrine was not applicable to the facts as claimed to be by the defendant in this case, and as the evidence tended to prove. The father, being nearly deaf, took the daughter along to hear for him, and as they came to the west side of the piece of woods he told her to look and listen for trains, and she did so by raising the rear curtain and looking in the direction of the railroad. If it be true that she was to do the listening and also to assist in the looking while he was doing the driving, they were engaged in a joint enterprise, and each would in such case be chargeable with the negligence of the other. It has often been held that the negligence of a servant is imputable to the master because he is the superior. *Railway Co. v. Wright*, 54 Ohio St. 181, 43 N. E. 688, 32 L. R. A. 340. On principle and sound reason the rule should be applied to those who take an active part in a joint enterprise. As to the wild cherry tree standing in the south line of the railroad right of way east of the ridge road, it is difficult to

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see how it could be an obstruction to her view of the train at the time of going upon the track, because the train was then far west of the cherry tree and the tree was behind the train. The time to look and listen for the last time is shortly before going upon the track as before explained, and, as the train was near enough to catch her before getting over the crossing at a fast trot or gallop, the train must have been far past the cherry tree when she should have looked the last time. If she saw the cherry tree as she drove by it, or knew of its being there, it only imposed upon her greater care and caution if she regarded it as an obstruction to her view. *Pennsylvania Co. v. Morel*, 40 Ohio St. 338.

Judgment reversed.

SPEAR, DAVIS, SHAUCK, and PRICE, JJ., concur.

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(*Supreme Court of Tennessee, March 1, 1902.*)

[67 S. W. Rep. 479.]

Accident at Street Railway Crossing.

Where the plaintiff, injured by a street car at a crossing, states on direct examination that he looked for an approaching car before going on the tracks, and it appears on cross examination that he is testifying from his general habit of looking, but he reaffirms the fact that he looked on redirect examination, it cannot be said as a matter of law that his evidence shows that he did not look, but the weight of his testimony is for the jury.

Same—Same—Instructions.*

The refusal to instruct that a recovery cannot be had if plaintiff, injured by a street car at a crossing, failed to look and listen, and such failure directly contributed to the accident, is erroneous, though the court instructs that such failure will preclude a recovery if it was the proximate and controlling cause of the accident, but can only be considered as affecting the damages if it did not so operate, as such instruction does not preclude a recovery if plaintiff's negligence contributed to the injury.

Same—Same—Same.

The refusal of an instruction that plaintiff, injured by a street car at a crossing, cannot recover if, by the exercise of reasonable care, he might have seen the car approaching in time to have avoided the accident, is not erroneous when considered in connection with an instruction given that plaintiff's failure to look and listen will prevent a recovery.

Same—Right of Way.†

A street car company in the operation of its cars has no rights at a street intersection superior to the rights of other vehicles.

*As to whether the stop, look and listen rule is applicable to street railway crossings, see note appended to *Keenan v. Union Traction Co.* (Pa.), 2 R. R. R. 64, 25 Am. & Eng. R. Cas., N. S., 64.

†As to whether a street railway rights at crossings are superior to those of an ordinary traveler, see *Stafford v. Chippewa Val. Elec. R. Co.* (Wis.), 23 Am. & Eng. R. Cas., N. S., 364, and foot-note, 365; *Traver v. Spokane St. Ry. Co.* (Wash.), 22 Am. & Eng. R. Cas., N. S., 759; *North Jersey St. Ry. Co. v. Schwartz* (N. J.), 22 Am. & Eng. R. Cas., N. S., 620; *Richmond R., etc., Co. v. Garthright* (Va.), 4 Am. & Eng. R. Cas.,

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Same—Negligence and Contributory Negligence—Sufficiency of Evidence.†

In an action against a street railway, where the corroborated testimony of the motorman tends to show that the car was going slow, with headlight burning, and that the gong had been sounded, on approaching the street intersection; and that he was in his proper place, but did not see plaintiff till two-thirds the way across the intersecting street, when plaintiff attempted to drive across the tracks on a trot; and that witness attempted to stop the car, but could not do so in time to prevent the accident; and the injury to the car indicates that the collision was with an object in front and at the side of the car,—it is error to refuse to instruct that plaintiff cannot recover if he drove in front of the car, at a time when the motorman was exercising reasonable care, and the latter, in the exercise of such care, could not prevent the accident.

Appeal from circuit court, Davidson county.

Action by P. R. Norman against the Nashville Railway and Nashville Suburban Railway Company. From a judgment in favor of plaintiff, defendants appeal. Reversed.

R. F. Jackson and J. M. Anderson, for appellants.
Washington, Allen & Rains, for respondent.

McALISTER, J. The plaintiff below recovered a verdict and judgment against the defendant companies for the sum of \$3,000 damages for personal injuries. Both companies appealed, and have assigned errors. The gravamen of the action is that the plaintiff, while driving a delivery wagon drawn by two horses, was injured in consequence of the negligence of defendants, their servants and agents, in the operation of a street car along Front street, in the city of Nashville. The evidence shows that the accident in question occurred about 11:30 o'clock at night. The grade of Front street from the public square to Church street is very heavy. Church street intersects Front street about halfway between the public square and Broad street. At the time of the accident the plaintiff was in the act of delivering freight to Diehl & Lord, whose business house is on the east side of Front street, and about 200 feet below Church street. The accident occurred just at the intersection of Church and Front streets. There is evidence tending to show that plaintiff was proceeding along Church street at a moderate rate of speed, and

N. S., 263; Consolidated Traction Co. v. Haight (N. J.), 8 Am. & Eng. R. Cas., N. S., 90; New Jersey Electric Ry. Co. v. Miller (N. J.), 6 Am. & Eng. R. Cas., N. S., 519; Sirk v. Marion St. R. Co. (Ind.), 2 Am. & Eng. R. Cas., N. S., 223; Omaha St. R. Co. v. Cameron (Neb.), 1 Am. & Eng. R. Cas., N. S., 258; Omaha St. R. Co. v. Duvall (Neb.), 1 Am. & Eng. R. Cas., N. S., 253; Hicks v. Citizens' R. Co. (Mo.), 1 Am. & Eng. R. Cas., N. S., 253; Orr v. Cedar Rapids & M. C. R. Co. (Iowa), 1 Am. & Eng. R. Cas., N. S., 239; Bunyan v. Citizens' Railway Co. (Mo.), 1 Am. & Eng. R. Cas., N. S., 246; Thacher v. Central Traction Co. (Pa. St.), 1 Am. & Eng. R. Cas., N. S., 253; Moore v. Kansas City & I. R. T. Co. (Mo.), 1 Am. & Eng. R. Cas. 254.

†As to the care required of those in charge of street cars to avoid collisions with persons, animals, or vehicles, see note appended to Robinson v. Louisville Ry. Co. (C. C. A.), 1 R. R. R. 838, 24 Am. & Eng. R. Cas., N. S., 838.

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turned into Front street, going in a diagonal direction across the street car track towards the business house of Diehl & Lord, on the opposite side of Front street. The wagon had not reached the track, but the horses' heads were about the center of the track, when plaintiff discovered a car about 100 feet away. He immediately pulled his horses to the right, but before he succeeded in getting away from the track the running board of the car struck the hub of the wheel and the doubletree of the wagon, throwing plaintiff upon the ground, under the feet of his horses and the wheels of his wagon, inflicting upon him severe and permanent injuries. There is evidence tending to show that the car was running at an immoderate and dangerous rate of speed, and that the bell was not rung, or the gong sounded, or other signal given of the approach of the car. Four or five witnesses prove that the motorman, prior to the accident, did not ring the bell or sound the gong; that the car was running at the time at a rate of speed which the witnesses variously estimate from 20 to 30 miles an hour, in violation of the city ordinance, which prohibits a rate of speed exceeding 6 miles an hour. The speed and momentum of the car are further shown by the fact that the wagon with which it collided, weighing 3,000 or 4,000 pounds, was thrown from the center of the street into the gutter, and the car ran a hundred feet before stopping. There is also evidence tending to show that the motorman, as the car approached Church street, could have seen the horses and wagon at a distance of 100 feet, but made no effort to check the car, or put it under control. The insistence, however, of counsel for the company under this assignment of error is that the injuries sustained by plaintiff resulted from his own negligence as the proximate cause. The specification is that, although plaintiff was aware that he was approaching the street car track, he neither looked nor listened, but drove upon the track heedlessly and recklessly. It is insisted that this fact appears from the plaintiff's own testimony. We have carefully read the evidence, and find that plaintiff did testify that as he approached Front street from Church street he looked up Front street in the direction of the public square, and had a view of 100 yards, but saw no car. Plaintiff states that his horses were then in a jog trot, and he proceeded to cross the street car track angling to the right, when he discovered the car approaching at a distance of only 100 feet, when he immediately pulled his horses to the right, and did all in his power to get out of the way. While the plaintiff does state that he looked up Front street while still on Church street and before going upon the street car track, the cross-examination weakened his testimony on that point, and left the impression that he was not testifying from positive recollection that he looked, but from his general habit to do so. However, the plaintiff in his redirect examination repeats with more or less positiveness that he did look before going upon

the track. The objections now urged go to the credibility of the witness and the weight to be given his testimony, all of which were matters for the determination of the jury.

The second assignment of error is based upon the idea that the court, in his instruction to the jury, proceeded upon the assumption that the effect of plaintiff's testimony was that, as he approached the track, before going on it, he looked up the street to see if a car was approaching. It is insisted that this was a judicial construction or interpretation of the plaintiff's testimony, and the determination by the court of a vital question, which was earnestly controverted before the jury. In other words, it is insisted that, while defendant's counsel was contending that the plaintiff had not testified that he looked up Front street before driving his horses on the track, the court, in stating the contention of the plaintiff, assumed that he had so testified. It is very obvious that the court, in the use of the language objected to, was simply stating the contention of the plaintiff's counsel below, and stated no fact as established by the testimony. The contention of counsel for plaintiff below and in this court was that the plaintiff, before going upon the track, looked and listened for the approach of a car; and we do not perceive that the court, in stating the respective contentions of the parties, infringed in any manner upon the province of the jury.

The third assignment of error is that the court erred in refusing the following supplemental instruction asked by counsel for defendant companies, namely: "It was the duty of plaintiff to look and listen for the approach of the car, before attempting to pass over the track, and if you believe from the evidence that he failed to look and listen, and that such failure was the direct and proximate cause of the accident, or directly contributed to it as its proximate cause, your verdict should be for the defendant." It is insisted by counsel for the plaintiff below this instruction was covered by the general charge, in which the court said as follows: "It was the duty of the plaintiff to look and listen, and to have his horses under reasonable control as he approached the cars," etc. The court, after further instructing the jury upon the reciprocal duties and obligations imposed by law upon the respective parties litigant, concluded as follows: "With these general principles of law you will proceed to consider the facts, and apply the same to the law as given you above, and find such verdict as you believe warranted. Otherwise, if you find that the plaintiff, upon the night in question, undertook to cross the track of defendant at the intersection of Church and Front streets; that he failed to observe the precautions required of him, as explained to you above, and that by reason of his own negligence, and in failing to observe those precautions, he drove upon the track of defendant companies, and that his own negligence was the proximate and controlling cause of the accident or collision, the cause without which the accident would

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not have occurred,—then, in that event, you should find for the defendant.” The court also gave in his general charge the following instruction: “Again, if you should find that the plaintiff’s own negligence and want of care and precaution contributed to the accident, but was not the proximate and controlling cause of same, this would not deprive the plaintiff of his right to a recovery, but should be taken by you into account in mitigation of damages that you otherwise would allow.” The objection to the charge and the refusal to charge as requested we quote at length from the brief, since it presents very clearly and pointedly the alleged errors, as follows: “The judge, in his charge to the jury, after defining the amount of care and caution incumbent upon plaintiff to avoid the accident, told the jury that if they found that this action and conduct of the plaintiff (describing it) was the proximate and controlling cause of the accident,—the cause without which the accident would not have occurred,—then, in that event, the jury should find for the defendant. It will be observed in this instruction of the judge that plaintiff was to be defeated in his action, provided only that the jury found that his negligence was the proximate and controlling cause of the accident,—the cause without which the accident would not have occurred. The court then adds: ‘Again, if you should find that the plaintiff’s negligence and want of care and precaution contributed to the accident, but was not the proximate and controlling cause of the same, this would not deprive the plaintiff of his right to a recovery, but should be taken by you into account in mitigation of damages that you would otherwise allow.’ In this same connection the defendant was entitled to have charged the jury not only as the judge did charge, that, if his negligence was the proximate and controlling cause of the accident,—the cause without which the accident would not have occurred,—but also the further principle that, although the plaintiff’s negligence was not the proximate and controlling cause of the accident,—the cause without which the accident would not have occurred,—that yet, if they found that the proximate and controlling cause of the accident was the mutual concurrent negligence of both plaintiff and defendant, that the plaintiff could not recover. In both of these requests this idea is incorporated; their language being that if ‘the negligence of the plaintiff either was the direct and proximate cause of the accident, or directly contributed to it as the proximate cause, your verdict should be for the defendant.’ It will be observed that the court does correctly state to the jury that, if the plaintiff’s negligence and want of care and precaution remotely contributed to the accident, but was not its proximate and controlling cause, that plaintiff would not be defeated of his recovery, but that this fact could be looked to only in mitigation of damages. But the court nowhere in its charge tells the jury that, if the plaintiff’s negligence and want of care and precaution con-

tributed to the accident as its proximate cause, that plaintiff would be barred of his right of recovery. The only charge as to this point is that, in order to defeat plaintiff's right of recovery, his negligence must be the proximate and controlling cause,—that cause without which the accident would not have occurred,—making no allowance whatever for the doctrine of mutual or concurrent negligence of plaintiff and defendant." We are constrained to hold that the objection thus urged to the charge is well founded, and the court was in error in refusing the supplemental request to the effect that, if the plaintiff's negligence contributed proximately to the accident, this fact would defeat the right of recovery. In other words, the court, in his general charge, only covered the proposition of remote contributory negligence, which is to be considered in mitigation of damages, but wholly ignored the doctrine of proximate contributory negligence, which defeats the action. In *Whirley v. Whiteman*, 1 Head, 617, it was held that if a party, by his own gross negligence, brings an injury upon himself, or contributed to such injury, he cannot recover; for if, by ordinary care and prudence, he might have avoided it, he must be regarded as the author of his misfortune, etc. It is likewise equally true that in case of mutual negligence, where the parties are equally blamable, there can be no recovery. The court reaffirmed in that case the general principle that a person shall not recover for an injury brought upon himself by his own want of reasonable care and prudence, or which his want of ordinary care contributed to produce, or where the parties must be viewed as equally culpable." Again, in *Railroad Co. v. Pugh*, 97 Tenn. 627, 37 S. W. 555, it was stated, viz.: "The rule at common law and in this state still is that any contribution to an injury which directly produced it would bar the action in any case where statutory provisions to the contrary do not apply," etc. Proximate contributory negligence is further explained in the following language: "If the injury was caused by the plaintiff's conduct, or was the immediate result of the plaintiff's conduct, to which the wrong of the defendant did or did not contribute as an immediate cause, the plaintiff cannot recover, but must bear the result of his own negligence or conduct." See, also, *Dush v. Fitzhugh*, 2 Lea, 307. In *Railway Co. v. Hull*, 88 Tenn. 35, 12 S. W. 419, the court said, viz.: "The jury were nowhere told that the negligence of the plaintiff which might and ought to be considered in mitigation of damages should be such as contributed remotely, and not directly, to the injury, and that, if the negligence of the plaintiff contributed directly to the injury as the proximate cause thereof, instead of remotely, such negligence would be a complete bar to any recovery. Contributory negligence is, when it proximately contributes to the infliction of the injury, a bar to an action, because a person cannot be permitted to rush upon an apparent danger, and then, because an injury ensues, saddle the other party with the pecuniary consequences

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of an injury which his own want of care brought upon him." In *Saunders v. Railroad Co.*, 99 Tenn. 135, 41 S. W. 1031, the court said, viz.: "The [trial] court rightly charged the jury, in effect, that any negligence on the part of the plaintiff that contributed to the injury as a proximate cause would bar his action, and that any negligence on his part that contributed to the injury as a remote cause should be considered in mitigation of damages otherwise allowable." In *Barr v. Railroad Co.*, 105 Tenn. 547, 19 Am. & Eng. R. Cas., N. S., 261, 58 S. W. 849, the court in considering the application of this principle to the facts, said, viz.: "The defendant's negligence in obstructing the plaintiff's rightful passage upon the highway did not justify her negligence in attempting to pass over the train. They were both in fault, and the fault of one concurred directly and proximately with that of the other in producing the injury. It is not a case of proximate negligence on the part of the defendant and remote negligence on the part of the plaintiff, in which the latter's fault goes merely in mitigation of damages, but it is a case of proximate negligence on the part of both, in which the latter's fault absolutely bars her action." The circuit judge was therefore in error in not submitting to the jury this supplemental instruction.

The fourth assignment of error is based upon a supplemental request refused by the court to the effect that if the plaintiff, by the exercise of reasonable care and diligence, might have seen the car approaching in time to have avoided the accident, he could not recover; but we think this instruction was necessarily embraced in the general charge to the effect that, if the plaintiff failed to look and listen before attempting to cross the street car track, this fact would defeat his right of recovery, for this was equivalent to instructing the jury that if the plaintiff, by the exercise of ordinary care and diligence, could have seen the car approaching, and failed to exercise that degree of care, he would not be entitled to recover.

The sixth assignment is that the court erred in refusing to charge as follows: "The street car company had the preferred right of way over and along the track for the passage of its cars, because such cars are necessarily confined to the tracks laid for them, and cannot run elsewhere." This instruction was properly refused, because in contravention of the rule laid down by this court in *Rapid Transit Co. v. Seigrist*, 96 Tenn. 120, 33 S. W. 920, in which it was held that a street car has no superior rights over vehicles at grade crossings or at street intersections. As stated in *Railway Co. v. Howard*, 102 Tenn. 474, 52 S. W. 854, the rule is that at crossings a street railway company has in the operation of its cars no preferential right of way over vehicles and pedestrians.

The seventh assignment of error is that the court erred in refusing to charge the following request, namely: "If you find from the evidence that, while the agents and servants in charge of the car were exercising ordinary care and precaution, the plaintiff drove upon the track in front of the moving

car when the car was so close to it that the motorman, by the exercise of reasonable care and diligence, could not stop the car in time to prevent the collision, the defendants would not be liable, and your verdict should be in their favor." This request embodied the theory of the defendants, namely, that plaintiff's wagon appeared upon the track so suddenly, and in such close proximity to the car, that it was impossible to stop the car in time to prevent the accident. There was evidence tending to support this theory. The motorman testified that as he approached Church street he sounded his gong, and when about two-thirds of the way across Church street on Front he saw plaintiff coming in a rapid trot across the track; that he attempted to stop his car by setting up his brake, and pulled his reverse lever back, but did not put on the current, because he was knocked loose from his lever by the horse's head. He further states that he had on no current at the time, and was running very slow; that he was standing, at the time of the accident, at his proper place, about the middle of the platform, with his right hand on the brake, and his left on the controller. He further states that plaintiff's wagon came straight across from Church street to the track, and that the horses were not turned until they struck the car. He further testified that his headlight was burning, and could have been seen a distance of one mile. He further stated that the gong was in good condition, and could be heard 100 yards at least, and probably further,—maybe a quarter of a mile; that he sounded it when 15 or 20 feet away from Church street and when he crossed it. There was evidence submitted by defendants corroborating the testimony of the motorman on the subject of the speed at which the car was traveling. Another witness testified that he made an examination of the street car after the accident at the shed, and found that the headlight box had a hole punched in the side, and the reflector had a dent in it. The glass in the headlight was also broken out. The hole in the headlight box was on the right-hand side, as was also the dent in the reflector. It is argued that it was impossible for the headlight to have been mashed and dented in the manner described without an external collision with an object from the side and in front of the car. The theory of defendants was that, as the head of the lead or left-hand horse was projected on the front platform from the side, the tongue of the wagon inflicted the injury to the headlight. The supplemental request presented the theory of the defendants, and was supported by the testimony just mentioned. The court, in his general charge, except in stating the contention of the respective parties, did not touch upon this theory. The defendants were entitled to have the jury instructed upon the law applicable to their theory of the case, and the refusal of the court to do so is a reversible error.

For the errors indicated, the judgment is reversed, and the cause remanded.

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[69 Pac. Rep. 153.]

Accident at Crossing—Stop, Look, and Listen*—Instruction.

Where an injury is occasioned by a collision at a railroad crossing, the refusal of an instruction that the company can run its train over the track at regular periods or as special or extra trains, and the obligation to look and listen is one from which the traveler is at no time excused on preparing to cross a railroad at grade, is not erroneous when the court not only gave the substance of such request, and charged that plaintiff was bound to use his sight and hearing and reasonable care, and give way to the train if in sight, but further instructed that, notwithstanding any omissions of the company, plaintiff could not recover if he could have discovered the approach of the train in time to avoid the accident.

Same—Failure to Stop*—Obstructed View—Instruction.

Where a track in the direction from which the train came which struck plaintiff on a crossing was obstructed by trees and a house, except that about 20 feet from the crossing an approaching train might have been seen at one place through the trees, and plaintiff slackened his speed to a slow walk, and looked and listened for trains, but did not stop, it was not erroneous to refuse an instruction that if plaintiff could not see the train, and the noise of his wagon lessened his opportunity to determine the approach by his hearing, it was his duty, before going on the track, to stop and listen to ascertain whether or not a train was approaching.

Same—Same—Same—Question for Jury.

The question whether plaintiff, under all the circumstances, was guilty of contributory negligence for failure to stop before crossing a car track, is a question for the jury.

Appeal from district court, Utah county; J. E. Booth, Judge.

*See notes, 12 Am. & Eng. R. Cas., N. S., 317; 20 Am. & Eng. R. Cas., N. S., 793; 19 Am. & Eng. R. Cas., N. S., 320; 12 Am. & Eng. R. Cas., N. S., 444; 10 Am. & Eng. R. Cas., N. S., 467, 489, 504. See also, *Ayres v. Pittsburgh, etc., Ry. Co. (Pa.)*, 1 R. R. 206, 24 Am. & Eng. R. Cas., N. S., 206; *Louisville & N. R. Co. v. Cooper (Ky.)*, 1 R. R. 230, 24 Am. & Eng. R. Cas., N. S., 230; *Cleveland, etc., Ry. Co. v. Heine (Ind.)*, 1 R. R. 948, 24 Am. & Eng. R. Cas., N. S., 948; *Chisholm v. Seattle Electric Co. (Wash.)*, 1 R. R. 635, 24 Am. & Eng. R. Cas., N. S., 635; *Burian v. Seattle Electric Co. (Wash.)*, 1 R. R. 218, 24 Am. & Eng. R. Cas., N. S., 218; *Hecker v. Oregon R. Co. (Ore.)*, 23 Am. & Eng. R. Cas., N. S., 33; *Cook v. Los Angeles & P. E. R. Co. (Cal.)*, 23 Am. & Eng. R. Cas., N. S., 69; *Merritt v. Foote (Mich.)*, 23 Am. & Eng. R. Cas., N. S., 43; *Gahagan v. Boston & M. R. R. (N. H.)*, 23 Am. & Eng. R. Cas., N. S., 141; *Chicago, etc., R. Co. v. Hoover (Ind. Ter.)*, 23 Am. & Eng. R. Cas., N. S., 73; *Cowden v. Shreveport Belt R. Co. (La.)*, 23 Am. & Eng. R. Cas., N. S., 355; *Kallmerten v. Cowen (C. C. A.)*, 23 Am. & Eng. R. Cas., N. S., 352; *Tacoma Ry. & Power Co. v. Hays (C. C. A.)*, 23 Am. & Eng. R. Cas., N. S., 58; *Olson v. Northern Pac. Ry. Co. (Minn.)*, 23 Am. & Eng. R. Cas., N. S., 352; *Stafford v. Chippewa Val. Elec. R. Co. (Wis.)*, 23 Am. & Eng. R. Cas., N. S., 364; *Kelly v. Wakefield & S. St. Ry. Co. (Mass.)*, 23 Am. & Eng. R. Cas., N. S., 67; *Born v. Philadelphia & R. R. Co. (Pa.)*, 22 Am. & Eng. R. Cas., N. S., 723; *Traver v. Spokane St. Ry. Co. (Wash.)*, 22 Am. & Eng. R. Cas., N. S., 759; *Fairbanks v. Bangor, O. & O. Ry. Co. (Me.)*, 22 Am. & Eng. R. Cas., N. S., 756; *Cummings v. Chicago, R. I. & P. Ry. Co. (Iowa)*, 21 Am. & Eng. R. Cas., N. S., 470; *Elston v. Del., L. & W. R. Co. (Pa.)*, 21 Am. & Eng. R. Cas., N. S., 354; *McCusker v. Pa. R. Co. (Pa.)*, 21 Am. & Eng. R. Cas., N. S., 351.

Peck v. Oregon Short Line R. Co

Action by Elisha Peck, Jr., against the Oregon Short Line Railroad Company. There was a judgment in favor of plaintiff, and defendant appeals. Affirmed.

P. L. Williams, Geo. H. Smith, and J. W. N. Whitecotton, for appellant.

King, Burton & King, for respondent.

BARTCH, J. This action was brought to recover damages for personal injuries alleged to have been received by the plaintiff through the negligence of the defendant in the operation of its railroad. It was alleged in the complaint, among other things, that the accident which resulted in this suit occurred in the city of Lehi, where the defendant's railroad track crosses one of the public streets; that there was an ordinance prohibiting the running of trains at a greater rate of speed than eight miles an hour within the inhabited portions of the city; that on the occasion of the accident the train was running at a rate of speed greater than that allowed by the ordinance, and was run carelessly in approaching the crossing; and that neither its whistle was sounded nor its bell rung. From the evidence it appears that the accident happened on the morning of December 4, 1899, in the inhabited portion of the city of Lehi, at a point where the defendant's railroad track crosses Peck street; that in approaching the crossing along Peck street the plaintiff's view of the railroad to the south—the direction from which the train in question came—was obstructed by a grove of trees, underbrush, and a small house, except that before reaching the house, which is about 25 feet from the railroad track, an approaching train might have been seen at one place by looking through the grove of trees; that on the morning of the accident the plaintiff was driving his team, consisting of two horses and a wagon, along Peck street toward the railroad on a trot, but before reaching the crossing he reduced the speed to a slow walk; that in approaching the crossing he looked and listened for trains, but did not stop; that as he had passed the obstructions, which interfered with his view, and saw the train, his horses were stepping upon the track, and before he could back them off the engine struck them, and caused the injuries complained of; that it was a passenger train, running at the rate of at least 15—some witnesses say 35 to 40—miles an hour, the ordinance providing for a rate of speed at that place not to exceed 8 miles an hour; and that this train was 15 minutes late, and the plaintiff thought it had passed. As to whether the whistle was sounded either for the crossing or station, and as to whether the bell was rung, there is a conflict in the evidence, but the proof seems to preponderate against the defendant on these points. Upon the submission of the case to the jury a verdict in the sum of \$4,650 was returned in favor of the plaintiff, and judgment was entered accordingly.

On this appeal various assignments of error are based upon

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the admission and rejection of evidence, but upon careful examination and consideration we are of the opinion that none of them are fatal to the judgment. It is, however, further contended that the court erred in refusing to submit to the jury appellant's request which reads as follows: "The duty of a traveler upon a highway at a railroad crossing to look and listen and to use care for the purpose of discovering the approach of the train before undertaking to pass over the railroad exists upon every occasion of his approaching such crossing. He is not relieved or excused from exercising the care required of him for the reason that he approaches such crossing shortly after a regular train is due, or supposed by him to have passed, or in fact has passed. The railroad track itself is an admonition of danger, and the railroad company has a right to run its train over the track at regular periods, or as special or extra trains, or in the event of their being behind time, the same as upon the regular schedule; and the obligation to look and listen is one from which the traveler is at no time excused upon approaching and preparing to cross a railroad at grade." Instead of giving the above request verbatim, the court charged the jury in language following: "Negligence of the defendant in the omission to sound its whistle or ring its bell, or in running its locomotive and cars at an unusual or unlawful rate of speed, if you find such was the case, did not relieve the plaintiff from the exercise of care on his part to avoid the accident complained of. It was his duty, on approaching the railroad track, to use his senses of sight and hearing to ascertain whether or not a train was approaching upon the railroad track from either direction; and if there was a grove of trees or obstructions or other objects that intercepted his vision, and prevented him from seeing the approaching train, in the direction in which it came, then the law imposed upon him greater care to discover whether or not the train was approaching, by the exercise of the sense of hearing. Therefore the court instructs you that if you find that the defendant was guilty of either or any of the negligent acts of commission or omission charged in the complaint, and you further find that the plaintiff, as he approached the track at the point where the accident occurred, could have discovered the approach of the train by looking and listening, but that he omitted to exercise such care, and was careless and negligent, and thereby, and as a consequence thereof, because of his negligence, omitted and failed to discover the approach of the train until it was too late to avoid the accident, then the injury of which he complains was the result, not of the sole negligence of the defendant, but was a result of his own negligence co-operating with that of the defendant, if you find that the defendant was so negligent,—then in that event the plaintiff would not be entitled to recover in this case." The court further charged that "the rights of a traveler on a highway at a point where it is crossed on a level by a

railroad are so far subordinate to the railroad company as to require the traveler to give way to any train which is in sight or hearing and approaching said crossing, and so near said crossing as to make it doubtful whether he can cross in perfect safety." From a comparison of appellant's request with these instructions, it is obvious that the refusal to charge in the exact language requested was not error. In its instructions the court gave not only the substance of the request, and charged the jury that the plaintiff was bound to make use of his senses of sight and hearing, and to use reasonable care to discover the approach of the train, and that his rights at the crossing were so far subordinate to those of the railway company that he was required to give way to the train if in sight or hearing, but further instructed them, in effect, that, notwithstanding any negligent acts of commission or omission charged in the complaint, still, if the plaintiff "could have discovered the approach of the train" in time to avoid the accident, by the use of his sense of sight or hearing, he could not recover. This was stronger and more favorable to the appellant than it had a right to request, for we apprehend the question was not whether the plaintiff could, by any possibility, as the instruction would seem to imply, have discovered the train, but whether, by the exercise of reasonable care,—such care as a reasonably prudent man, under all the circumstances, would have exercised,—the plaintiff could have discovered the approaching train, and avoided the accident, notwithstanding the negligence of the defendant. If, therefore, the court committed error in its action on this point, the error was in favor of the railway company, and hence it has no cause to complain because thereof. All material propositions contained in the defendant's request were embraced in the charge of the court, and therefore it was not necessary to repeat them in a special request. *Leak v. Railway Co.*, 9 Utah, 246, 33 Pac. 1045; *Railway Co. v. Leak*, 163 U. S. 280, 16 Sup. Ct. 1020, 41 L. Ed. 160; *Railroad Co. v. Ives*, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. Ed. 485.

It is next assigned for error that the court refused to charge the jury, as requested by the defendant, that if the plaintiff "could not see the train approach, and his wagon and team caused any noise that would interfere with or lessen his opportunity to determine the approach of the train by the exercise of his sense of hearing, then it was his duty, before going upon the track, to stop and listen to ascertain whether or not a train might be approaching." It must be conceded that this request was in harmony with the rule adopted in a few of the American states, notably in Pennsylvania, where the rule of "stop, look, and listen," before attempting to cross a steam railway track is so inflexible that a nonobservance of it under any circumstances, it seems, is held to be negligence per se. If, therefore, in that jurisdiction, a person attempts to drive across a steam railroad track, without first stopping to look

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and listen, and is struck and injured by a train, he is deemed, as matter of law, guilty of such negligence that he cannot recover, regardless of whether or not the railway company was also negligent. In *Railroad Co. v. Beale*, 73 Pa. 504, 13 Am. Rep. 753, it was said: "There never was a more important principle settled than that the fact of the failure to stop immediately before crossing a railroad track is not merely evidence of negligence for the jury, but negligence per se, and a question for the court." *Omslaer v. Traction Co.*, 168 Pa. 519, 32 Atl. 50, 47 Am. St. Rep. 901. This rule has been applied in some other jurisdictions to cases where, in the vicinity of the crossings, the traveler's view of the railway track was obstructed. Thus the supreme court of Oregon, in *Blackburn v. Southern Pac. Co.*, 55 Pac. 225, 12 Am. & Eng. R. Cas., N. S., 461, where, from a city street the view of the traveler in the vicinity of the crossing was obstructed, and he, without stopping his vehicle to listen for approaching trains, attempted to drive across the railroad track, and was struck by a train and killed, held that the failure to stop and listen before making the attempt to cross was negligence per se, and the plaintiff was not permitted to recover, although the train was running at an unlawful rate of speed when the accident occurred. Among this class of cases are *Smith v. Railroad Co.*, 87 Me. 339, 32 Atl. 967; *Railroad Co. v. Hogeland*, 66 Md. 149, 7 Atl. 105, 59 Am. Rep. 159; *Railroad Co. v. Smalley* (N. J. Err. & App.) 39 Atl. 695; *Houghton v. Railway Co.*, 99 Mich. 308, 58 N. W. 314; and *Henze v. Railway Co.*, 71 Mo. 636, 2 Am. & Eng. R. Cas. 212. The doctrine of the above cases, however, has never been adopted in this jurisdiction. Nor has the rule to "stop, look, and listen," been accepted or adopted by a majority of the courts of the Union, or by the supreme court of the United States. The objection to its general acceptance appears to be that it singles out and places too much stress upon a single fact in evidence, whereas such fact, with all the other material facts in the case, should be considered together in determining the question whether or not the traveler was exercising that degree of care which an ordinarily prudent man would, under similar circumstances, have exercised. Under the strict application of the Pennsylvania rule the question of the contributory negligence of the injured is conclusively determined if it appears in evidence that he did not stop to look and listen before attempting to cross, and yet there are doubtless many cases where the facts and circumstances which surrounded the injured at the time of the occurrence, including the fact of the failure to stop before attempting to cross the track, are of such character that all reasonable men could not draw the same conclusion from them,—the test for withdrawing such a case from the jury. The enforcement, therefore, of such a rule, regardless of all the other facts in a case, would seem to be an invasion of the province of the jury. No doubt there are

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cases where the fact of a failure to stop should receive great weight in determining the right of recovery, but still it is within the province of the jury to pass upon that fact, and, looking at and weighing all the other facts and circumstances connected with the accident, to say whether the failure to stop was an omission of that care and prudence which an ordinarily careful and prudent person should have exercised under such circumstances. The fundamental rule as to the care to be exercised at a railroad crossing is that both the traveler and those operating a railway train must exercise such caution as a man of ordinary care and prudence would exercise under like circumstances and surroundings. If the crossing is particularly dangerous, a degree of care commensurate with the danger is required of both parties. They have the mutual duty of keeping a sharp lookout for danger. The railroad company violates such duty by running its train at an unlawful rate of speed, or by failing to give proper warning of the approach of the train at the crossing; and the traveler violates it by failing to look and listen before attempting to cross; but his failure to stop before attempting to cross is not negligence per se within this jurisdiction, nor, it seems clear, within the majority of the jurisdictions of this country. In *Olsen v. Railway Co.*, 9 Utah, 129, 33 Pac. 623, where the material facts were quite similar to those in this case, counsel for the defendant requested, same as in this case, the court to charge the jury that it was the plaintiff's duty "to stop his team, and listen for approaching trains." This the court refused to do, but instructed the jury that in determining the question whether either party was negligent they "should take into consideration the circumstances and conditions with which they were surrounded" at the time of the accident, and that they had a right to take into consideration the fact, if they believed it from the evidence, "that there were obstructions to the view of the track or train from the road on which the plaintiff was traveling, and whether the train was a special one, and not a regular train, and whether there was a high wind or otherwise." The court further charged that, if there were obstructions to the view, "then it was the plaintiff's duty to use greater efforts to see and hear any train that might be approaching." The supreme court, passing upon the instructions and action of the court, held that the law of the case was fairly submitted to the jury, and in the course of its opinion said: "It was for the jury to pass upon the weight of the testimony, and as to whether or not the respondent was guilty of contributory negligence, under the circumstances in proof."

* * * The plaintiff may have expected that if any train was passing it would blow its whistle or ring its bell, as provided by statute; * * * and that it would not be run at an unusual rate of speed, and without reasonable and timely warning of its approach; and, while expecting this, yet it was his duty, under the facts shown, to make careful and vigilant

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use of his eyes and ears to look and listen for trains before crossing, and use greater efforts to see and hear any train that might be approaching than he would be expected to do were it not for the obstructions that prevented his view. We think these questions were fairly covered by the charge of the court, and thus properly left for the consideration of the jury." See, also, *Leak v. Railway Co.*, 9 Utah, 246, 33 Pac. 1045; *Smith v. Railway Co.*, 9 Utah, 141, 33 Pac. 626; and *Olson v. Railroad Co. (Utah)* 68 Pac. 148. In *Beach, Contrib. Neg.* § 182, the author, speaking of the rule of "stop, look, and listen," says: "But this rule has not met with general acceptance, though some courts apply it where there is an obstruction to the view." So, in 7 Am. & Eng. Enc. Law (2d Ed.) 430, after referring to the Pennsylvania rule, it was said: "But in other jurisdictions such a precaution is not necessary to constitute 'ordinary care,' and the general rule is that a person about to cross a track must bear in mind the dangers attendant upon crossing, and vigilantly use his senses of sight and hearing in the endeavor to avoid injury. And if the traveler looked and listened, or did all that a prudent man would have done under the circumstances, it will not be said, as a matter of law, that he should have stopped; nor will a failure to stop, look, and listen be held negligent when the circumstances were such that an observance of these precautions would have been unavailing as a guard against injury. Hence a failure to stop, look, and listen is not contributory negligence per se." In *Patt. Ry. Acc. Law*, § 175, the author says: "There does not, however, seem to be any sound reason why any different rule should be enforced by the courts in cases of crossing accidents from that which prevails in all other actions grounded upon negligence, and in which contributory negligence is available as a defense. There is, in every case, a preliminary question for the judge to determine, and that is whether, assuming the truth of the testimony and all the inferences that legitimately can be drawn from it, the jury would, as reasonable men, be justified in finding a verdict in favor of the party on whom the burden of proof rests. The application of that rule of procedure would leave to the jury the question of the effect of the failure of the injured person to look and listen, except in those cases where that failure, being proven or conceded as a fact by the plaintiff's case, was so obviously a contributory cause of the plaintiff's injury, and so incontrovertibly negligent, that a jury of reasonable men would not be justified in finding a verdict for the plaintiff. The hard and fast rule, first enunciated in the Pennsylvania cases, that under all circumstances the person injured must 'stop, look, and listen' before crossing a railway line, has no statutory basis, and is really a judicial usurpation of the functions of the jury; for there are conceivable cases in which the person injured might justifiably go upon the railway's line without pausing to 'stop, look, and listen,'—as, for

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instance, when a flagman invites him to cross, or when a gate protecting the crossing stands open, or when the view of the line is so obstructed that nothing can be seen, and a storm of such severity is raging that no sounds incident to the movements of trains could possibly be heard. The Pennsylvania rule also goes further than that in most other jurisdictions in that it requires the person injured not only to 'look and listen,' but also to 'stop'; yet, in most cases one who approaches the crossing of a railway line can effectually care for his safety by looking and listening, without stopping." The supreme court of New York, in *Kellogg v. Railroad Co.*, 79 N. Y. 72, where the same question was raised, speaking through Mr. Justice Earl, said: "We cannot say that at that particular time he should have looked toward the south. Under all the circumstances surrounding the accident, we think it was for the jury to determine whether he exercised that care which the law required of him. He could probably have avoided the accident by stopping before he passed upon the track. But that is a degree of care not usual even with very prudent persons. It has not been decided by the courts of this state that a person approaching a railroad is bound as matter of law to stop, to avoid the imputation of negligence. There may be cases in which a traveler ought to do so, and if he omits to do so it would be one of the facts, with all the others, to be submitted to the jury." In *Strong v. Railroad Co.*, 61 Cal. 326, 8 Am. & Eng. R. Cas. 273, where many of the material facts were similar to those herein, it was said: "Plaintiff was authorized to assume that all other persons using the street would do so with due care. It cannot be imputed as negligence that he did not anticipate culpable negligence on the part of the employees of defendant. He had a right to assume, until he reached a point where he could look up and down the track, that no train was approaching the crossing, because there was no sound of an engine bell. He would have had no right to close his eyes had he been in a position to see the track, but, as already stated, the evidence shows that he could not look up and down the track, because of the intervening buildings and lumber, until he reached a point very near it. * * * We cannot say that it was his duty to stop, fasten his team at some point considerably distant from the track, and from thence make a reconnoissance of the situation afoot. Whether plaintiff was properly cautious after he reached a place from which he could see the track was a question of fact as to which we cannot say the jury found wrongly." The same question here under consideration was before the supreme court of the United States in *Railroad Co. v. Ives*, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. Ed. 485. There, as here, the accident which resulted in the suit occurred at a public street crossing. The view of the railroad from the street was obstructed by buildings, an orchard, and small bushes for several hundred feet, and not until the traveler was within 15 or 20 feet of the track could he get a view of it. At

the time of the accident the intestate and his wife attempted to drive across the track, and were struck by a train and killed. The train, it appears there, as in this case, was running at an unlawful rate of speed, and there, as here, the plaintiff's testimony showed that the whistle was not blown for the crossing, and that the bell was not rung. There, as here, counsel for the railroad company insisted that it was the traveler's duty to stop where he could get a clear view of the track, for the purpose of looking and listening, before attempting to cross, and that, as the intestate failed to do so, he was guilty of contributory negligence, which entitled the defendant to a verdict, and requested the court to so charge the jury. The court refused the request, saying: "It is too much upon the weight of the evidence, and confines the jury to the particular circumstance narrated without notice of others that they may think important." The supreme court said: "This reason is a sound one. In determining whether the deceased was guilty of contributory negligence, the jury were bound to consider all the facts and circumstances bearing upon the question, and not select one particular prominent fact or circumstance as controlling the case to the exclusion of all the others." Speaking with reference to contributory negligence on the part of the deceased, the supreme court also said: "It is earnestly insisted that, although the defendant may have been guilty of negligence in the management of its train which caused the accident, yet the evidence in the case given by the plaintiff's own witnesses shows that the deceased himself was so negligent in the premises that, but for such contributory negligence on his part, the accident would not have happened; and it is therefore contended that the court below should, as matter of law, have so determined, and, it not having done so, this court should so declare, and reverse its judgment. To this argument several answers might be given, but the main reason why it is unsound is this: As the question of negligence on the part of the defendant was one of fact for the jury to determine under all the circumstances of the case, and under proper instructions from the court, so also the question of whether there was negligence in the deceased which was the proximate cause of the injury was likewise a question of fact for the jury to determine under like rules. The determination of what was such contributory negligence on the part of the deceased as would defeat this action, or, perhaps, more accurately speaking, the question of whether the deceased, at the time of the fatal accident, was, under all the circumstances of the case, in the exercise of such due care and diligence as would be expected of a reasonably prudent and careful person under similar circumstances, was no more a question of law for the court than was the question of negligence on the part of the defendant. There is no more of an absolute standard of ordinary care and diligence in the one instance than in the other." In *Railroad Co. v. Farra*, 13 C. C. A. 602, 66 Fed. 496, referring to the rule "to stop, look, and

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listen," it was said that this rule "seems much calculated to condone carelessness and recklessness by railroad companies at public crossings, where the rights and duties of the public and of the company are reciprocal. Nor are we prepared to say that the duty of stopping is imperative in all cases where the track is obscured. There may be circumstances, as in the case at bar, where the duty is debatable, and proper for the consideration of the jury." 1 Shear. & R. Neg. § 92; 7 Am. & Eng. Enc. Law (2d Ed.) 430, 433, 436; Beach, Contrib. Neg. §§ 181, 183; Railroad Co. v. Mizell, 100 Ky. 235, 38 S. W. 5; Railroad Co. v. Rice, 10 Kan. 426; Greany v. Railroad Co., 101 N. Y. 419, 24 Am. & Eng. R. Cas. 473, 5 N. E. 425; Railroad Co. v. Morgan, 43 Kan. 1, 22 Pac. 995; Wright v. Railroad Co., 94 Ky. 114, 3 Am. & Eng. R. Cas., N. S., 441, 21 S. W. 51; Hughes v. Railway Co., 88 Iowa, 404, 55 N. W. 470; Reed v. Railway Co., 74 Iowa, 188, 37 N. W. 149; Salter v. Railroad Co., 88 N. Y. 42, 8 Am. & Eng. R. Cas. 437; Davis v. Railroad Co., 47 N. Y. 400; Russell v. Railroad Co., 118 N. C. 1098, 24 S. E. 512; Neudoerffer v. Railroad Co., 9 App. Div. 66, 41 N. Y. Supp. 50; Hall v. Railway Co., 13 Utah, 243, 4 Am. & Eng. R. Cas., N. S., 77, 44 Pac. 1046, 57 Am. St. Rep. 726; Dederichs v. Railroad Co., 13 Utah, 34, 4 Am. & Eng. R. Cas., N. S., 259, 44 Pac. 649; Schneider v. Railway Co., 134 Cal. 482, 66 Pac. 734; Tyler v. Railroad Co., 137 Mass. 238, 17 Am. & Eng. R. Cas. 296; Clark v. Railroad Co., 164 Mass. 434, 13 Am. & Eng. R. Cas., N. S., 569, 41 N. E. 666; Railroad Co. v. Crawford, 24 Ohio St. 631, 15 Am. Rep. 633; Donohue v. Railway Co., 91 Mo. 357, 2 S. W. 424, 3 S. W. 848; Eilert v. Railroad Co., 48 Wis. 606, 4 N. W. 769; Improvement Co. v. Stead, 95 U. S. 161, 24 L. Ed. 403.

Upon a careful consideration of this case, we are of the opinion that the court sufficiently charged the jury as to the care which the law required travelers and railway companies to exercise at public railway crossings to prevent accidents. On that question the charge given is as strong as the defendant had a right to request, and, under the circumstances disclosed in the evidence, the court did not err in refusing to further charge that it was the duty of the plaintiff to stop for the purpose of looking and listening before attempting to cross the track. The failure to stop was properly left to the jury to be considered by them, with all the other circumstances in evidence, in determining the question of contributory negligence.

The question whether the plaintiff, under all the circumstances, and in view of the existing conditions and surroundings, exercised due care was for the jury. The facts and circumstances disclosed by the proof were not such that the court could say, as matter of law, that ordinary care required plaintiff to stop his team before crossing the track. We find no reversible error in the record.

The judgment is affirmed, with costs.

MINER, C. J., and BASKIN, J., concur.

SMETHPORT R. CO. *v.* PITTSBURGH, S. & N. R. CO.*(Supreme Court of Pennsylvania, May 19, 1902.)*

[52 Atl. Rep. 88.]

Practicability of Overhead Crossing.*

Under Act June 19, 1871, § 2 (Purd. Dig. p. 288, § 40), providing that in proceedings for the crossing of a railroad by another the court shall ascertain and define the mode of crossing which will inflict the least practicable injury on the rights of the company owning the road to be crossed, and shall, if reasonably practicable, prevent a grade crossing, a crossing should not be allowed which will, at such point, deprive the road crossed of three-fourths of its 60-foot right of way, it appearing that the future needs of such road will require two tracks and a large siding, though it has constructed only one track, and an overhead crossing being practicable, though expensive.

Time Limit in Constructing Overhead Crossing.

Time that a railroad may cross another at grade, while constructing an overhead crossing should be limited by the court.

Appeal from court of common pleas, McKean county.

Suit by the Smethport Railroad Company against the Pittsburgh, Shawmut & Northern Railroad Company to procure a decree for a crossing of defendant's road by plaintiff's road. Decree for plaintiff. Defendant appeals. Modified.

John G. Johnson, Frank Sullivan Smith, Edwin E. Tait, Thomas F. Richmond, and Sheridan Gorton, for appellant. J. W. Bouton and F. D. Gallup, for appellee.

MESTREZAT, J. The plaintiff has a constitutional right with its road to cross the railroad of the defendant company, subject, however, in the exercise of the right, to the control of a court of equity, under the provisions of the act of June 19, 1871 (Purd. Dig. p. 288, § 40). The second section of the act declares that: "When such legal proceedings relate to crossings of lines of railroads by other railroads, it shall be the duty of courts of equity of this commonwealth to ascertain and define, by their decree, the mode of such crossing which will inflict the least practicable injury upon the rights of the company owning the road which is intended to be crossed; and if, in the judgment of such court, it is reasonably practicable to avoid a grade crossing, they shall by their processes prevent a crossing at grade." This court has frequently interpreted this section of the act of 1871, and in doing so has clearly defined the rights of the two contesting railroads. In *Pittsburg & C. R. Co. v. Southwest Pennsylvania Ry. Co.*, 77 Pa. 173, Mercur, J., delivering the opinion of the court, says: "We see it [act of 1871] does not put the rights of the company desiring to cross the railroad of another on a level with the rights of that other company, but manifestly declares them to be secondary. Two thoughts are clearly expressed in this statute. The one, that no unnecessary injury shall be perpetrated on the road sought to be

*See note, 7 Am. & Eng. R. Cas., N. S., 537.

crossed; the other, that crossings at grade shall be prevented whenever they can reasonably be avoided. * * * The parties do not stand on an equality. The rights of the first occupant of the ground, in pursuance of law, are recognized as superior to those of the new claimant." In Appeal of Pittsburgh Junction R. Co., 122 Pa. 511, 6 Atl. 564, 9 Am. St. Rep. 128, it is held that a railroad company has a right to consider the needs of the future, and to construct its road and make its plans with reference to those needs. Paxson, J., speaking for the court, quotes and declares as sound and sensible the following language of Judge McKennan in Lake Shore & M. S. Ry. Co. v. New York, C. & St. L. Ry. Co. (C. C.) 8 Fed. 858: "Every reasonable intendment must be taken in favor of the primary rights of the complainant at the points of the alleged conflict. No actual encroachment upon these rights can be sanctioned or allowed, and in measuring their extent there must be a liberal consideration for the future, as well as the existing necessities of the complainant, the use of the existing tracks, the construction of additional ones, the convenient storage of its freight at all seasons, and the unembarrassed transaction of all its business." We do not think it necessary to take up and consider separately the 39 assignments of error filed in this case. It would unduly and unnecessarily extend this opinion. It is to be regretted that the learned trial judge did not, in addition to answering the points, find and state briefly and clearly the facts of the case. Such is much the better practice, and the one that should be adopted in cases of this character.

The appellant objects to the decree entered by the court below, and alleges that it does not provide a proper mode of crossing its right of way,—one that will inflict the least practicable injury upon the rights of the appellant company,—and that a temporary grade crossing for construction purposes should not be permitted without limitation as to time. We have read and carefully considered all the testimony in the case, and, in our judgment, it does not authorize the decree entered by the learned trial judge. The appellee's road crosses the appellant's right of way at an angle of 21 degrees and 28 minutes, and the mode of crossing, as defined by the decree, deprives the defendant company at this point of the use of about three-fourths of its right of way, leaving to it at the place of the proposed crossing sufficient space only for a single track, unless the appellant company in the future convince the court that it needs an additional track. The reason for the decree, as stated by the learned judge, is that "there is no probability, and scarcely a possibility, that the defendant company will ever need more than two tracks at this point," and that "at the present time the business transacted on the defendant's road is of trifling importance." These conclusions ignore the facts disclosed by the evidence. The appellant had secured a right of way 60 feet in width, pre-

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sumably to be used for the construction of its roadway. The testimony of its officers is to the effect that it will occupy with its tracks the full right of way at the place of crossing; that the plans of the appellant company call for a double track and for a long siding at that point; that its railroad carries passengers, coal, lumber, and general merchandise, 85 per cent. of its traffic being coal; that at present it has a daily coal tonnage of about 3,200 tons, and that new mines are being opened, and means are being taken to increase the coal tonnage to 6,000 tons per day, or 1,500,000 tons annually. The court found that the appellant had finished and was operating 143 miles of its through line of road, and that on portions of the road, including the place of the crossing, it was running regular passenger and freight trains. With these facts conceded or undisputably established, the mode of crossing the right of way by the appellee's road, defined by the court below, invades the superior rights of the appellant company. Having selected and adopted the route for its road, the appellant may use the whole or any part of it for the purpose for which it was acquired; and to the extent that such use is necessary the appellee cannot, without an imperative necessity, appropriate any part of it in crossing or for any other purpose. Here, as observed above, it is shown that the future needs of the road will require two tracks and a large siding. The appellant company has constructed only one track, but it has the unquestioned right to anticipate its future necessities in the operation of its road, and hence its right to adequate space over its right of way for additional tracks in the future made necessary in handling its traffic. An overhead crossing is conceded to be practicable. But neither its economical construction nor the convenience of the appellee is sufficient to justify the exclusive occupancy of any part of the appellant's right of way which is necessary for the operation of the latter's road. In the location of its road the appellee should have considered the mode of crossing the appellant's railroad and the possibility of other locations by means of which such crossing would be avoided. *Perry County R. Extension Co. v. Newport & S. V. R. Co.*, 150 Pa. 201, 24 Atl. 709. Such considerations might have saved the appellee the expenditure of a large sum of money. This expenditure, however, will not be permitted to interfere with the franchises of another railroad company. *Appeal of Pennsylvania R. Co.*, 93 Pa. 150. The primary rights of the appellant to its right of way must be regarded and enforced, subject only to the right of the appellee to a crossing "which will inflict the least practicable injury upon the rights of the company owning the road which is intended to be crossed." We are convinced by the evidence in the case that the appellant will meet sufficient space for two tracks and one siding, and we agree with its counsel that a proper mode of crossing its road will be by a three-span structure with a vertical clearance of 21 feet, sup-

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ported by iron posts on piers resting upon the right of way, as shown by Exhibit N, and fully and particularly described in the testimony of A. G. McComb, the civil engineer. Such an overhead crossing may not do the least practicable injury to the appellant, but manifestly it gives to the appellee all the rights and privileges of the appellant's right of way to which it is entitled. It involves the expenditure of more money than the mode of crossing directed by the court below, but the excess is not burdensome, nor sufficient to justify complaint on the part of the appellee.

Under the testimony and the finding of facts by the learned trial judge, we cannot say that he erred in granting the appellee a temporary crossing for construction purposes, but the court should have required its removal within a designated time. As the decree hereinafter directed to be made by the trial court will finally dispose of the case, the reason for not fixing a time limit for the temporary grade crossing suggested in the argument of appellee's counsel will cease, and hence no longer avail their client. If necessary, the court below can take further testimony to enable it to ascertain the time in which the grade crossing should remain on the appellant's right of way. If any valid reason should arise for extending the time fixed in the decree, the court, being convinced of the fact, can modify the decree so as to protect and enforce the right of the parties.

It is now ordered, adjudged, and decreed that the court of common pleas of McKean county, sitting in equity, modify the decree heretofore entered by it in this case on August 9, 1901, so as to conform to the views expressed in the foregoing opinion, and the decree, as thus modified, is affirmed. It is further ordered that the appellee pay the costs of this appeal.

KNOX v. PHILADELPHIA & R. RY. CO.

(*Supreme Court of Pennsylvania, May 19, 1902.*)

[52 Atl. Rep. 90.]

Crossings—Speed—Evidence.

There is no evidence to go to the jury that a train was run at too high a speed at the crossing of a county road, the only testimony as to excessive speed being that of a passenger, who, after saying that he could not tell how many miles an hour it was running as he had no way of measuring it, said that it was running 60 miles an hour; this being opposed to the schedule of the train and the positive testimony of the engineer.

Same—Negative and Positive Evidence.*

Testimony of a passenger that no whistle was blown or bell rung at the regular distance from the crossing—that he did not hear any—is not

* As to the comparative weight of positive and negative evidence as to whether crossing signals were given, see *Haun v. Rio Grande W. Ry. Co.*, 19 Am. & Eng. R. Cas., N. S., 370, and note, 384.

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enough to go to the jury on the question, as against the testimony of engineer, fireman, conductor, and brakeman.

Same—Stop, Look, and Listen—Obstructed View.†

Testimony merely that a person stopped at a point 60 to 125 feet from the crossing, and then drove rapidly in a heavy rain over the intervening space, where view was obstructed, and was struck by a train just as he went on the track, shows contributory negligence.

Appeal from court of common pleas, Montgomery county.

Action by Fayette Knox against the Philadelphia & Reading Railway Company for death of plaintiff's husband, killed at a crossing. Judgment for defendant. Plaintiff appeals. Affirmed.

The following is the opinion of the court below (WEANDER, J.):

"On the conclusion of the testimony in this case, we directed a verdict for defendant for the reason that no negligence on its part had been shown. As no motion for a new trial was made, the court had no opportunity to review the case and spread its reasons upon record. As the lower court are called upon to decide points of law in the hurry of trial without time for examination of authorities, it would seem but fair for counsel, before appealing a case, to allow the court an opportunity for review. As this was denied us in this case, we exercise our right at this time to place our opinion upon record, confirming our ruling at the trial.

"The deceased was killed at a country railroad crossing. He approached the crossing during a rain storm, seated in a carriage and driving one horse. He was struck almost as soon as he entered on the tracks. The accident was witnessed by but one person other than the engineer.

"As the defendant company was in the exercise of its right in running the train, the plaintiff was obliged to show (1) a case clear of contributory negligence on part of the deceased and (2) negligence on the part of the defendant. Upon an accident at a railroad crossing, if there be no evidence of negligence, the jury should not be permitted to infer it on the part of the railroad company. *Sullivan v. Pennsylvania R. Co.* (Pa.) 7 Atl. 177.

"It was claimed and endeavored to be shown that the defendant was negligent in two particulars, viz.: (1) in running at an unusual and dangerous rate of speed; (2) in not giving the customary or proper signals on approaching the crossing. It must be conceded that unless the plaintiff's testimony is established, by competent proof, either of these propositions the direction of the court was proper.

"Remembering that the scene of the accident was the crossing of a country road, what is the law as to the rate of speed on the part of a steam railroad? The point was so clearly stated by Mr. Justice Dean in *Newhard v. Railroad Co.*, 15

†See note, 9 Am. & Eng. R. Cas., N. S., 24; 10 Am. & Eng. R. Cas. N. S., 467; 6 Am. & Eng. R. Cas., N. S., 570.

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Pa. 417, 26 Atl. 105, 19 L. R. A. 563, as to require no elaboration on our part. There is no rule of law which defines the rate of speed allowed a passenger train, although, of course, there must in certain cases be limitations, but in this case it was the ordinary running of a passenger train at a rate which, if it amounted to that claimed by plaintiff, could not be claimed as unusual. There was not a single fact or circumstance, except the rain, which could by any process of reasoning require the engineer to lessen his speed, and depart from his running schedule. In *Childs v. Railroad Co.*, 150 Pa. 73, 24 Atl. 341, it was held the right of a railroad company to move its trains at such rate as the necessities of its business or the requirements of the public may make necessary is subject only to such restrictions as may be found necessary in cities and populous towns. The movement of trains must be regulated by the railroad companies in the exercise of a business discretion and upon consideration of the competition they have to encounter and the necessities of modern business. We do not think a jury may fix the maximum rate of speed at which a train shall be moved in the open country, or that a high rate of speed is negligence per se. If the question of speed was not for the jury, then the rate, if not excessively unusual, had no bearing on the case, if defendant in other respects did its duty. But there was no competent proof of excessive or improper speed. The only witness for plaintiff who testifies to speed was a passenger, Mr. Daniel Steinmetz, who testifies: 'After the train left Quakertown that day, and on down to Krupp's crossing, it was going very rapidly. I could not tell how many miles an hour because I have no means of measuring that, but I was cognizant of the fact that the train was moving very rapidly from the rapidity with which we were passing objects and the jerking of the train. The train was running very rapidly.' And: 'Between those times, the train was running at the rate of sixty miles an hour. It was raining very hard; it was one of those sudden storms that we have sometimes, that come up very suddenly, and it was raining bucketsfull, a very severe storm.' The witness did not show anything which would qualify him to judge of the rate of speed, and he was contradicted by the positive evidence of the engineer. To allow a jury to decide this question upon the evidence before them would lead to the usual result of a verdict against the defendant. To say that a passenger whose training or experience has not qualified him to judge of speed run on a rainy day, as described, for the reasons given by this witness, can judge and testify with any degree of accuracy that a train is running at 45 or 60 miles an hour, is absurd, and when opposed to the schedule of the train and the positive evidence of the engineer ought to have no weight with court or jury. It is not unusual for passenger trains to run rapidly, nor for the train to have a jerky motion when running at moderate speed; nor is 60 miles an hour considered unusual

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on first-class roads. It was contended that because of the rain the speed should have been reduced. Whether this would have added to the safety of other travelers, or whether it would be good railroading, we are unable to decide, but if increased care was required of the railroad company it was equally so on the part of the traveler. The evidence of the witness amounted to no more than a scintilla, and was insufficient to rebut the presumption that the engineer did his duty, or to rebut his positive testimony as to speed. 'A mere guess or conjecture respecting the rate of speed was not sufficient to establish it.' *Smith v. Railway Co.*, 187 Pa. 451, 41 Atl. 479.

"The only witness to show that no whistle was blown or bell was rung was Mr. Steinmetz, who said: 'No whistle before the crossing was reached, that is, at the regular distance from the crossing,' and, 'There was no bell rung before approaching the crossing.' 'I did not hear any whistle until the one I spoke of when the crash occurred. That was a rapid, jerky whistle.' He was contradicted by the engineer, fireman, conductor, and brakeman. Here again we have the case of a passenger whose attention was not directed to signals, and yet might well say that he heard none. How many in a train do hear the whistle or can with certainty say that none was sounded? In *Hauser v. Railroad Co.*, 147 Pa. 440, 23 Atl. 766, the witness was asked: 'Q. Did you hear the blowing of the whistle that night on the train? A. No, sir; if I did, I did not hear anything. Q. Did you hear the ringing of the bell? A. 'No, sir.' The court said: 'She simply says she did not hear any whistle or bell, and, as against the positive affirmative testimony of six witnesses who did hear it, her omission to hear is simply a scintilla of evidence, which is not enough to make out a charge of negligence in that respect;' and the case was reversed without a new venue. If but a scintilla, and not sufficient to justify a charge of negligence, why should the court submit it to the jury? In this case we adopted the conclusions given by the supreme court and instructed the jury that, both the evidence as to speed and as to signals being insufficient to charge defendant with negligence, the verdict must be for the defendant. The plaintiff, however, relies on an expression contained in the opinion of the supreme court in *Laib v. Railroad Co.*, 180 Pa. 503, 37 Atl. 96, 8 Am. & Eng. R. Cas., N. S., 150. 'In this connection we may add that it was held in *Haverstick v. Railroad Co.*, 171 Pa. 101, 32 Atl. 1128, that the presumption that the trainmen performed their duty when a train approached a grade crossing might be rebutted by the testimony of a single witness for the plaintiff that no whistle was sounded or bell rung.' It will be observed that this was an affirmation of what was ruled in the case cited, and on referring to that case we find that what was really ruled was that the presumption might be overcome by the testimony of a single witness for plaintiff, etc., 'if the defendant offers no

evidence on the subject.' In *Daubert v. Railroad Co.*, 199 Pa. 345, 49 Atl. 72, several witnesses testified as to the fact that no warning of the approach of the train was given, but 'they each had a reason as well as an opportunity for hearing the signal of the incoming train,' etc. We therefore adhere to our ruling that in neither respect as claimed by plaintiff was there evidence of negligence on the part of the defendant company.

"At the conclusion of plaintiff's testimony, the defendant moved for a nonsuit, which motion was overruled. It was claimed that, even if defendant was negligent, the decedent was also guilty of contributory negligence in not stopping immediately before entering upon the track. As this question will no doubt be raised on the appeal, it may be proper to make a statement as to the facts. It was claimed by plaintiff that her husband stopped at the best point from which to get a view of the railroad, and that from the point where he did stop until the crossing was reached the view toward the approaching train was obstructed by an embankment and bushes. We recognize the fact that the higher courts have ruled that whether the point at which the stop, look, and listen took place was the best place is a question for the jury, but when plaintiff shows that after leaving that point 125 feet distant, until a traveler gets on the track, no view of the road can be had until you get on the track, it ought not to be held unreasonable that the traveler should again stop. In this case, having stopped at a point 75 or 125 feet from the crossing, in a heavy rain, with the wagon curtains down and with the view obstructed until he reached the tracks, it might well be said that he was negligent. In reading the testimony as to the condition of the approach to the railroad, it must be kept in mind that in the direction decedent was going, Lansdale was to his right and Bethlehem, from which point the train was coming, to his left. Much, in fact most, of the testimony describes the difficulty of seeing toward Lansdale, but all plaintiff's witnesses admit a better view toward Bethlehem. The only witness to the accident describes the decedent as stopping at a point 60 or 75 feet from the crossing. Then he started his horse and drove pretty fast. 'At that moment I looked up the track and saw the train coming in a hurry. At that moment I heard a whistle and the strike both together.' This witness was 200 feet from the crossing. Some of the other witnesses for plaintiff fix the stopping at 125 feet from the crossing. If this was the best point from which to look, he would have seen as far as the signal post, 500 feet distant from the crossing. He then drove rapidly, with curtains down, in a severe rain, and was struck as soon as he got on the tracks. He must have seen the train, for it could not have been beyond the signal post, or at least not far from it. If prevented from seeing it by the rain, the duty to proceed cautiously and again stop was the greater; and it almost seems incredible that a man can be within 20 feet of

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a railroad and not hear an approaching train, even although no whistle was sounded or bell rung. We ruled this case with due regard to the rights and duties of traveler and the railroad, and upon what we conceive to be the rulings of the supreme court. If we were in error in not holding that the deceased was guilty of contributory negligence, our ruling would still be correct, even if our reasons assigned would not sustain the verdict."

Gilbert Rodman Fox, Muscoe M. Gibson, and Nicholas H. Larzelere, for appellant.

Chas. Heebner and James Boyd, for appellee.

PER CURIAM. In this case the jury, by direction of the court, rendered a verdict in favor of the defendant. This direction was based on the conclusion of the court that the evidence was not sufficient to warrant a submission of the case to the jury. This conclusion appears in harmony with the views entertained by the court below. We therefore sustain the judgment entered by said court, and affirm it on the opinion of Judge Weand.

BOGGERO v. SOUTHERN RY. CO.

(Supreme Court of South Carolina, April 21, 1902.)

[41 S. E. Rep. 819.]

Negligence—Pleading and Proof.

Under Acts 1898, p. 693, regulating the practice in actions *ex delicto*, and providing that a party in such a suit shall not be required to state several acts of negligence separately, plaintiff may allege without separate statement and prove acts of negligence and of willful conduct, and recover on both.

Accident at Crossing—Failure to Give Crossing Signals.*

In an action for an accident on a track at a point beyond a crossing, evidence of failure to give statutory signals at the crossing is admissible.

Same—Signals—Instruction.

In an action for injuries to person on a track, a charge that if a railroad of ordinary care would give warnings at a particular place, then defendant is required to give such warnings, is not erroneous, the meaning being that defendant was required to give warning if such was demanded in exercise of ordinary care.

Regulation of Speed in Cities.

Rev. St. §§ 1630, 1633, giving railroad commissioners general supervision of railroads, and providing that on complaint of city or county officials they shall examine the condition and operation of the road in its limits, and remove any cause of complaint, does not give such commissioners exclusive jurisdiction of such matters, and deprive the municipality of the right to regulate the rate of speed within its limits.

*See notes, 12 Am. & Eng. R. Cas., N. S., 406; 20 Am. & Eng. R. Cas., N. S., 225; 16 Am. & Eng. R. Cas., N. S., 631. See also, *Edwards v. Atlantic Coast Line R. Co.* (N. Car.), 23 Am. & Eng. R. Cas., N. S., 38; *Philadelphia & B. C. R. Co. v. Holden* (Md.), 22 Am. & Eng. R. Cas., N. S., 192; *Hutto v. South Bound R. Co.* (S. Car.), 22 Am. & Eng. R. Cas., N. S., 724.

*Boggero v. Southern Ry. Co***Care Due Licensees.**

A railroad company owes a greater duty to one on a railroad track with its consent than it does to a trespasser.

McIver, C. J., dissenting.

Appeal from common pleas circuit court of Greenwood county; Klugh, Judge.

Action by Emiliano Boggero against the Southern Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

The following is the complaint:

"The complaint of the plaintiff herein respectfully shows unto the court:

"(1) That the defendant is now, and was at the times hereinafter named, a corporation created by and under the laws of the state of Virginia.

"(2) That the defendant is now, and was at the times hereinafter named, the owner of, and as such operates and has control of, the engines, cars, and all other appurtenances and appliances belonging to or used on a certain line of railroad from Greenville, by way of and through Greenwood, to Columbia, all in the state of South Carolina, which said railroad is commonly known as and called the Columbia & Greenville Railroad.

"(3) That the defendant's railroad track, after entering the town of Greenwood from the direction of Greenville, crosses over and intersects the railroad track of the Charleston & Western Carolina Railway Company, and from said point of intersection the tracks of said two railroads run almost parallel for a long distance, to and beyond their respective depots.

"(4) That in a less distance than 150 yards from the point of intersection aforesaid the two said tracks cross a public street of the town of Greenwood near the home of C. G. Waller.

"(5) That in a less distance than 150 yards from the point where the two said tracks cross the aforesaid public street both of said tracks cross over the railroad track of the Seaboard Air Line Railway by means of a trestle or bridge over a deep cut or excavation made by the said Seaboard Air Line Railway at this point.

"(6) That in a less distance than 150 yards from the point where the two first-mentioned railroad tracks cross over the said cut or excavation, the two said tracks, to wit, that of the defendant and that of the Charleston & Western Carolina Railway Company, again cross over another public street of the town of Greenwood, leading from the east to the west side of the public square of said town.

"(7) That on the east side of said two railroad tracks, and about 15 or 20 yards therefrom, Logan street runs along almost parallel therewith from the public square of the said town of Greenwood over and beyond the cut or excavation made by the Seaboard Air Line Railway.

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"(8) That on the west side of said two railroad tracks, and about 15 or 20 yards therefrom, another street of the town of Greenwood, leading from west side of public square of said town, by the Oregon Hotel, the storeroom of Joel S. Bailey and others, runs along almost parallel with said two tracks to within a few feet of the said cut or excavation made by the Seaboard Air Line Railway, where the same ends.

"(9) That in front of the home of the said Joel S. Bailey, and at the terminus of the last-named street, there is now, and was at the times herein mentioned, and had been for a long time prior thereto, a well-constructed plank walk, which leads from the last-mentioned street up to the track of the Charleston & Western Carolina Railway Company, and extends across its track to the track of the defendant herein, where the same is fastened to and the planks thereof nailed upon the cross-ties of defendant's track.

"(10) That the said plank walk is about 30 yards from the cut or excavation hereinbefore mentioned, and on either side of said cut or excavation, and close thereto, are well-beaten footpaths leading to and from defendant's said track from and to Logan street; and between said footpaths and said plank walk, or on the opposite side of said track therefrom, are no walks or paths or other evidences of travel leading from defendant's track.

"(11) That the plank walk and footpaths above mentioned are now, were at the times herein mentioned, and have for a long time prior thereto been, continuously and generally used by the public, and a great number of the citizens of Greenwood in going or returning to or from Logan street, at or near said cut or excavation, and from all places beyond said cut or excavation, and on the west side of said railroad track, walk upon said track across said cut or excavation, where planks are also laid and fastened to the cross-ties of said track, until they reach the plank walk above mentioned; and the defendant has acquiesced in the use by the public of the said walk and along its track, and has knowledge thereof, and has never made objection thereto, but has allowed—perhaps constructed and maintained—the plank walk leading upon its track and fastened to the cross-ties thereof, and has thereby given the public permission to pass over its track to and from said plank walk from and to the said footpaths over and beyond the said cut or excavation.

"(12) That the said town of Greenwood has nearly 5,000 inhabitants, and the tracks of this defendant's railroad run almost through the center of the said town, and it is very dangerous for a train to pass over the defendant's track at and between the points herein mentioned at a greater rate of speed than six miles per hour, and without ringing the bell or blowing the whistle of its engine, and without the constant watch-out and care of its agents and servants in charge of its engine.

"(13) That the town council of Greenwood, on the 19th day

of September, 1899, passed an ordinance of the said town, which has never been repealed or altered, whereby all railroad companies were prohibited from running their trains at a greater rate of speed than six miles per hour from the cut or excavation herein mentioned to their respective depots and beyond.

"(14) That on the 13th day of April, 1901, at about 8:30 o'clock p. m., while the plaintiff was walking along the defendant's railroad track between the cut or excavation hereinabove mentioned and the plank walk above mentioned, and at or near the said plank walk, intending to cross over on the said plank walk to the street leading by and to the storeroom of Joel S. Bailey, an engine with two cars attached thereto, in charge of and operated by the agents and servants of the defendant, negligently, carelessly, and without any signal or warning whatever, ran up behind him at a rapid rate of speed,—that is to say, at a greater speed than six miles per hour,—in violation of the ordinance of the town of Greenwood and the laws of this state, and without ringing its bell or blowing its whistle, although defendant's agents knew or ought to have known that the citizens of Greenwood were constantly passing along its track at this place, and although its engine was in a less distance than 500 yards of a public crossing, and was at the time passing over a place where defendant had permitted the public to travel; and before this plaintiff could step off of said track, the said engine struck him, knocking him down, and passing over and upon both his feet and legs, and so badly crushing and bruising them that, in order to save his life, it became necessary to amputate both of said legs.

"(15) That by reason of the gross negligence, carelessness, and willful misconduct of the servants and agents of the defendant in failing to ring its bell or blow its whistle, in running its train at a dangerous rate of speed and in violation of the laws of the town of Greenwood and the laws of this state, in failing to keep the proper watchout, and in failing to give this plaintiff any warning or signal whatever of its approach, he has been damaged in the sum of \$1,990.

"Wherefore plaintiff prays judgment against the defendant company for the sum of \$1,990, and the costs of this action."

The defendant answered as follows:

"(1) That it admits the truth of the statements contained in paragraphs 1, 2, and 3 of the complaint.

"(2) That it denies each and every other allegation contained in the said complaint.

"(3) The defendant alleges that the plaintiff had no legal right to walk upon the track of the defendant; that plaintiff was a trespasser, and the defendant owed him no duty except to refrain from willfully injuring him.

"(4) That the plaintiff was walking, just before the accident, upon the side track of the defendant; that he heard the defendant's train approaching, but, mistaking it for a train

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upon the side track, he left said latter track without looking around, and stepped upon the defendant's track immediately in front of the engine, and was struck before the agents of defendant in charge of said train could prevent the disaster.

"(5) The defendant further alleges that the injury to plaintiff was brought about by his own negligence, and that by his negligence the plaintiff contributed thereto.

"Wherefore the defendant demands that the complaint be dismissed, with costs."

From judgment for plaintiff, defendant appeals.

T. P. Cothran, for appellant.

Caldwell & Park and Johnstone, Welsh & McGhee, for appellee.

GARY, A. J. This is an action for damages alleged to have been sustained by the plaintiff through the negligence of the defendant in cutting off both his legs with its train of cars at Greenwood, S. C., on the 13th of April, 1900. In order to understand clearly the facts out of which the controversy arose and the issues involved under the pleadings, it will be necessary to refer to the complaint and answer, which will be incorporated in the report of the case. The jury rendered a verdict in favor of the plaintiff for \$1,200.

The defendant appealed upon exceptions, the first of which is as follows: "(1) The presiding judge erred in charging the jury as follows: 'Now, persons may acquire the right to go upon the property of others by the public continually using or going upon such property, or openly and adversely,—i. e., in open opposition to any will or permission or license of the owner of the property,—such going, if continuous for a sufficient or long period, to raise the presumption of law that such right does exist. A man may acquire the right to pass across the lands of another where he, in open violation, knowing that he is acting in open violation of the rights of the owner of the property, and where he does so with the knowledge, with notice to the owner that he is acting in open violation of the rights of the owner, or where he does so in such a notorious manner that the owner may be presumed to know that he is so violating his rights,—if he does that as long as twenty years, the law will raise the presumption that he has the right to go there; and under those circumstances he would cease to be a trespasser, if he has established a prescriptive right, as it is called, to go upon or pass over the property of another. And that principle applies to the property of a railroad company, to its track, just as much as it does to the private lands of individuals.' The errors assigned being as follows: (1) The plaintiff made no claim in his complaint to a right by prescription to walk upon the track. The law declared by the court was, therefore, inapplicable. (2) The complaint alleges permission by the defendant to the public to use its track. This is inconsistent with the idea of

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right by prescription, and for this reason, also, the law was inapplicable. (3) To constitute a prescriptive right to a way, the use must have been open, adverse, exclusive, and accompanied by some act of the owner which shows a recognition on his part of the right of the claimant to use the way without his permission. The charge is not consistent with this proposition. (4) The use must have been adverse, and knowledge on the part of the owner that the use is adverse cannot be presumed from the notorious character of the use. The circuit judge, therefore, erred in charging the jury that a man may acquire the right to pass over the land of another 'where he does so in such a notorious manner that the owner may be presumed to know that he is violating his rights.' (5) There is no evidence showing that the use of the track as alleged in the complaint by the public was adverse to the right of the railway company, or that it was accompanied by such facts and circumstances as show that it was claimed as a right exercised without the consent and in opposition to the rights of the railway company. The charge was, therefore, inapplicable and misleading. (6) A right to use the track of a railway company as a footpath cannot be acquired by prescription. (7) The right claimed by the plaintiff was to get upon the railway tracks, cross a trestle spanning a cut, and continue down the track a distance of fifty yards to a certain foot bridge. Such right cannot be acquired by prescription, and there was no pleading or testimony making the charge applicable to the case. (8) Prescription rests upon presumption of a grant. A railroad being a public highway, it would be unlawful to grant the use of its track as a footpath. A presumption of an illegal act cannot be sustained." When the charge considered in its entirety, it will be seen that it is very full and clear upon the issues raised by the pleadings. No question of a right by prescription was involved under the pleadings, nor was there any testimony whatever sustaining such right. In the exception it is stated that "there was no pleading or testimony making the charge applicable to the case." The right by prescription is entirely separate and distinct from that set out in the complaint; one being founded upon an adverse, and the other upon a permissive, claim. Under these circumstances, even if there was error in the charge as to a prescriptive right, we do not feel justified in remanding the case for a new trial on this ground. Realizing that it is almost too much to expect that during the progress of a long trial, in which many questions were presented, errors will not be committed, the court is not inclined to grant a new trial, unless it is satisfied that there is a reasonable ground for supposing the error may have affected the verdict, which it is not satisfied exists in this case.

The second exception is as follows: "(2) The presiding judge erred in charging the jury that the plaintiff would be entitled to a verdict if they came to the conclusion that the

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defendant willfully inflicted injury upon the plaintiff. It is submitted that the action was based upon ordinary negligence, and that a recovery for a willful tort should not have been allowed." The complaint alleges both negligent and willful misconduct on the part of the defendant. Section 2 of an act entitled "An act to regulate the practice in the courts of this state in actions *ex delicto* for damages" (Acts 1898, p. 693) is as follows: "That in all cases where two or more acts of negligence or other wrongs are set forth in the complaint, as causing or contributing to the injury for which such suit is brought, the party plaintiff in such suit shall not be required to state such several acts separately, nor shall such party be required to elect upon which he will go to trial, but shall be entitled to submit his whole case to the jury under the instruction of the court, and to recover such damages as he has sustained, whether such damages arose from one or another or all of such acts or wrongs, alleged in the complaint." Under this act the plaintiff was entitled to recover damages both for negligence and willful misconduct.

The third and fourth exceptions are as follows: "(3) The accident is alleged to have happened as the plaintiff was walking down the track at a point between two public street crossings in the city of Greenwood. It was error to have admitted evidence of a failure on defendant's part to give the statutory signals upon approaching these crossings. (4) The accident was alleged to have happened as the plaintiff was walking down the track at a point between two public street crossings in the city of Greenwood. It was error to charge the jury that the defendant's failure to give the statutory signals upon approaching these crossings could be considered by the jury in determining whether the railway company exercised due care in giving signals or warnings of its approach to the plaintiff." The cases of *Mack v. Railroad Co.*, 52 S. C. 323, 29 S. E. 905, 40 L. R. A. 679, 68 Am. St. Rep. 913, and *Mason v. Railway Co.*, 58 S. C. 70, 36 S. E. 440, 53 L. R. A. 913, 79 Am. St. Rep. 826, 19 Am. & Eng. R. Cas., N. S., 83, show that these exceptions cannot be sustained.

The fifth exception is as follows: "(5) The presiding judge erred in charging as follows: 'Now, therefore, if a railroad company of ordinary prudence and care would give warning of its approach at any point on its line, then this railroad company is required to give warning of its approach,'—the error consisting in this: (1) It eliminates the question of the plaintiff being a trespasser. (2) It makes the duty of the defendant in this particular case depend upon what a railroad of ordinary prudence and care should have done at any point on its line,—a highway crossing, a crowded street, a crowded yard, or elsewhere." First. When this portion of the charge is considered in connection with the entire charge, it will be seen that it was full upon the question of the plaintiff being a trespasser. Second. His honor simply intended to instruct

the jury that the defendant was required to give warning of its approach, if such was demanded in the exercise of ordinary prudence.

The sixth exception is as follows: "(6) The presiding judge erred in charging the jury as follows: 'If it failed to give warning of its approach,—such warning as a railroad of average prudence and care would give,—then it failed in its duty in this respect;' the error consisting in thus eliminating the question of the plaintiff being a trespasser on the track, and also the explanation of the defendant that the plaintiff was walking upon the side track, and, being misled by the headlight, stepped over on the main line immediately in front of the engine." The language set forth in the exception as the basis of the assignment of error must be considered with reference to the whole charge, by reference to which it will be seen it is not amenable to the objection imputed to it.

The seventh exception is as follows: "(7) The presiding judge erred in admitting in evidence the ordinance of the city of Greenwood limiting the speed of trains within a certain area, upon the ground that such ordinance is beyond the power of said municipality, the matter being exclusively within the jurisdiction of the board of railroad commissioners." The appellant relies upon sections 1630 and 1633 of the Revised Statutes, which are as follows (section 1630): "The commissioners shall have the general supervision of all railroads and railways in this state operated by steam, and shall examine the same and keep themselves informed as to their condition and the manner in which they are operated, with reference to the security and accommodations of the public and the compliance of the several corporations with the provisions of their charters and the laws of the state; and the provisions of this charter shall apply to all railroads and railways, and to the corporations, trustees, receivers or others owning or operating the same." Section 1633: "Upon the complaint and application of the mayor and aldermen or council of any city or town, or board of county commissioners of any county within which any part of any such railroad is located, it shall be the duty of the commissioners to make an examination of the condition and operation thereof. Before proceeding to make the examination in accordance with such application, they shall give to the applicants and the railroad corporation reasonable notice in writing of the time and place of entering upon the same. If upon such examination it shall appear to them that the complaint alleged by the applicant is well founded, they shall so adjudge, and shall inform the corporation operating such railroad of their adjudication in the same manner as is provided in section 1631 of this chapter; and the company failing for sixty days after such notice to remove the cause of such complaint, they shall make report thereof to the general assembly for such action as it may deem expedient; or if there be necessity for prompt action, they

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may take such legal proceedings as may be proper and the attorney general shall institute and conduct such proceedings." The general principle is settled beyond controversy that a municipality has the power to pass an ordinance regulating the rate of speed of trains passing through its limits. These sections of the Revised Statutes do not confer upon the railroad commissioners power to nullify any law of the state, whether municipal or otherwise.

The eighth exception is as follows: "(8) The presiding judge erred in charging the jury as follows: 'If you should conclude from the testimony that the city authorities of the city of Greenwood have prescribed a rate of speed beyond which the railroad company is forbidden to go in operating its trains in the city limits or in a particular part of the city, if you conclude that there is a city law to that effect, then, if the testimony establishes that the railroad company did exceed the rate of speed prescribed by law, the railroad company violated its duty to obey that law. It is competent, as the court has already held in your hearing, for the city authorities to establish such a law as that. We call these local laws of the municipal government "ordinances," but they have the force of law within the incorporate limits just the same as all other statutory enactments have, provided they are valid, not in violation of the law of the land,—the law that is higher, and that governs the city authorities as well as every other part of the land; and if the city prescribes a rate of speed which it has the power to do, and the railroad company exceeds that rate of speed, then it violates that law, and violates its duty to obey that law,'—the error consisting in this: By section 1630, Rev. St. 1893, the supervision of all railroads in the state is committed to the railroad commissioners, especially as to the manner in which they are operated in reference to the security of the public. The regulation as to the speed of trains falls within the exclusive jurisdiction of said railroad commissioners, and not within the jurisdiction of the several municipalities of the state. By section 1633, by complaint and application by the mayor and council of any city touching the operation of any railroad within the incorporate limits, the railroad commissioners are directed to examine into the operation of said railroad, decide the matter, and take such legal steps to enforce the determination as may be proper. For the same reasons the presiding judge erred in charging the plaintiff's eighth request. The ordinance is void, as an attempt to regulate the speed of trains at points where the public have no right to be." This exception is disposed of by what was said in considering the seventh exception.

The ninth exception is as follows: "(9) The presiding judge erred in charging the jury that every person in the city of Greenwood had the right to assume in his conduct and actions that every other person will obey the law and is acting

in obedience to the law, and therefore, if a person act in violation of the law, and some other person is injured because of that violation of the law, it becomes an act of negligence on the part of the violator of the law, and he is liable for whatever injury he may by that breach of duty occasion the other party,—the error consisting in this: (1) The charge eliminates the question of contributory negligence. (2) It imposes an absolute liability upon the defendant in case the jury found that the defendant was violating the ordinance as to speed. (3) If plaintiff were a trespasser, he could not claim the benefit of the ordinance fixing the speed." When this portion of the charge is considered in connection with the entire charge, it will be found free from the errors assigned.

The tenth exception is as follows: "(10) The presiding judge erred in charging the jury that the burden was upon the defendant to establish by the preponderance of the evidence the allegation of the answer that the plaintiff 'was walking upon one railroad track, and, hearing the train approaching behind him, by some mistake supposed that he was upon the track in the way of the train, crossed over to another track, and that that crossing over was what brought him into the position of danger, and what brought on the injury by his getting in front of the engine,—immediately in front of it, and so near that the persons in charge of the engine and train did not have time to stop the train before it caused the injury;' the error consisting in this: The allegation in the answer was explanatory of how the accident occurred. It was not an affirmative defense. The burden of proving negligence throughout was upon the plaintiff, and the burden is not shifted when the defendant undertakes to explain the circumstances of the accident." That portion of the charge relative to this question was as follows: "The railroad company answers the complaint, and denies that he is entitled to any recovery against the railroad; and further alleges affirmatively that the plaintiff had no legal right to walk upon the track of the defendant, and that the defendant owed him no duty except to refrain from willful conduct; and further alleges that the plaintiff, just before the injury or accident, was walking upon another track; that he heard the defendant's train approaching, and, mistaking it for a train upon the track on which he was walking, left that track without looking around, and stepped upon defendant's track immediately in front of the engine, before the agents of the defendant in charge of the train could prevent the disaster; and alleges further that the injury to the plaintiff was brought about by his own negligence and by his contributory negligence. Now, the denial by the defendant of any right in plaintiff to recover, first of all puts the burden upon the plaintiff of proving the facts that he alleges here as entitling him to recover. He must prove that he was on the track with the permission, as he alleges, of the railroad company, and he

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must prove that the railroad company was negligent in the particular in which he alleges that it was negligent, and he must prove that that negligence in those particulars—one or more of those particulars—was the cause of his injury. He must prove those facts by the preponderance or greater weight of the testimony; and if he proves those facts by that degree of proof, and further establishes the fact that he was injured, he is entitled to a verdict at the hands of this jury, unless the defendant establishes by proof something by way of affirmative allegation or defense which would defeat his right to recover." It will thus be seen that the exception is founded upon a misapprehension of the charge.

The eleventh exception is as follows: "(11) The presiding judge erred in charging the plaintiff's third request to charge, as follows: 'A person on the railroad track with the consent or permission of the railroad company is not a trespasser, and is entitled to reasonable care on the part of persons running the trains of such railroad,'—for the reason under such circumstances the plaintiff would be a licensee, and the rule of law is that the licensee takes his license subject to the concomitant perils, and the licensor owes him no duty except to refrain from willfully or wantonly injuring him." A railroad company owes even to a trespasser the duty to refrain from willfully or wantonly injuring him. It owes a greater duty to one on the railroad track with the consent or permission of the railroad company.

The twelfth exception is as follows: "(12) The presiding judge erred in charging the plaintiff's eighth request to charge as follows: 'An ordinance of a town forbidding railroad trains to run beyond a rate of speed fixed by the ordinance makes it the legal duty of a railroad company to regulate the speed of trains within the limits of such town accordingly. A railroad company violating such an ordinance is guilty of negligence; and a traveler going upon the track within the area for which such limit of speed is prescribed is not necessarily negligent, if not otherwise a fault, if he relies upon the prescribed rate of speed being used by the railroad trains, though going upon the track at another place than a street or highway crossing,'—for the following reasons: (1) For the reasons stated in exception 8. (2) The city council of Greenwood has no control of defendant's trains except at street crossings. (3) The plaintiff had no right to rely upon the prescribed rule of speed being used, but was obliged to use his senses to avoid a possible infraction of the rule. (4) If plaintiff were a trespasser he could not claim the benefit of the ordinance." This exception is disposed of by what was said in considering the other exceptions.

Judgment affirmed.

McIVER, C. J., dissents.

FT. WORTH & R. G. RY. CO. v. GREER *et al.**(Court of Civil Appeals of Texas, June 21, 1902.)*

[69 S. W. Rep. 421.]

Accident at Crossing—Signals.

Under Rev. St. 1895, § 4507, requiring a locomotive whistle to be blown at the distance of at least 80 rods from the place where the railroad shall cross a public road or street, the whistle is not required to be blown before crossing a street which is less than 80 rods from the starting point of the locomotive.

Damages—Evidence—Services of Physician.

Where, in an action for personal injuries, there is no evidence as to the value of the services of the physicians called, it is error to submit the question of such value to the jury.

Appeal from district court, Parker county; J. W. Patterson, Judge.

Actions by G. T. Greer against the Ft. Worth & Rio Grande Railway Company and by G. W. Greer against the same, consolidated and tried together. From a judgment for plaintiffs, defendant appeals. Reversed.

West, Chapman & West, for appellant.

McLean, Booth & Morton and H. W. Kuteman, for appellees.

GULF, C. & S. F. RY. CO. *et al.* v. SANDIFER *et al.**(Court of Civil Appeals of Texas, May 24, 1902.)*

[69 S. W. Rep. 461.]

Railroad Crossing—Dangerous Approach—Liability of Railroad and City.

Where a railroad company constructs on its right of way a bridge over a ravine, together with approaches; the bridge and approaches being likewise in, and constituting a part of, the roadway of a city street; the whole leading up to the railroad crossing,—and one of the approaches is dangerous to travelers, from want of a guard rail to prevent falling over its sides into the rocky ravine, nine feet below, both the city and the railroad company are liable for injuries to travelers thereby occasioned.

Personal Injuries—Excessive Verdict.

For injuries to a married woman, consisting of bruises and a Colles fracture in the lower arm, permanently impairing its use, and injuries to a minor daughter, consisting of a painful straining of both elbows, one of which became stiff and crooked, a verdict of \$2,023 to the husband and father is not excessive; neither is a verdict for \$1,500 for the daughter in her own right.

Same—Contributory Negligence—Frightened Horse.

A mother and minor daughter, who drive a gentle horse along an approach to a bridge at about 8 o'clock in the evening,—it being dark, but the way well known,—and who are injured by the sudden and unaccountable fright and shying of the horse, whereby it and the carriage are precipitated over the unguarded side of the approach to the rocky bottom of a ravine 9 feet below, are not guilty of contributory negligence.

Same—Dangerous Approaches—Liability of Railroad and City.

Sayles' Ann. Civ. St. 1897, arts. 4426, 4438, permit a railroad company

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to construct its road, with the city's consent, along, upon, or over any street, but require that it shall so restore the street to its former state as not to unnecessarily impair its usefulness, and shall keep such crossing in repair: *held* that, as to an injured person, a railroad company could not escape liability for an unguarded approach to a bridge in a street on its right of way, leading up to its crossing, by pleading a contract with the city whereby the company was to build such bridge and approaches, and the city was to forever keep them in repair.

Same—Same—Personal Injuries—Right of City to Indemnity from Railroad.

A city which contracts with a railroad company that the latter shall erect in a street in its right of way a bridge and approaches leading up to its crossing,—the city thereafter to maintain them in repair,—and which accepts the work, though the approaches are not protected by guard rails, and acquiesces in the company's performance for 10 years, cannot claim indemnity from the company for its liability to travelers injured by falling over the unguarded approach.

Same—Same—Same—Frightened Horse—Proximate Cause.

Where travelers in a carriage at night are injured by the sudden and unaccountable fright and shying of the horse, whereby the rig is precipitated over a 9-foot embankment, constituting an approach to a bridge in a city street, the want of a guard rail, which would have prevented the accident, is the proximate cause of the injury.

Appeal from district court, Parker county.

Actions by S. B. Sandifer and by Esther Sandifer, by S. B. Sandifer, as her next friend, against the city of Weatherford and the Gulf, Colorado & Santa Fe Railway Company. From a judgment in each action for plaintiff, defendants appeal. Affirmed.

H. C. Shropshire and J. L. Moyer, for appellant city of Weatherford.

Cowan, Burney & Lee, for appellant Gulf, C. & S. F. Ry. Co.

Howard Martin and H. L. Mosely, for appellees.

INDIANAPOLIS ST. RY. CO. v. WALTON.

(Appellate Court of Indiana, Division No. 2, June 19, 1902.)

[64 N. E. Rep. 630.]

Injury to Pedestrian—Rope Stretched across Street—General Verdict for Plaintiff Not Overcome by Answers to Interrogatories.

A general verdict for plaintiff in an action against a street railway company for injury received by walking into a rope stretched across the street by defendant while repairing a broken feed wire is not overcome by answers of the jury to interrogatories, though one of them is that the method used by defendant in fixing its broken wire was reasonably prudent, others being that the method was such as to have probably caused the injury to careful persons, that it could have better given warning of the rope by a guard and danger signal, that the light from the headlight of a car was not sufficient to reveal the presence of the rope to every one, and that plaintiff did not see it and could not have seen it by the exercise of ordinary care.

Same—Care Required in Crossing Street—Instruction.

An instruction that when a person is about to cross a street he is required to exercise ordinary and reasonable care to observe any obstruc-

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tions or danger in the street, and to look out for passing vehicles or such permanent obstructions as would ordinarily be expected therein, but not to anticipate and guard against obstructions which are unusual and not ordinarily to be observed in the exercise of reasonable and ordinary care in passing along or crossing a street, does not relieve a traveler from observing anything but vehicles and permanent obstructions. Damages.*

An instruction that in estimating plaintiff's damages the jury may consider the nature and extent of her injuries, whether they were temporary or permanent, also any physical or mental pain or suffering, and, from all the facts shown by the evidence, may give her such damages as will fully compensate her for the injuries she has sustained, not exceeding the amount claimed, fairly informs the jury as to the facts they may consider.

Appeal from superior court, Marion county; Vinson Carter, Judge.

Action by Mary A. Walton against the Indianapolis Street Railway Company. Judgment for plaintiff. Defendant appeals. Affirmed.

F. Winter and W. H. Latta, for appellant.

H. N. Spaan, for appellee.

UNITED RAILWAY & ELECTRIC CO. OF BALTIMORE CITY v.
FLETCHER.

(*Court of Appeals of Maryland, June 19, 1902.*)

[52 Atl. Rep. 608.]

Street Railways—Negligence—Persons near Track—Evidence.†

Where plaintiff was employed in filling in a trench in a street, the side of the trench next to a street car track being about three feet from the track, and he was injured by being struck by the body of the conductor of a street car, the conductor being on the side footboard of a car and engaged in collecting fares, there was no negligence on the part of the street railway.

*As to physical and mental suffering as elements of damages, see *Yerkes v. Northern Pac. Ry. Co.* (Wis.), 23 Am. & Eng. R. Cas., N. S., 642, and foot-note, 643; *Texarkana & Ft. S. Ry. Co. v. Anderson* (Ark.), 18 Am. & Eng. R. Cas., N. S., 37; *Gulf, C. & S. F. Ry. Co. v. Hayter* (Tex.), 18 Am. & Eng. R. Cas., N. S., 46; *Denver & R. G. R. Co. v. Roller* (C. C. A.), 18 Am. & Eng. R. Cas., N. S., 595; *Norfolk & W. R. Co. v. Marpole* (Va.), 16 Am. & Eng. R. Cas., N. S., 291; *Beath v. Rapid Ry. Co.* (Mich.), 15 Am. & Eng. R. Cas., N. S., 793; *Texas & P. Ry. Co. v. Armstrong* (Tex.), 14 Am. & Eng. R. Cas., N. S., 256; *Becker v. Albany Ry.* (N. Y.), 12 Am. & Eng. R. Cas., N. S., 853; *Omaha St. Ry. Co. v. Emminger* (Neb.), 12 Am. & Eng. R. Cas., N. S., 188; *Consolidated Traction Co. v. Lambertson* (N. J. 1896), 6 Am. & Eng. R. Cas., N. S., 793; *Louisville & N. R. Co. v. Sander's Adm'r* (Ky.), 10 Am. & Eng. R. Cas., N. S., 528; *Atchison, T. & S. F. Ry. Co. v. Chance* (Kan.), 4 Am. & Eng. R. Cas., N. S., 328; *Goodhart v. Penn. R. Co.* (Pa.), 5 Am. & Eng. R. Cas., N. S., 364; *Missouri, K. & T. R. Co. v. McGlamory* (Tex.), 3 Am. & Eng. R. Cas., N. S., 434.

†As to the care required of those in charge of street cars to avoid collisions with persons, animals, or vehicles, see note appended to *Robinson v. Louisville Ry. Co.* (C. C. A.), 1 R. R. R. 838, 24 Am. & Eng. R. Cas., N. S., 838.

Appeal from Baltimore city court; George M. Sharp, Judge.

Action by John T. Fletcher against the United Railway & Electric Company of Baltimore City. From a judgment for plaintiff, defendant appeals. Reversed.

Argued before McSHERRY, C. J., and BOYD, PAGE, PEARCE, SCHMUCKER, and JONES, JJ.

Fielder C. Slingluff, for appellant.

John H. Walraven and Frederick C. Cook, for appellee.

SCHMUCKER, J. This is an appeal from a judgment of the Baltimore city court in favor of the appellee against the appellant for damages resulting from personal injuries. The plaintiff was injured, while standing on a public street near the car track, by coming in contact with the body of a conductor who was passing along the footboard at the side of a moving open summer car. At the close of the plaintiff's testimony in the court below the defendant offered a prayer taking the case away from the jury for the want of evidence legally sufficient to entitle the plaintiff to recover. The court rejected the prayer, and the defendant then introduced its testimony. At the close of the whole evidence the plaintiff offered four prayers, and the defendant offered seven, the first of which was a renewal of the prayer taking the case away from the jury. The court granted three of the plaintiff's prayers, and rejected one of the plaintiff's and all of the defendant's prayers, and granted two instructions of its own to the jury. It is unnecessary for us to review in detail the action of the learned judge below on these prayers and instructions, because, for reasons which we will state, we are of opinion that he should have granted the defendant's prayer taking the case away from the jury for want of legally sufficient evidence to enable the plaintiff to recover. Three witnesses, who were present at the happening of the accident, testified in the case. They were the plaintiff and two laborers, who were at the time engaged with him in the service of the city water department in laying a water pipe. These witnesses agree that a long trench, two or three feet wide at the top and about four feet deep, had been dug by them in the street between the car track and the sidewalk, and distant three feet from the nearest track. They had been engaged in digging this trench and laying a six-inch pipe therein during the entire day up to the time of the accident, which occurred at about 4 o'clock in the afternoon. Cars had been passing the men engaged in the work at intervals throughout the day, and the workmen had stood in safety on the strip of ground between the trench and the tracks as the cars went by. At the time of the accident the pipe had been laid, and the workmen were engaged in filling up the trench. The several accounts given by the witnesses of the accident are substantially as follows: The plaintiff testified that he and the

witness Burk were working on the side of the trench next to the track, when, as he says, "I saw the car was coming, and the car had rung up get out of my way, and I was standing there,—standing on the side of the ditch,—and if I had been let alone the car would have had plenty of room to pass me. The ditch was three feet from the railway track. * * *

I stepped aside to let the car pass me, and as I did, why I felt the blow from the conductor where his body struck me." "I saw the conductor on the car. I saw him come up the track, and he passed Burk, and just as he got to me he swung, and when he swung himself he struck me, and therefore I know it was the conductor." He also testified that, although he saw the conductor on the footboard of the approaching car, he did not watch it as it was coming up, because he was satisfied that he was out of its way. He said that he saw no difference between the rate of speed of this car at the time when he was struck and that of the other cars which passed the place where he was working. John Kelbaugh, one of the two laborers who testified for the plaintiff, did not see him actually struck, but corroborated his evidence as to the local conditions at the place of accident, and said, "The ditch was about three feet from the railroad track, and there was plenty of room for any man to get out of the way of the car." He also saw the conductor on the footboard as the car approached.

He thought the car was going at an unusually high rate of speed. Louis Burk, the other laborer, testified that he saw the conductor on the footboard of the passing car, collecting fares, as he thought, and that as the car neared the plaintiff the witness saw the conductor swing out, and that some part of his body struck the plaintiff, and knocked him down in the ditch. The testimony of this witness as to the local conditions of the place of the accident agreed with that of the other two. He also thought the speed of the car was very rapid. No other witnesses testified as to any facts bearing directly upon the happening of the accident. We fail to find in this testimony such evidence of negligence on the part of the defendant or its servants directly contributing to the injury of the plaintiff as to entitle the case to go to the jury. It has been repeatedly held by this court that the negligence of a defendant will not be presumed, nor will a surmise or a scintilla of evidence that there may have been negligence on his part justify a court in sending a case to the jury. There must be some reasonable evidence of well-defined acts of negligence or breach of duty on the part of the defendant causing the injury complained of. No one is responsible for injuries resulting from unavoidable accidents while engaged in a lawful business. *Railroad Co. v. Pumphrey*, 72 Md. 85, 19 Atl. 8; *Baltimore & O. R. Co. v. State*, 71 Md. 599, 18 Atl. 969; *Cumberland P. R. Co. v. State*, 73 Md. 77, 20 Atl. 785, 25 Am. St. Rep. 571; *Railroad Co. v. Burkhardt*, 83 Md. 522, 523, 34 Atl. 1010. The evidence in the case at bar goes only

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so far as to show that the body of the conductor, while passing the footboard of the moving car, struck and injured the plaintiff. The conductor not only had the right to pass along the footboard of the car when it was in motion, but the discharge of his duty required him to do so very frequently. It is a well-known fact that the footboard is a narrow one, and a conductor, in order to pass along it in safety, especially if he has to lean in between the successive seats to collect fares, must, in passing by the upright standards of the car, give to his body a swaying or swinging motion. There is no evidence that the conductor in this case acted in a negligent or unlawful manner when passing along the footboard. The entire space between the railway track and the ditch was but three feet, a considerable part of which must have been occupied by the overhanging part of the car and the footboard. Under these circumstances the mere fact that the plaintiff, while standing in the narrow space between the car and the ditch, came in contact with the body of the conductor, is not per se even prima facie evidence of negligence on the part of the latter. If the plaintiff and the conductor were both small men, they may have passed each other in this narrow space with safety. If, on the other hand, they were both large men, they may have come in contact without any negligence on the part of the conductor. The evidence showed that the plaintiff stood between the ditch and the track in safety when other cars passed by, but it does not appear that in any of those cases the conductor was upon the footboard of the car as it passed. In the absence of reasonable evidence of any act of negligence or failure of duty on the part of the conductor, it was improper to let this case go to the jury to be determined by surmise or conjecture.

There were a number of exceptions taken by the defendant in the course of the trial in the court below to the court's action in admitting evidence, but, as the case will not go back for a new trial, it is unnecessary for us to pass upon the propriety of the court's rulings thereon. The judgment appealed from will be reversed, without a new trial.

Judgment reversed, without a new trial.

CENTRAL PASS. RY. CO. v. PHILADELPHIA, W. & B. R. CO.

(*Court of Appeals of Maryland, June 19, 1902.*)

[52 Atl. Rep. 752.]

Street Railways—Crossing Steam Railroad Tracks—Compensation.*

A street railroad company has no right to construct its line across railroad tracks rightfully maintained in a city street, without first compensating the railroad company for damages resulting therefrom.

*See generally, *Southern Ry. Co. v. Atlanta Rapid-Transit Co.* (Ga.), 18 Am. & Eng. R. Cas., N. S., 425, and notes, 441 et seq.

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Same—Same—Same.

A railroad company rightfully maintaining its tracks in a city street is entitled to require a street railroad company constructing a line across such tracks to pay for the construction of the crossing, and any change in the tracks necessitated by the crossing, but is not entitled to damages for the impairment of the easement in the street.

Same—Same—Duty to Maintain.

A street railroad company constructing its track across steam railroad tracks rightfully located in a city street must perpetually maintain and repair such crossing according to the direction of the engineer of the steam road.

Same—Same—Damages.

A street railroad company constructing its track across a steam railroad track rightfully located in a city street is not required to pay a portion of the expense of the steam road in maintaining crossing gates and other safety appliances at the crossing.

Schmucker, J., dissenting in part.

Appeal from circuit court of Baltimore city; Henry Stockbridge, Judge.

Injunction by the Philadelphia, Wilmington & Baltimore Railroad Company against the Central Passenger Railway Company. From a decree for plaintiff, defendant appeals. Affirmed.

Argued before McSHERRY, C. J., and FOWLER, BOYD, PAGE, PEARCE, SCHMUCKER, and JONES, JJ.

George D. Penniman and Fielder C. Slingluff, for appellant.

Bernard Carter, John I. Donaldson, and Shirley Carter, for appellee.

McSHERRY, C. J. In 1835 the Baltimore & Port Deposit Railroad Company, now forming part of the Philadelphia, Wilmington & Baltimore Railroad system (a railroad operated by steam) laid its track along Canton avenue, in the city of Baltimore, in pursuance of authority obtained from the mayor and city council. In 1896 the mayor and city council gave to the Central Passenger Railway Company (a street railway company) permission to construct its tracks along Wolfe street, in the city. Wolfe street intersects Canton avenue at right angles. When the railway company undertook to cross the track of the railroad company at the intersection of Canton avenue and Wolfe street, the railroad company interposed an objection, and in June, 1897, filed in the circuit court of Baltimore city a bill of complaint for an injunction to restrain the street railway company from interfering with the steam railroad company's track until the former company would enter into an agreement to pay, not only the cost of making the crossing, but the subsequent cost of keeping the crossing in repair, which repairs, it was insisted, should be done under the supervision and according to the direction of the engineer of the railroad company. The bill was answered. Later on, the street railway company, under an agreement with the steam railroad company, made the

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crossing at its own expense, and the question as to the relative rights and obligations of the two companies with respect to the maintenance of the crossing was reserved for the future determination of the court. Finally the case came on to be heard, and the circuit court decreed on April 3, 1902, that an injunction should issue to restrain the street railway company from further using the crossing over the track of the steam railroad company at the intersection of Wolfe street and Canton avenue until the railway company would execute "an agreement for the maintenance of said crossing in the terms set forth for that purpose in the agreement filed with the bill of complaint." From that decree the street railway company has appealed. The precise question, therefore, is, was the circuit court right in restraining the railway company from using the crossing until the company would execute an agreement binding itself to maintain at its own cost in the future and for all time the above-mentioned crossing?

The bill, as originally filed, was designed to restrain the construction of the crossing unless the street railway company would agree to do two things: First, to construct the crossing at its own cost; and, secondly, to maintain that crossing, when constructed, for all time, and to maintain it in accordance with the requirements which the steam railroad company's engineer might prescribe. With the first of these demands we are not now concerned, further than as the legal principles which are applicable to that situation may throw light upon the second; and we are not concerned with the first demand, because, by the agreement alluded to, the crossing was actually constructed at the expense of the street railway company.

The adjudged cases are quite in accord in holding that, when a new road or way is constructed across an old road or way, the owner of the new way must not only bear the expense of making and keeping in repair the new way, including the cost of such structural changes in the old way as are rendered necessary by the construction of the crossing, but he must, in addition, make compensation to the owner of the old way for the property or easement appropriated for the occupancy of the new way. *Mayor, etc., v. Cowen*, 88 Md. 447, 41 Atl. 900, 71 Am. St. Rep. 433; *Northern Cent. Ry. Co. v. Mayor, etc., of Baltimore*, 46 Md. 445; *Chicago, M. & St. P. Ry. Co. v. City of Milwaukee*, 97 Wis. 418, 72 N. W. 1118; *Kansas City R. Co. v. Jackson County Com'rs*, 45 Kan. 716, 26 Pac. 304; *In re First St.*, 66 Mich. 55, 33 N. W. 15; *Railroad Co. v. Bayonne*, 51 N. J. Law, 428, 17 Atl. 971. Whilst this is conceded by the street railway company to be the law when the new way crosses the private property of the owner of the old way, it is denied that the doctrine is applicable where one railway track crosses another railway track on the bed of a city street, to which street neither railway company has any other right than the permission given

by the municipality to lay tracks thereon. And this distinction is alleged to exist because neither the first nor the second occupant of a pre-existing city highway has, it is claimed, any exclusive right to the use of the public thoroughfare, and because the first occupant's right, whatever it may be, is, in its inception and throughout its existence, subordinate to the same use of the highway by the second occupant if the latter be granted a license to use that highway. The lines of the pending controversy are thus sharply drawn, and the case is narrowed down to the single inquiry as to whether the asserted distinction in reality exists. If it does exist to the full extent claimed, then the decree is wrong. If it does not exist, then the decree is right.

It is indisputably true that a railway or a railroad company which, under authority obtained from the city, lays its track along or across an opened and subsisting city street, acquires thereby no exclusive right to the use of the street; but it does not thence follow that it secures no rights of any kind which another company subsequently seeking to use the same track, or a part of the same track, is bound to recognize. In the assertion of the opposite conclusion lies the fallacy of the appellant's contention. There may well be no exclusive right in the company to the use of the street as against the public generally, or as against a parallel or competing road, and yet there may be, and certainly there is, a right in the company to use its own tracks upon the street, and to use them to the exclusion of any other company, unless the other company procures the right to use those tracks upon making due compensation. This has been distinctly decided in *North Baltimore Pass. Ry. Co. v. North Ave. Ry. Co.*, 75 Md. 233, 23 Atl. 466, and in *North Baltimore Pass. Ry. Co. v. Mayor, etc., of Baltimore*, 75 Md. 247, 23 Atl. 470. In the first of these cases it appeared that the North Baltimore Passenger Railway Company was by an ordinance of the city council given the right to lay its tracks on certain named streets, and in the ordinance the city reserved the power to grant to any other road the privilege to use the same tracks, but under such regulations and upon the payment of such sum or sums of money to the first-mentioned company as should be agreed upon by the mayor, the city commissioner, and the president of the company. The North Avenue Railway Company was afterwards incorporated, and was granted by an ordinance of the city the right to use the tracks of the North Baltimore Passenger Railway Company on North avenue, and it was further given authority to use electricity as a motive power. The use of electricity necessitated changes in the roadbed and tracks of the North Baltimore Passenger Railway on North avenue. These changes, it was alleged, would occasion loss and injury to the North Baltimore Passenger Railway Company, which owned the tracks, and it accordingly filed its bill of complaint for an injunction to restrain the North Avenue

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Company from interfering with the tracks. Whilst this court held that the North Avenue Railway Company had authority under the ordinance to change the North Baltimore Passenger Railway's tracks, it also determined that compensation must be made to the latter company, and accordingly the injunction asked for was directed to be issued. And the ground upon which the relief was granted was distinctly this: that the North Baltimore Passenger Railway Company had a property right in its tracks, though they had been laid on a city street, and that the property right thus owned could not be invaded without just compensation being paid, even had there been no provision in the ordinance directing such compensation to be paid. This is made apparent by the following extract from the judgment of the court, as delivered by Chief Judge Alvey: "But such change and disturbance are not to be allowed without just compensation to the plaintiff company." The provisions of the ordinances are then cited, and the judgment proceeds: "This, therefore, is the contract of the parties; and it must be conformed to as a condition precedent to the exercise of the right of the defendant to enter upon or use in any manner the tracks and property of the plaintiff. This provision of the ordinance is simply in accordance with the settled general rule of law upon the subject. 2 Dill. Mun. Corp. § 727; Jersey City & B. R. Co. v. Jersey City & H. H. R. Co., 20 N. J. Eq. 61. And justice, as well as the principle of analogy to cases resting upon the power of eminent domain, requires that the compensation should be paid, if required, before the property of the plaintiff is appropriated to the use of the defendant company." In the second case the controversy arose out of a claim made by the North Baltimore Passenger Railway Company to an exclusive right of track way over a city bridge across Jones' Falls. The claim was resisted, and this court, again speaking through Chief Judge Alvey, said: "Under a grant or license of the municipality to a street railroad company to use the street for its tracks, it is only so much of the street as may be actually occupied that can be claimed to be exclusive of other tracks; and other parts of the street may be granted to a competing line or lines. Elliott, Roads & S. p. 566." There is, then, some right which the first occupant has in its tracks that cannot be appropriated by the second occupant under a claim of a right to use the street.

It is objected, however, that these cases have a reference to a longitudinal use of the tracks, and not to the bisecting of a track at right angles, and its use in that way, and therefore that, whilst compensation must be made for the one use, it need not be made for the other. But how can this difference in the method of using the tracks of the first occupant make a difference in the application of the unvarying legal principle which requires the owner of the new way to make and maintain the crossing over the old way, especially if a

crossing of the track will to some extent appropriate a part of the track of the old way as it is actually occupied? The exclusive use spoken of in the case last cited, or the right to occupy the space covered by the tracks in the street, and to occupy that space to the exclusion of other tracks, has relation to the whole length of the track, and therefore to every part of its length, and hence to those portions of it which must be cut and removed so that cross frogs may be inserted. It is obvious, then, that the cutting and removal of so much of the track as must be taken up to permit the crossing structures to be laid is an interference with and an invasion of the exclusive right of the steam railroad company to use its own tracks on the street; and it can make no possible difference that the interference or invasion has been occasioned by a right-angle intersection, rather than by a longitudinal use, except as to the quantum of damage inflicted. Precisely the same right is invaded in each instance, and it is the right to actually occupy the space covered by the track, and to occupy that space to the exclusion of other tracks. If the longitudinal use of the tracks is an invasion of that right (and it is definitely settled in this state that it is), then the transverse or rectangular use of the same tracks is also an invasion of the same right, differing not in kind, but merely in degree.

There are, as already stated, two elements of damage in the ordinary crossing of an established way by a new way, and these are: First, the cost of the construction and of the maintenance of the new way, including structural changes in the old way made necessary by the building of the new way; and, secondly, the value of the easement or property belonging to the owner of the old way, and which may be impaired or appropriated by the new way. Both of these must be paid by the person who constructs the new way. In cases such as the one at bar, where a railway crosses a railroad in the bed of a city street, the second of these two elements of damage does not exist, because when a steam railroad is located on a street the company takes its rights subject to the rights of the public to use the street in a reasonable and lawful manner, and since the street railway is not an additional burden to the street, but simply such a use as the public are entitled to have made of the street, the steam railroad takes its right in the street subject to the right of the street railway company to lay its tracks across the former's tracks, "and the steam railway is not entitled to recover any compensation for such crossing as for an additional burden." 3 Elliott, R. R. § 1135. The cases cited by the appellant's counsel relate to this second element of damages, and to nothing more. In *Chicago & C. Terminal R. Co. v. Whiting, H. & E. C. St. Ry. Co.*, 139 Ind. 297, 38 N. E. 604, 26 L. R. A. 337, 47 Am. St. Rep. 264, the railroad company (the second comer) proposed to furnish the cross rails and tracts for the crossing, but the railroad company (the first comer) insisted

that the crossing would be a burden and a hindrance to the free use of its railroad, and that this would be a taking of private property without just compensation. This element of damage was disallowed, and, whilst the court stated that the duty was on the steam road to keep the street crossing as nearly as possible as it had been before the first rails were laid, it distinctly held that that duty "does not impose the burden of providing cross rails and tracks for the street railway to make the crossing." To the same effect is *Chicago, B. & Q. R. Co. v. West Chicago St. R. Co.*, 156 Ill. 255, 40 N. E. 1008, 29 L. R. A. 485. The street railway company (the second comer) offered to construct the crossings at its own expense, without disturbing the steam railroad's tracks, and to keep the same in repair; but the railroad company refused to accept the offer, and demanded compensation for the occupancy of what it termed its "private property rights in the street," and it also exacted payment for damage to its business, and finally, because the crossing would occasion a greater expense in the operation of its road, it asked to be compensated for that additional outlay. These claims for compensation, forming what has been above designated the "second element of damage in crossing cases," were the ones with which the court dealt, but the obligation of the second comer to make and keep up the crossing at its own expense was neither denied nor questioned. In *Morris & E. R. Co. v. Newark Pass. Ry. Co.*, 51 N. J. Eq. 379, 29 Atl. 184, the question of compensation does not seem to have been considered. The case relates to the right of the street railway to cross the tracks of the steam railroad,—a thing not in dispute here; but it does not touch upon the obligation of the intersecting road to make and maintain the necessary crossing,—the precise thing that is in dispute here. The same observation is applicable to the case of *Lynn & B. R. Co. v. Boston & L. R. Corp.*, 114 Mass. 88. In *Brooklyn Cent. & J. R. Co. v. Brooklyn City R. Co.*, 33 Barb. 420, and *New York & H. R. Co. v. Forty-Second St. & G. St. Ferry R. Co.*, 50 Barb. 309, nothing more was decided than that the mere crossing of the tracks of one railroad by the tracks of another on a city street furnished no ground for the first comer to claim damages from the second; and consequently they do not concern this controversy, which is limited to the other element of damage,—the cost of constructing and maintaining appropriate crossing appliances.

The common-law doctrine that whatever structures are necessary for the crossing of an old way by a new way must be erected and maintained at the expense of the party under whose authority and direction the crossing is made is applicable to railways and railroads which intersect each other upon the public streets of a city, unless that doctrine be modified by statute. Outside of statutory provisions,—and there are none such in this state,—there is neither precedent nor authority for requiring the owner of the subsisting way to contribute

any part of the expense rendered necessary to enable the owner of the new way to cross the old way. The crossing of the old way is made for the benefit of the second comer, and not for the benefit of the owner of the old way; and, even though both occupants claim under licenses from the same municipality, common justice dictates that the one for whose exclusive benefit the crossing is made should defray the expense of constructing it. And as the continuance of the crossing is as much for his benefit as was the construction of it in the first instance, it is equally obvious that he should maintain it wholly at his own cost. That is all the decree appealed against determined, and that is all the steam railroad insists on.

There is included in the proposition just stated the following corollary, viz.: That the engineer of the railroad company shall have the right to say when and in what manner and to what extent repairs or renewals shall be made, and, that if they are not made by the street railway company, they may be constructed at its expense by the steam railroad company. As it is the duty of the street railway company to keep the crossing in repair, so that it may be used not only by itself, but by the steam road, whose tracks the crossing in some measure interrupts, and as the steam road requires more durable and substantial construction than a street railway needs, it is altogether reasonable and proper that the decision of the questions as to when, in what manner, and to what extent the repairs ought to be made should be left to the engineer of the steam railroad company.

Nothing said in this judgment is to be understood as justifying the demand made by the steam railroad company that the street railway company must pay one-half of the cost of safety gates or other similar appliances required under an exercise of the police power for the protection of the public at the crossing. Such appliances it is the duty of the steam railroad company to supply. *Mayor, etc., v. Cowen*, 88 Md. 454, 41 Atl. 900, 71 Am. St. Rep. 433.

This case does not present the question decided in *Kirby v. Railway Co.*, 48 Md. 168, 30 Am. Rep. 455. That was a contest between the city of Baltimore, in fact, though in the name of its contractors, and the street railway company, with reference to the right of the city to interfere temporarily with the tracks of the company, so that a sewer might be laid in the bed of the street; and none of the principles applicable to the crossing of one way by a new way were involved.

Interpreting the decree in the way we have, there is no error to be found in it, and it will accordingly be affirmed. Decree affirmed, with costs above and below.

SCHMUCKER, J., dissents as to the proposition that the street railway company must keep the crossing in repair at its own expense.

KRUEGER *v.* CHICAGO & A. RY. CO.

(*Court of Appeals at Kansas City, Mo., May 5, 1902.*)

[68 S. W. Rep. 220.]

Damages—Evidence That Plaintiff Had Learned a Trade.

Where, in an action for injuries, no special damages are alleged, evidence that plaintiff had been employed in earning money before the injuries, and that he had learned a trade, was inadmissible to enhance his damages.

Ejection of Trespasser from Moving Train*—Authority of Brakeman.

Where brakemen on freight trains commonly eject trespassers from trains with the approval of the officers of the road, the road is liable for the act of a brakeman in forcing a trespasser to jump from a moving train.

Same—Same—Instructions.

In an action for injuries sustained by a trespasser on a freight train by his ejection from the train by a brakeman, it was in issue whether brakemen were in the habit of ejecting trespassers with the approval of the railroad, so as to render it a part of their duty, and the court instructed on the general proposition whether plaintiff was forced from the train by the brakeman while acting within the scope of his authority, but the instruction was not accompanied by one based on the evidence that such service was habitually performed: *held* error, as the question whether the brakeman's duty arose from habitual performance was not submitted.

Appeal from circuit court, Jackson county; Edward P. Gates, Judge.

Action by Otto Krueger against the Chicago & Alton Railway Company. From a judgment for plaintiff, defendant appeals. Reversed.

Charles B. Adams, Wash Adams, and F. Houston, for appellant.

Reed & Reed, for respondent.

LOGGINS *v.* SOUTHERN RY.

(*Supreme Court of South Carolina, June 25, 1902.*)

[42 S. E. Rep. 163.]

Carriers—Authority of Conductors—Arrest of Disorderly Passengers.

Where a passenger on a train has acted disorderly and boisterous, and, after being put off, threw rocks at the conductor and the cars, the conductor has the right, under Gen. St. § 1718, giving him the power of a constable, to arrest him without a warrant, and detain him until he can turn him over to the proper authorities, though at the time of his arrest he was acting in an orderly manner.

*See note, 2 R. R. R. 431, 25 Am. & Eng. R. Cas., N. S., 431. See also, *Bolin v. Chicago, etc., Ry. Co. (Wis.)*, 19 Am. & Eng. R. Cas., N. S., 735, and note at end of case; *Fagg v. Louisville & N. R. Co. (Ky.)*, 22 Am. & Eng. R. Cas., N. S., 171; *Illinois Cent. Ry. Co. v. West (Ky.)*, 21 Am. & Eng. R. Cas., N. S., 239; *Johnson v. Chicago, etc., Ry. Co. (Iowa)*, 1 R. R. R. 504, 24 Am. & Eng. R. Cas., N. S., 504.

Loggins v. Southern Ry

Appeal from common pleas circuit court of Anderson county; Townsend, Judge.

Action by James Loggins against the Southern Railway. Judgment for plaintiff. Defendant appeals. Reversed.

T. P. Cothran, for appellant.

E. G. McAdams and Tribble & Prince, for appellee.

POPE, J. Briefly stated, the action instituted by the plaintiff sought to make the defendant responsible in \$2,000 for the alleged unlawful arrest and imprisonment of the plaintiff on the 10th day of November, 1900, on the defendant's passenger coaches, while such coaches were transporting passengers for hire between the stations on said railway at Seneca, S. C., and Richland, S. C., through the conductor of said train, who "wantonly, wickedly, and without just cause assaulted plaintiff, and with force and intimidation restrained plaintiff of his liberty." The answer of the defendant justified the conduct of its conductor in arresting the plaintiff while in its passenger coaches, alleging that the plaintiff, "while under the influence of liquor, behaved in a most outrageous and boisterous manner, shouting and cursing in the presence of ladies and other passengers; that the conductor approached plaintiff and warned him to desist, but he cursed and shouted all the more, when the conductor, as in duty bound, stopped the train and put him off." The cause came on for trial before his honor Judge Townsend and a jury in October, 1901. The verdict was for plaintiff for the sum of \$100. After judgment was entered up, the defendant appealed on the following grounds:

"(1) The presiding judge erred in charging the jury as follows: 'In the argument there was something said about rocks,—assaulting the conductor. If you were to find that the plaintiff was put off of the train under the charge of disorderly conduct, and he assaulted the conductor outside of his train, the conductor did not have the common-law powers to arrest him outside of the train; and, if the conductor went back in his train, the conductor would not have the right to arrest him for that rock-throwing out there, if he were quiet and peaceable; but if he went back in the train, and the conductor had a reasonable apprehension that he was about to commit a breach of the peace again, then he would have the right to take him into custody and detain him until he could turn him over to a magistrate or the proper officer of the law.' The error consisting in this: The act of 1898 (22 St. at Large, p. 776) gives to a conductor on board his train the common-law powers of a constable to make arrests. By the common law, constables had authority to arrest without a warrant those who were engaged in an affray or a breach of the peace committed in their presence. If, therefore, the plaintiff assaulted the conductor,—the former being on the ground, and the latter on the platform, as the testimony

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tended to show,—the conductor had the right, without warrant, to arrest the plaintiff, either while the latter was on the ground, or after he boarded the train, whether he were at that time peaceable and quiet or not.

“(2) The testimony tended to show that the plaintiff was put off the train for disorderly conduct. While on the ground, as the train moved off, he threw rocks at the train, and struck the conductor, the latter standing on the platform. The train was stopped for the purpose of apprehending the plaintiff. The plaintiff again boarded the train, and was arrested by the conductor while seated in the car. Under these circumstances, the conductor had the right, without warrant, to arrest the plaintiff; and the circuit judge erred in charging to the contrary.

“(3) The presiding judge erred in refusing the defendant's fourth request to charge, as follows: ‘If the jury believe from the evidence that the plaintiff committed an assault upon the conductor, or that he injured a railroad car in the conductor's presence, the latter had a right to arrest him without warrant.’ The said request containing a sound proposition of law applicable to the case. If the assault were committed upon the conductor, it was a breach of the peace in his view; if he threw rocks at and injured the car, it was also a breach of the peace, under 22 St. at Large, p. 777,—for either of which the conductor could arrest without warrant.

“(4) The presiding judge erred in the following: Defendant's attorney stated: ‘I think the court has indicated that he [plaintiff] could not be arrested for throwing rocks,—for making the assault upon the conductor.’ The court replied: ‘Yes, sir; I charged that. He would have to have a warrant to arrest him for assault, if he got back on the train and was quiet, and was not committing a breach of the peace, or was not about to commit a breach of the peace.’ The error being the same as specified in exception 1.

“(5) The presiding judge erred in refusing the defendant's first request to charge, as follows: ‘If the jury believe from the evidence that plaintiff was in a grossly intoxicated condition upon defendant's train on November 10, 1900, and conducted himself in a disorderly manner, or that he used obscene or profane language, accompanied with disorderly conduct, at such time and place, in view of the conductor of said train, the latter had the right, without warrant, to arrest him and have him turned over to a magistrate or other proper authorities for trial as soon as practicable.’ Such conduct constituted an offense for which, under the circumstances, the conductor could arrest without warrant.

“(6) The presiding judge erred in not charging the defendant's second request to charge, which was as follows: ‘If the jury believe from the evidence that the plaintiff was guilty of disorderly conduct, to the terror of passengers upon de-

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defendant's train, on November 10, 1900, the conductor of said train had the right, without warrant, to arrest him and have him turned over to the proper authorities for trial as soon as possible.' Under section 26 of the Criminal Code, such conduct was a breach of the peace, for which the plaintiff was liable, and for which the conductor had the authority to arrest without warrant.

"(7) The presiding judge erred in charging plaintiff's tenth request, which was as follows: 'That under section 1718, Gen. St., conductors are authorized to eject passengers who shall be guilty of disorderly conduct, or for using any obscene or grossly profane language to the annoyance of passengers; and if the jury find from the evidence that the conductor undertook and did arrest plaintiff and deprive him of his liberty, and have him incarcerated, without warrant, the defendant company is liable for damages.' Thus withdrawing from the consideration of the jury the right of the conductor to arrest the plaintiff without warrant for a breach of the peace committed in his view.

"(8) The presiding judge erred in modifying the defendant's fifth request to charge, which was as follows: 'If the jury believe from the evidence that the conductor rightfully expelled the plaintiff from the train, and that he willfully returned to the train, he was then violating the law, and was subject to arrest without a warrant.' The modification was: 'I charge you that, with the addition of these words: "Provided that such violation of law was a breach of the peace, or tended to a breach of the peace, or gave the conductor, at the time the arrest was made, reasonable apprehension that the peace was about to be broken."' The error consisted in this: The law which authorized the conductor to eject a disorderly passenger implies the right to keep him off. His act in willfully boarding the train again after his ejection, as matter of law, is a breach of the peace, subjecting him to arrest for disorderly conduct.

"(9) The presiding judge erred in charging the jury that if, after his ejection, the plaintiff boarded the train again without permission, he could not be arrested without a warrant, if he was at that time quiet and well behaved, for the reasons stated in the preceding exception, and for the further reason that such rule, if declared to be the law, would neutralize the effect of the statute allowing the conductor to eject disorderly passengers."

The laws of this commonwealth subject railway companies to a high degree of responsibility in the protection of the persons of passengers. This responsibility does not cease in the protection of the persons of passengers. It extends likewise to their freedom from blackguardism from other passengers. Ruffians are not to be allowed on the trains to use blasphemous and disorderly conduct in the presence of passengers. This being true as to the measure of the responsibility of railway companies to their passengers, it is nothing

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but right and proper to expect that the legislature of this state will clothe railway companies with power to enforce good behavior in their trains. An examination of our statutory laws will show that this has been done. The compilation of the Civil Statutes by Mr. Townsend states the law thus, in sections 2173 and 2174:

"Sec. 2173. Conductors of railroad trains and station or depot agents are hereby declared to be conservators of the peace, and they and each of them shall have the common law power of constables to make arrests, except that the conductors shall only have such power on board of their respective trains and the agents at their respective places of business; and said conductors and agents may cause any person or persons so arrested by them to be detained and delivered to the proper authorities for trial as soon as practicable.

"Sec. 2174. When any passenger shall be guilty of disorderly conduct, or use any obscene or grossly profane language, to the annoyance and vexation of passengers, or play any game of cards or other game of chance for money or other valuable thing upon any railroad train, the conductor of such train is hereby authorized to stop his train at any place where such offense has been committed and eject such passenger from the train, using only such force as may be necessary to accomplish such removal, and may command the assistance of the employees of the railroad company or any of the passengers to assist in such removal."

The act of 1898 (22 St. at Large, p. 777) also provides: "Whoever willfully discharges any kind of firearms or throws any kind of missile at or into the engine or any car of a train, shall be guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not more than," etc. The circuit judge in his charge recognized the foregoing statutes of the state, but it is suggested by the appellant that he narrowed the provisions of the law when he required that the plaintiff, after being guilty of cursing and other disorderly conduct on the train, and was ejected by the conductor therefrom the train, and while the ejected passenger was on the ground, and while the conductor was on the platform of the car, struck the conductor by throwing a rock against him, and also rocked the train itself, could not be arrested therefor by the conductor without a warrant for his arrest. We cannot agree with the circuit judge. The plaintiff was not arrested until after, as a trespasser, he reappeared upon the train after his ejection therefrom by the conductor. The plaintiff was in flagrant violation of the law from the beginning of his conduct in the passenger coach until his arrest. He resisted his ejection from the car. He threw rocks at the conductor and at the passenger coach. He re-entered the car after his ejection by the conductor. There was no moment of all that time that he was not liable under the law to being arrested, without a warrant, by the conductor. Why, if a bystander were to throw rocks against a passenger coach in

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the presence of the conductor, under the law, such bystander could be arrested by the conductor without a warrant. By the terms of the act of 1898, which has become sections 2173 and 2174 of our Civil Statutes, the conductor is clothed with all the powers of constables under the common law to make arrests. That power under the common law to make arrests has received judicial construction in our courts, when it has been held as follows: "From time immemorial, constables and watchmen had authority, without warrant, to arrest those whom they saw engaged in an affray or breach of the peace, and to detain them until they should find proper securities." *City Council v. Payne*, 2 Nott & McC. 475, approved in *State v. Bowen*, 17 S. C. 58; *State v. Sims*, 16 S. C. 486. The law is above us all. We sustain this first exception.

As to the second exception, we may remark that it is controlled by our observations on the first exception, and it is sustained.

The third exception is governed by our previous rulings, and is sustained.

The fourth exception is likewise sustained, for the same reasons.

The circuit judge erred in not sustaining, as sound law, the first request of defendant, as set out in the fifth exception. No warrant was necessary to enable a conductor to arrest a person who was guilty of such conduct as is pointed out in the request. It is governed by sections 2173 and 2174 of our statutes. The fifth exception is sustained.

We also sustain exception 6. Very clearly, the law justifies an arrest without warrant in the case suggested in the exception.

Exception 7 is well founded. It was error for the circuit judge to charge the plaintiff's tenth request. The laws of our state, as we have already shown, authorize a conductor to eject a passenger who is guilty of the bad act indicated. There was no arrest made for such conduct. The plaintiff was arrested for a breach of the peace in the presence of the conductor. The charge should not have been made in the form it was.

As to the eighth exception and the ninth exception, we will consider them together. We cannot see how, after a breach of the law in the presence of a peace officer has been committed, the sudden return to good behavior by a passenger should deprive the conductor, who is acting as a constable under the common law, of the right to arrest without a warrant. It is the offense that will be punished. Proof that, after a man has already completed the commission of an offense, he suddenly returns to good behavior, is at best only a mitigation of the offense. These exceptions are sustained.

It is the judgment of this court that the judgment of the circuit court be reversed, and the action be recommitted to that court for a new trial.

JONES, J., concurs in the result.

GILLILAND *v.* MIDDLESEX & S. TRACTION CO.*(Court of Errors and Appeals of New Jersey, June 16, 1902.)*

[52 Atl. Rep. 693.]

Street Railroads—Injury to Prospective Passenger—Contributory Negligence.

Deceased and her sister went to defendant street railway company's track in front of their residence to take a car. Deceased returned for a wrap, and her sister signaled an approaching car to stop. As deceased returned, the sister called to her not to cross ahead of the car, which was but $1\frac{1}{2}$ car lengths away. It was night, and the car was brightly lighted and making considerable noise. Deceased attempted to cross ahead of the car, tripped over the first rail, fell, and was run over: *held* guilty of contributory negligence as a matter of law.

Collins, J., dissenting.

Error to supreme court. Action by Jesse P. Gilliland against the Middlesex & Somerset Traction Company. From a judgment against plaintiff, he brings error. Affirmed.

Alan H. Strong, for plaintiff in error.

Willard P. Voorhees, for defendant in error.

GUMMERE, C. J. This suit was brought to recover damages for the death of Theresa Gilliland, who was killed by being run over by one of the defendant's cars. The deceased lived with her father upon his farm, which fronted upon a public road over which the single-track electric railroad of the defendant company passed. On the evening of the accident, the deceased, with her sister Margureta, started from their father's house for the purpose of going to the city of New Brunswick by means of the trolley car. They walked from the house to the road, and across the tracks, to take the car, which was expected to leave about that time. The deceased then turned back to the house for the purpose of getting a collarette which she had forgotten, leaving her sister in the road by the side of the track. Before the deceased again reached the road, the car had come in sight, and her sister signaled to it to stop. It had a bright headlight upon it, its interior was lighted up, and the noise of its machinery was audible for a considerable distance. Almost immediately after signaling the car to stop, Margureta observed the decedent approaching, and called to her, "I will stop the car, Tess; don't come across," in a tone loud enough to be plainly heard by the deceased. The deceased, however, did not heed this warning, but attempted to cross the tracks, the car then being about $1\frac{1}{2}$ times its own length away from her. As she reached the first rail she tripped over it, fell down, and was run over and killed. Her fall was due to the fact that the tracks, at the point where she attempted to cross, were elevated some six inches above the surface of the highway. This was the case made by the plaintiff. The evidence submitted on the part of the defendant was directed to showing that the accident was not caused by any negligence on the

part of the company in the construction of its road or in the operation of its car. At the close of the testimony, the court below directed a verdict for the defendant, considering that the evidence showed conclusively that the decedent's death resulted solely from her own negligence, and that the defendant was blameless in the matter. Error is assigned upon this direction; the contention of the plaintiff being that both the question of the defendant's negligence, and that of the decedent, should have been left to the jury.

Without considering whether the nonnegligence of the defendant was conclusively shown, we think that there is no doubt as to that of the decedent. She must have known that the car was approaching. Even if she had neglected to observe it herself, her sister's warning told her of the fact. Notwithstanding this knowledge, she took the risk of crossing before it. In the case of *Fitzhenry v. Traction Co.*, 64 N. J. Law, 679, 46 Atl. 698, this court, discussing a question somewhat similar to the one now under consideration, said, "When the plaintiff attempted to cross defendant's tracks as she did, either in front of a car which she saw, or by rushing heedlessly into danger without looking, she acted in such entire disregard of her duty that there is room but for one opinion, and that is that she was guilty of contributory negligence." In the case of *Brady v. Traction Co.*, 63 N. J. Law, 26, 42 Atl. 1054, the court says, "The testimony shows that the plaintiff, a boy about 9½ years old, ran across the avenue in front of the car, where he was hit by the northerly corner of the fender. He heard the gong of the car ringing, and saw the car coming, while he was still in a place of safety. Under these circumstances, there can be no doubt that, if he had been of full age, he would be chargeable with contributory negligence, and the only question is whether his youth should exonerate him from that charge. * * * The plaintiff saw the car approaching, and there was no element of danger which he did not perceive, or which a boy of his years was not capable of fully appreciating. He chose to run in front of the car, on his judgment that he could get across before it reached him, in spite of the evident danger of the attempt, and we think it should be held that he took the risk of failing in the effort which he designedly made." In the case of *Blaker's Ex'rs v. Receivers*, 30 N. J. Eq. 240, Vice Chancellor Van Fleet says, "A person intending to cross a [steam] railroad track is bound to look and listen for an approaching train; and if he sees or hears a train approaching, and then daringly assumes the hazard of attempting to cross in advance of it, and fails, he must bear the consequences of his folly." In the case of *Railroad Co. v. Houston*, 95 U. S. 702, 24 L. Ed. 542, it is said that if a person approaching a railroad crossing "saw a train coming, and yet undertook to cross the track instead of waiting for the train to pass, and was injured, the consequences of his mistake and temerity cannot be cast upon the

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company. If one chooses, in such a position, to take risks, he must bear the possible consequences of failure.' To the same effect is *Burnett v. Railroad Co.*, 61 N. J. Law, 373, 39 Atl. 663. Although the three cases last referred to were those of accidents which occurred at the crossing of a steam railroad, the principle upon which they rest is equally applicable in the case of persons attempting to cross in front of street railway cars, when the danger of doing so is apparent. In the case before us, when the decedent attempted to cross the defendant company's track the car which ran her down was only 1½ times its length away from her. The risk of injury in case she should happen to stumble and fall, and the motor-man should be unable to stop the car before it reached her, was manifest. It caused her sister to warn her against making the attempt. Notwithstanding the warning, notwithstanding the obviousness of the danger, she took the risk of crossing in safety, and the consequence of her failure must rest upon herself.

The judgment below should be affirmed.

COLLINS, J., dissenting.

AMORY v. WABASH R. Co.

(*Supreme Court of Michigan, April 22, 1902.*)

[90 N. W. Rep. 22.]

Carriers—Passenger's Baggage—Merchandise—Notice—Evidence.*

Where plaintiff had traveled over defendant's road for six years, carrying samples of merchandise in trunks different in style from the ordinary, and a witness testified that on the last of these trips the baggage master stated that plaintiff was a dress man, and that he had ladies' dresses, but the trunks were received as passenger's baggage, and some of the contents stolen, there was evidence from which the jury might infer knowledge on defendant's part as to the character of the contents, and a verdict for plaintiff will not be disturbed.

Error to circuit court, Wayne county; Joseph W. Donovan, Judge.

Action by William R. Amory against the Wabash Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

This is an action to recover the value of merchandise or samples, shipped by plaintiff as a passenger, and lost or stolen in transit. In the conduct of his business the past six or seven years, Wm. R. Amory, a ladies' tailor and milliner of Detroit, had been making semiannual visits to Paris, to secure the latest fashions, bringing back with him suits, single garments, and millinery. With these he made quarterly trips to St. Louis, Cincinnati, and Cleveland, and occasionally to Chicago, Pittsburg, and Toledo, where he exhibited the samples or models for the purpose of sale, or the taking of

*See monograph by Mr. Rose, 2 Am. & Eng. R. Cas., N. S., 1.

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orders for duplication. These goods were carried in trunks, originally procured in Paris, of which he had 10, of about the same size,—3 feet 5 inches long, 1 foot 11 inches wide, 2 feet 2½ inches high. On May 12, 1900, he started from Detroit for St. Louis, Mo., on one of his trips, with four employees, taking his entire stock of garments and millinery, of a total approximate value of \$10,015, packed in six trunks,— five of the same size, and one a little larger, with square top. These were sent to the Union Station baggage room by an omnibus line wagon about 12:30 p. m., receipted for by a porter, and placed upon a transfer truck, where they remained until checked and loaded on the 3:30 p. m. Wabash train for St. Louis. The party of five persons arrived at the depot about 3 o'clock, and, before boarding the train, Mr. Amory attended personally to the checking of the trunks, going to the baggage room and presenting to the Union Station baggage master five mileage books for their transportation. He said nothing to Baggage Master Jones, who checked the trunks, as to what they contained, and no inquiry was made. If plaintiff had notified Jones of the character and value of the contents of the trunks, or, if Jones knew that they contained merchandise, it would have been the duty of Jones, before consenting to check them, to require of Mr. Amory a shipping contract, or release, reading as follows: "In consideration that said company has consented to carry the property covered by this agreement upon its passenger trains, and for a rate based upon the valuation thereof hereinafter given, I agree that the value of said property does not exceed the sum stated, and that no claim beyond its value as herein stated shall be made against said company, or any of its connecting lines, on account of any injury to, or loss or destruction of, such property from any cause whatever." For six years Mr. Amory had been making trips with his trunks over this road, four times a year. Jones, the baggage master, had been employed by the defendant in that capacity during all this time. An employee of the omnibus line delivered the trunks, and testified that he said to the employees at the baggage room, to whom he delivered them, that he had six trunks of Mr. Amory, the ladies' tailor, Mr. McCormick, one of these men, testified that Mr. Jones said to him that "Mr. Amory was a dress man; he had ladies' dresses, and brought them over from Paris." The trunks had European baggage stamps on them. At the same time four empty hat boxes were sent with the trunks to the depot, to be sent by express, with the name, business, and address of Mr. Amory upon them. The testimony of Mr. Jones is evasive. When asked whether the trunks differed in any way from the ordinary run of trunks containing baggage, he replied, "Well, I took them to be personal property." Again, when asked if they differed in their general appearance from ordinary trunks, he replied, "Well, all I could see, some of them had canvas covers on." Again he said, "They were something like show baggage or family

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baggage; that is what I took them for." Upon arrival at the Southern Hotel, St. Louis, the following morning, one of the trunks was found to have been broken open, the contents disarranged, and goods to the amount of \$385 were missing. Verdict and judgment for plaintiff.

Thomas W. Parker (Alfred Russell, of counsel), for appellant.

E. T. Wood, for appellee.

GRANT, J. (after stating the facts). Counsel do not disagree as to the law of the case. The statute provides for compensation for transporting any passenger and his ordinary baggage, not exceeding in weight 150 pounds. Comp. Laws, § 6234, subd. 9. All the authorities agree that the baggage which a passenger is entitled to have carried is the articles which are necessary and requisite for his personal convenience. Story, Bailm. § 499. If a passenger ships merchandise in his trunk without notice to the railroad company, or knowledge on its part of the contents of the trunk, the company is not responsible for its loss. It is the duty of the passenger to give the carrier notice that his trunk contains merchandise, or things which cannot be included as baggage, unless the carrier has knowledge that the contents of the trunk are not baggage, but merchandise. Knowledge is equivalent to notice. The question, therefore, is, in this case, was there any probative testimony from which a jury could infer that Mr. Jones, the agent of the defendant, knew that these trunks contained merchandise? We think this question must be answered in the affirmative. If the jury believed Mr. McCormick, Mr. Jones did know that Mr. Amory's trunks contained merchandise, and that he was transporting such merchandise for business purposes. Were it not for the testimony of Mr. McCormick, the question would be more doubtful. But, in connection with that, the fact that Mr. Amory had traveled over this road so often for several years, using these same trunks; that they were delivered by an employee of the omnibus line as the trunks of Mr. Amory, the ladies' tailor; that Mr. Jones knew Mr. Amory and his business, and the large and uniform size of the trunks,—were competent for the jury to consider in connection with Mr. McCormick's testimony in determining Jones' knowledge of the character of the contents of the trunks. *Sloman v. Railroad Co.*, 67 N. Y. 208; *Jacobs v. Tutt* (C. C.) 33 Fed. 412; *Railroad Co. v. Swift*, 12 Wall. 262, 20 L. Ed. 423; 2 Fetter, Carr. Pass. § 606; *Ft. Worth & R. G. R. Co. v. I. B. Rosenthal Millinery Co.* (Tex. Civ. App.) 29 S. W. 196; *Oakes v. Railroad Co.*, 20 Or. 392, 26 Pac. 230, 12 L. R. A. 318, 23 Am. St. Rep. 126. See, also, *Railway Co. v. Hochstim*, 67 Ill. App. 514.

Judgment is affirmed.

LONG, J., did not sit. The other justices concurred.

INTERNATIONAL & G. N. R. CO. *v.* PHILLIPS.*(Court of Civil Appeals of Texas, May 8, 1902.)*

[69 S. W. Rep. 107.]

Carriers—Negligence—Injury to Passenger—Instructions.*

A passenger was injured by the window of a car falling on his fingers, and in an action for the injuries it was shown that the car had left a place of general inspection; that it was a new one, and that the window was supplied with proper catches, but that the window was not raised above the catches; and that it is sometimes difficult to raise windows above catches on new cars: *held*, that the evidence was sufficient to sustain a verdict for plaintiff.

Appeal from district court, Houston county; John Young Gooch, Judge.

Action by H. J. Phillips against the International & Great Northern Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

N. A. Stedman, John M. Moore, and G. H. Gould, for appellant.

Adams & Adams, for appellee.

CROSBY *et al.* *v.* PERE MARQUETTE R. CO.*(Supreme Court of Michigan, June 27, 1902.)*

[91 N. W. Rep. 125.]

Carriers—Failure to Transport—Action for Penalty—Parties.

Under 2 Comp. Laws 1897, § 6235, providing a penalty, to be recovered by the party aggrieved, in case of refusal of a carrier to take and transport a passenger or property, the shipper, and not a connecting carrier to whom freight is consigned, is the party to sue for the penalty.

Error to circuit court, Muskegon county; Fred J. Russell, Judge.

Action by Edward S. Crosby and another against the Pere Marquette Railroad Company. Judgment for defendant. Plaintiffs bring error. Affirmed.

William Carpenter, for appellants.

Smith, Nims, Hoyt & Erwin (F. W. Stevens, of counsel), for appellee.

MONTGOMERY, J. This is an action to recover the penalty prescribed by 2 Comp. Laws 1897, § 6235, which reads as follows: "Every such corporation shall furnish sufficient accommodation for the transportation of all such passengers and property as shall, within a reasonable time previous thereto, offer or be offered for transportation at the place of starting and the junctions of other railroads, and at siding and at stopping places established for discharging and

*See generally, note appended to *Herbert v. St. Paul City Ry. Co.* (Minn.), 3 R. R. R. 152, 26 Am. & Eng. R. Cas., N. S., 152.

receiving way passengers and freight; and shall take, transport and discharge such passengers and property at, from and to such places, on the due payment of toll, freight or fare, legally authorized therefor; and every such corporation shall transport merchandise, wood, lumber and other property and persons from the various stations upon said road, without partiality or favor, when not otherwise directed by the owner of said property, and with a practicable dispatch, and in the order in which such freight and property shall have been received, under a penalty for each violation of this provision, of one hundred dollars, to be recovered by the party aggrieved, in an action of debt against such corporation: provided, that perishable or explosive freight and property shall have the preference over all other classes of merchandise. In case of the refusal by such corporation or agents so to take and transport any such passenger or property, as aforesaid, or to deliver the same, or either of them, without a legal or just excuse for such default, such corporation shall pay to the party aggrieved all damages which shall be sustained thereby, with costs of suit, or the penalty prescribed in this section, at the election of the party aggrieved." The declaration avers, in the first count, that plaintiffs are copartners doing business under the firm name of Crosby Transportation Company, and operating a line of steamboats carrying goods and merchandise for hire from the cities of Muskegon and Grand Haven, in the state of Michigan, to the city of Milwaukee, in the state of Wisconsin. It then avers the duty of defendant to furnish accommodation for the transportation of property offered for transportation, and to transport the same with all practicable dispatch, without partiality or discrimination, under a penalty of \$100. It next avers that on the 26th day of August, 1901, one Charles F. Hale, of Shelby, Mich., within a reasonable time previous to the starting of defendant's train, offered to defendant's agent at its station at Shelby one car of fruit, consigned to the Crosby Transportation Company, at Muskegon, Mich., and offered to prepay the freight, but that defendant's agent, without legal or just excuse, refused to receive the car load of fruit, and that by reason thereof, and by force of the statute, "an action has accrued to the plaintiffs, who were the parties aggrieved by the said refusal, for the recovery of the penalty named in the statute." The second count is general, alleging that defendant exercised partiality in accepting at its station at Shelby a car load of fruit to be delivered to the Goodrich Transportation Company, at Muskegon, and refusing to accept a certain other car load of fruit to be delivered to the plaintiffs, contrary to the form of the statute, by reason whereof "an action has accrued to the plaintiffs (they being the parties aggrieved) to recover from the defendant the penalty named in said statute," etc.

The case presents numerous interesting questions. But the question which meets us at the threshold of the case is

whether the plaintiffs occupy such a relation to this proposed shipment of goods as entitled them to maintain this action. It is not averred that the fruit was the property of the plaintiffs, or that they had any interest therein other than the prospective profits which they might have earned as common carriers had the freight been shipped to them. This calls for a construction of the terms of the statute, which confine the recovery of the penalty to the "party aggrieved." It will be noted that the penalty fixed is "a penalty for each violation of this provision, to be recovered by the party aggrieved." The penalty arises "in case of the refusal by such corporation or agents to take and transmit any such passenger or property, or to deliver the same, without legal or just excuse for such default." It would be an enlargement of this statute to hold that more than a single penalty was contemplated. A penal statute is not to be enlarged by construction. It would seem clear that the one offering the goods for shipment, or his principal, if he be an agent, would be a party aggrieved, within the terms of this statute. He is the person who, either on his own behalf or on behalf of the owner, has sought to invoke the service. It is his right which is, in the first instance, violated. Can it be said, then, that the plaintiff, having no further interest than as common carriers, prepared to perform a service in case the freight was shipped and reached the point of connection with their line, have suffered a legal injury, such as excludes the right of the shipper to recover, and transfers the cause of action to them? We think not. A somewhat similar question was presented in *St. Louis & T. R. Packet Co. v. Missouri Pac. Ry. Co.*, 35 Mo. App. 272. In that case plaintiff was a common carrier. Goods had been consigned to the plaintiff's agent. Instead of delivering the goods to the plaintiff's agent, they were delivered to another carrier, and plaintiff thereby lost the freight which it would have earned. It was held that the plaintiff had no such interest in the contract between the shipper and the first carrier as entitled it to maintain an action. It was said. "The rule which enables one to sue upon a contract made for his benefit does not, in its very nature, include cases where the contract is made for the benefit of the main contracting parties." So in the case of *Lafaye v. Harris*, 13 La. Ann. 553, under a statute which broadly declared that "every act whatever of man, that causes damage to another, obliges him by whose fault it happened to repair it," it was held that the refusal of a common carrier to take goods consigned to the plaintiff was a violation of the obligation to the shipper, and not to the consignee, and that an action for damages by the consignee will not lie in such a case. A case which furnishes persuasive authority in the present is the case of *Hadley v. Telegraph Co.*, 115 Ind. 191, 15 N. E. 845. In that case the court had before it for construction a statute which, in respect to the prohibition of discrimination, is singularly like the

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statute under consideration in this case. It provided that telegraph messages should be received during the usual office hours, whether from other telegraph lines or from individuals, and should be transmitted upon the usual terms, with impartiality and in good faith, and in the order of time in which they were received. It also prohibited discrimination in rates charged, and in the manner or conditions of service, between any of its patrons. A third section provided that any person or company violating the provisions of the act should be liable "to any party aggrieved" in a penalty of \$100 for each offense. It was contended that the expression "any party aggrieved" was broad enough to include as well the person to whom or corporation to which the dispatch was directed, when aggrieved by a noncompliance with the requirements of the act, as to the sender of the dispatch. The court applied the well-understood rule that, in construing a statute authorizing the recovery of a penalty, a strict, rather than a liberal, construction ought to be given to its provisions; and, while conceding that the fixed penalty is imposed for a breach of a duty which telegraph companies owe to the public generally, and not as damages for the nonperformance of a contract to properly transmit a dispatch, the court says that nevertheless "such a breach of duty cannot arise until after the telegraph company has either entered to a contract, or has become obligated to transmit the dispatch," and holds that the primary object of the statute was to protect the interests of patrons, by preventing discrimination between them, and that the person to whom a dispatch is sent cannot become a party aggrieved, in the sense contemplated by the act under consideration; adding, "Any other construction might result in a multiplicity of suits to recover the same penalty." Our statute more clearly excludes the consignee, for not only is a single penalty provided for each violation, but the damages are given to "the party aggrieved," while under the Indiana statute "any party aggrieved" might recover the penalty.

Having reached the conclusion that the plaintiffs are not entitled to recover the penalty under this statute, it would be premature to discuss the other questions involved in the case. The circuit judge having directed a verdict for the defendant, the judgment will be affirmed, with costs.

LONG, J., did not sit. The other justices concurred.

ECCLES et al. v. MISSOURI PAC. RY. CO.

(*Supreme Court of Missouri, Division No. 1, May 21, 1902.*)

[68 S. W. Rep. 1041.]

Appellate Jurisdiction—Transfer of Cause.

Where in an action against a carrier the amount in dispute is less than \$4,500, and no construction of either the state or federal constitution is

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involved, and the validity of no treaty, statute, or authority exercised under the law of the United States is questioned, the supreme court is without jurisdiction.

Appeal from St. Louis circuit court; Franklin Ferris, Judge.

Action by Robert Eccles and others against the Missouri Pacific Railway Company. There was a judgment in favor of plaintiffs, and defendant appeals. Transferred to the St. Louis court of appeals.

Martin L. Clardy and Henry G. Herbel, for appellant.

G. H. Ten Broek, L. C. Spooner, and J. M. Holmes, for respondents.

MACDONALD *et al.* v. GRAND TRUNK RY. CO.

(*Supreme Court of New Hampshire, Coos, June 3, 1902.*)

[52 Atl. Rep. 982.]

Loss of Freight—Limiting Liability—Conclusiveness of Foreign Judgment.

Where goods shipped from Scotland to Canada, under a bill of lading exempting the carrier from loss by fire resulting from its negligence, were destroyed by fire resulting from defendant's negligence, while being transported across the state of New Hampshire, a judgment on the merits, in an action for such loss instituted and litigated to its conclusion in a Canadian court of general jurisdiction having jurisdiction of the parties, was a conclusive defense to a subsequent action for the same loss instituted in New Hampshire, regardless of whether the stipulation against liability was void or not under the laws of New Hampshire.

Transferred from superior court.

Action by John F. MacDonald & Co. against the Grand Trunk Railway Company. Transferred to supreme court. Judgment for defendants.

Case to recover the value of goods destroyed by fire, through the defendants' negligence, while in their possession as common carriers. The pleadings and facts agreed by the parties were as follows: The goods in question were shipped upon the Allan steamship "Sarmatian," at Glasgow, Scotland, under a bill of lading which was made a part of the case, for transportation to Toronto, Canada. The goods were received by the defendants at Portland, Me., for transportation upon the terms of the original bill of lading. While in transportation across this state, they were destroyed by fire resulting from a collision caused by the defendants' negligence. The goods were insured with the Mannheim Insurance Company, which has paid the plaintiffs, MacDonald & Co., their value, \$2,469.50. Prior to the commencement of this action, the consignees, who are residents of Toronto, and the insurance company, brought suit before the high court of justice in the dominion of Canada, against the defendants, in which the present plaintiffs claimed to recover of the present defendants for the loss of the goods in question; and in that action, after

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hearing, judgment was rendered in favor of the defendants. The high court of justice is a court of record of general jurisdiction. It had jurisdiction of the parties to the action and of the subject-matter of the case, and the judgment rendered was a judgment upon the merits of the issue presented, and is not reversed. The defendants pleaded the judgment in bar of this action, and also pleaded that, by the terms of the bill of lading, they were protected from liability for loss from fire, whether due to their own negligence or otherwise, and from liability for any loss which could be covered by insurance. The pleadings and record in the suit referred to were made a part of the case.

Matthews & Sawyer, for plaintiffs.

Clarence A. Hight, L. Leroy Hight, and Chamberlin & Rich, for defendants.

PARSONS, J. The plaintiffs, prior to the commencement of this suit, voluntarily submitted the claim which they now make against the defendants—their right to damages for the negligent destruction of their property while in the hands of the defendants as common carriers—to a judicial tribunal established by the government of which they were citizens, and to whose decrees they owe obedience. The tribunal to which they appealed was a court of record of general jurisdiction; it had jurisdiction of the parties and of the subject-matter of the controversy. Both parties appeared and were heard; the plaintiffs had full opportunity to present such matters of fact, and to argue such propositions of law, as they deemed essential to their case. The judgment was upon the merits, and against the plaintiffs. It is not claimed that, by any erroneous ruling of the court, the plaintiffs were prevented from fully and fairly presenting their case. Nor is it suggested that the court erred in its decision of the legal question which the parties considered decisive of their rights. No accident or mistake on the part of the plaintiffs in the presentation of their case is suggested. Fraud is not charged. It is apparent that, if the plaintiffs' claims had been sustained in Canada, the defendants would have been bound by the result, and would have been compelled to satisfy any judgment that might there have been obtained against them. Is there any reason why the plaintiffs, having compelled the defendants to litigate the claim made by them in this suit before a tribunal of their own selection, and having suffered defeat without fraud, accident, or mistake, and after a fair hearing as full as they care to make it, by the results of which the defendants were necessarily bound, should not also be everywhere bound by the judicial determination which they invoked, and be estopped from presenting before any other tribunal the claim once judicially decided against them? The judgment in Canada was final, and is not reversed. It is conclusive against the plaintiffs in their own country. As an expression of the will of the sovereign to whom their allegiance

is due, they owe obedience thereto abroad as well as at home. Upon every ground of natural right and justice, it would seem that they should be debarred from invading the courts of another country to retry a controversy settled against them at home.

Against the binding effect upon the plaintiffs here of the judgment in Canada, it is urged that, in this court, that judgment is a foreign judgment. "It is universally agreed that the laws of a state have, *ex proprio vigore*, no extraterritorial force." *Crippen v. Loughton*, 69 N. H. 540, 549, 44 Atl. 538, 541, 46 L. R. A. 467, 76 Am. St. Rep. 192; *Smith v. Godfrey*, 28 N. H. 379, 381, 382, 61 Am. Dec. 617. But the courts of the state are open to others besides our own citizens. Pub. St. c. 216, § 1. And the controversies our courts are called upon to determine are not limited to those which arise within this sovereignty or under its laws. The substance and effect of foreign laws are, therefore, subjects of frequent consideration. "There is, perhaps, no general principle of law better established than that the validity of a contract is to be decided by the law of the place where the contract is made. If valid there, it is valid elsewhere; but if void or illegal by the law of the place where made, it is void everywhere. * * * But there are some exceptions to this rule, and among them is this: that no nation is bound to recognize or enforce contracts which are injurious to its own interests, or to those of its own citizens, or which are in fraud of its laws." *Smith v. Godfrey*, 28 N. H. 379, 381. That the law of the country where a contract is made or to be executed is to be examined to ascertain what the agreement was which the parties made, is elementary. *Bank v. Howard* (N. H.) 51 Atl. 641; *Insurance Co. v. McKellar*, 68 N. H. 326, 328, 44 Atl. 516. "If there is a conflict between the *lex loci* and the *lex fori*, the former governs in torts, the same as in contracts, in respect to the legal effect and incidents of acts." *Beacham v. Portsmouth Bridge*, 68 N. H. 382, 40 Atl. 1066, 73 Am. St. Rep. 607. If there is no ground of action in the sovereignty where the tort is alleged to have occurred, there is none anywhere. *Leazotte v. Railroad Co.*, 70 N. H. 5, 6, 45 Atl. 1084. To ascertain the rights resulting from acts done or omitted, attention must be paid to the circumstances under which the events took place; and one of the governing circumstances is the law of the place which characterizes the act. It is sometimes said that in such circumstances the courts of one country out of comity give effect to the laws of another (*Smith v. Godfrey*, *supra*); but a more exact view has been taken. "When the courts of one country consider the laws of another, in which any contract has been made, * * * in construing its meaning, or ascertaining its existence, they can hardly be said to act from courtesy or *ex comitate*; for it is of the essence of the subject-matter to ascertain the meaning of the parties, and that they did solemnly bind themselves; and it

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is clear that you must presume them to have intended what the law of the country sanctions or supposes; it is equally clear that their adopting the forms and solemnities which that law prescribes shows their intention to bind themselves,—nay, more, it is the only safe criterion of their having entertained such an intention. Therefore, the courts of the country where the question arises resort to the law of the country where the contract was made, not *ex comitate*, but *ex debito justitiae*, and in order to explicate their own jurisdiction by discovering that which they are in quest of, and which alone they are in quest of,—the meaning and intent of the parties.” *Warrender v. Warrender*, 2 Clark & F. 488, 530. In like manner, when a right is claimed upon acts occurring in another country, courts look to the law of that country not to extend the binding force of a foreign law beyond the territorial limits of the sovereignty to which it belongs, but to ascertain whether the right claimed exists or not. It is not the foreign law, but the rights acquired under it, which are enforced by the courts of another country. And this is true whether the question be one of contract, tort, or status. As the will of the sovereign expressed in general law can of itself have no extraterritorial force, the same will expressed in concrete form in a judgment between two suitors can have no greater effect. A plaintiff cannot here have execution upon a foreign judgment, nor a successful defendant have execution for costs, in the absence of legislative direction to that effect. The question is not of the enforcement of the foreign judgment, but it is, what are the rights of the parties? The particular law declared by the judgment is evidence of the rights now in controversy, as would be the general law if the dispute related to matters to which it applied which had not passed into judgment.

The plaintiffs, MacDonald & Co., contracted with the Allan Steamship Company for the transportation of certain goods from Glasgow, Scotland, to Toronto, Canada. One of the stipulations of the written contract, called the bill of lading, provided that the carriers should not be liable for loss from fire even if resulting from their own negligence. The goods were delivered to the Grand Trunk Railway Company in Portland, Me., who accepted them upon the terms of the original bill of lading. While in transport across this state, the goods were destroyed by fire through the negligence of the defendant railroad. The claim in this suit is that the stipulation releasing the carrier from liability for loss through negligence is void by the law of this state, and that, as the loss occurred through the defendants’ tort in this state, the plaintiffs can maintain an action for the value of the goods. Assuming this claim to be sound without examination, and that upon the occurrence of the loss the plaintiffs had a valid claim against the defendants for the amount of it, it does not necessarily follow that they can now maintain an action

for it. By contract subsequently made in Canada, they could have released the defendants from liability. By an arbitration, and award against them, their claim might be destroyed. Had either event taken place in Canada, the question would be: Was the contract, or arbitration and award, valid by the laws of Canada? The action for the tort being transitory, the Canadian court had jurisdiction of the claim, and to determine, if required, the law of New Hampshire, which apparently was the law of the case. *Hughes v. Railroad Co. (Pa.)* 51 Atl. 990. The fact that the defense set up is a legal adjudication, instead of a contract of release, or arbitration and award, does not alter the legal question, which, in respect to the legal effect and incidents of the acts of the parties, is determined by the law of the place. It is conceded that the judgment was upon the merits, is final, valid, and unreversed, and that, by the law of Canada, it conclusively establishes the defendants' right to protection against further litigation of the same claim. This right, resulting from the plaintiffs' acts, is not limited by territorial lines, nor destroyed by the plaintiffs' selection of another sovereignty as the place for the renewal of litigation. This right of the defendants depends, not upon the extraterritorial force of the Canadian judgment, but: (1) Upon the "universal law of justice, * * * which binds one to submit to a final decision resulting from his own acts" (*Fisher v. Fielding*, 67 Conn. 91, 34 Atl. 714, 32 L. R. A. 236, 52 Am. St. Rep. 270, dissenting opinion, *Hamersley, J.*, page 132, 67 Conn., page 718, 34 Atl.; *Schibsby v. Westenholz*, L. R. 6 Q. B. 155, 161; *Williams v. Jones*, 13 Mees. & W. 628, 633. The principle is that of a voluntary submission to arbitration. *Erle, C. J.*, *Barber v. Lamb*, 8 C. B. [N. S.] 95, 99); (2) upon the plaintiffs' obligation of obedience to the government of which they are citizens; "for it is a part of the original contract entered into by all mankind who partake of the benefits of society, to submit in all points to the municipal constitutions and local ordinances of the state of which each individual is a member" (3 Bl. Comm. 158); and (3) upon the fundamental principle of the common law, that a matter once litigated and determined before a court of competent jurisdiction shall not again be controverted before any court. "The law as laid down in the *Duchess of Kingston's Case* (11 How. St. Tr. 261) seems to be the law to-day; that a judgment of a court of competent jurisdiction directly upon the point involved is, as a plea, a bar; as evidence, conclusive." *Railroad Co. v. McHenry* (C. C. A.) 17 Fed. 414, 417.

"The maxim, '*Interest reipublicæ ut sit finis litium*,' is not restricted in its application to controversies or suits originating in the state before whose courts it is invoked. It does not rest on the excellence of any particular system of jurisprudence. It governs wherever the parties come, in the last resort, before a court constituted under an orderly establishment of

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legal procedure. No one who has been, or could have been, heard upon a disputed claim, in a cause, to which he was duly made a party, pending before a competent judicial tribunal having jurisdiction over him, proceeding in due course of justice, and not misled by the fraud of the other party, should be allowed, after a final judgment has been pronounced, to renew the contest in another country. The object of courts is hardly less to put an end to contests than to decide them fairly." *Fisher v. Fielding*, 67 Conn. 91, 110, 34 Atl. 714, 32 L. R. A. 236, 52 Am. St. Rep. 270. The case from which this quotation is taken was a suit in Connecticut to recover the amount of an English judgment rendered by default, service having been made upon the defendant while temporarily in England. By the majority of the court, the English judgment was held conclusive. Hamersley, J., dissented solely upon the ground that by a default the matter in controversy was not *res judicata* in the sense that it had in fact been submitted by the parties to a court, and heard and determined. The following is from the dissenting opinion in the same case (pages 130, 131, 67 Conn., page 724, 34 Atl.): "The principle, broadly stated, is this: A claim once submitted by the parties to a court of competent jurisdiction, fully heard, determined, and decided by that court, shall not thereafter be controverted between the same parties. This principle is entirely distinct from the right given by law to a party to a judgment to ask the state to exercise its sovereign power in compelling obedience to that judgment. It is simply a principle of jurisprudence, firmly established in our municipal law, and based on considerations so general in their application, so clearly equitable and essential in any administration of justice, that it may fairly be called a universal principle of jurisprudence. This principle does not, and from its very nature cannot, depend upon the particular court whose judicial action has been invoked, so long as its jurisdiction is competent, and its judgment final. It applies wherever the parties have so submitted their claims to a final decision by a court of competent jurisdiction, whether that court be inferior or superior, of law or equity, domestic or foreign. * * * Whether we call this law a rule of comity of nations, is immaterial to the matter in hand. It is a part of our law, and derives its force from that fact; and foreign laws, as conclusive evidence of the legal effect of acts done under them, are received, by virtue of our law, with the vital qualification stated by Story,—'unless they are repugnant to its policy or prejudicial to its interest.' * * * In assuming that the real obligations of the parties are controlled by the fact that they arose or were undertaken with reference to the law prevailing where their acts were done, our courts do not assume to execute a foreign law, although the obligation they enforce as legal under our own law may also find its source in the command of a foreign sovereign; they treat the foreign law as a fact essential, in connection with other facts, to

ascertain what the parties really meant by what they have done; and if, in receiving and weighing such fact, they may also theoretically enforce the will of a foreign sovereign, it is only as an incident to the exercise of the judicial power vested in the courts, and does not offend the sovereignty of the state where such law may be proved as a fact."

It is urged that a foreign judgment, though admissible in evidence, is not conclusive, but is merely *prima facie* evidence. Support for this proposition is to be found in early English cases and dicta where the judgment is offered as evidence of debt in an action to recover the amount found due by the former judgment. In *Phillips v. Hunter* (1795) 2 H. Bl. 402, 410, a distinction was made by Lord Chief Justice Eyre between cases where a judgment was brought before an English court, upon the application of a successful party, to enforce and obtain the fruits of it against the defendant, and those cases where the defendant sets up the foreign judgment as a bar to a new suit with reference to the former subject-matter. "It is in one way only," he said, "that the sentence or judgment of the court of a foreign state is examinable in our courts, and that is, when the party who claims the benefit of it applies to our courts to enforce it. * * * In all other cases, we give entire faith and credit to the sentences of foreign courts, and consider them as conclusive upon us." The latter statement does not appear to have been questioned in England. *Burrows v. Jemino*, 2 Strange, 733; *Boucher v. Lawson*, Hardw. Cas. temp. 85, 87, 89; *Barber v. Lamb*, 8 C. B. (N. S.) 95; *Ricardo v. Garcias*, 12 Clark & F. 368. The distinction has, however, been abandoned, and foreign judgments are not now held examinable there to the extent suggested by Chief Justice Eyre. *Bank v. Nias*, 16 Adol. & E. 717; *Scott v. Pilkington*, 2 Best & S. 11; *Godard v. Gray*, L. R. 6 Q. B. 139.

At the time of the Revolution, it appears to have been understood, as the law of England, that a judgment offered as evidence of a debt, in an action by the plaintiff to obtain its fruit, was merely *prima facie* evidence, and examinable upon the merits. *Hilton v. Guyot*, 159 U. S. 113, 187, 16 Sup. Ct. 139, 40 L. Ed. 95. This view was followed by the early American cases, among which is the case of *Robinson v. Prescott*, 4 N. H. 450, and to this view is to be ascribed the expressions found in *Bryant v. Ela*, Smith, 396, 404; *Thurber v. Blackbourne*, 1 N. H. 242, 243; *Taylor v. Barron*, 30 N. H. 78, 95, 64 Am. Dec. 281. The American cases, however, adopted in full the distinction made in *Phillips v. Hunter*, which, it is said by Story, "has been very frequently recognized as having a just foundation in international justice," upon the ground that where a defendant sets up a foreign judgment as a bar to the proceedings, "if it has been pronounced by a competent tribunal, and carried into effect, the losing party has no right to institute a new suit elsewhere, and

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thus to bring the matter again into controversy; and the other party is not to lose the protection which the foreign judgment gave him. It is then *res judicata*, which ought to be received as conclusive evidence of right; and the *exceptio rei judicatæ* under such circumstances is entitled to universal conclusiveness and respect." Story, *Conf. Laws*, § 598; 2 Kent, *Comm.* 120. See Bigelow, *Estop.* 196-203; *Freem. Judgm.* § 592; Black, *Judgm.* § 228; Dicey, *Conf. Laws*, 417.

It has been said that "all the American cases agreed that, where a foreign judgment comes incidentally in question, it is conclusive" (*Cummings v. Banks*, 2 Barb. 602, 605); and that "it is an established rule that a foreign judgment, when used by way of defense, is as conclusive to every intent as those of our own courts" (*Griswold v. Pitcairn*, 2 Conn. 85, 92). "Foreign judgments are never re-examined unless the aid of our courts is asked to carry them into effect by a direct suit upon the judgment. The foreign judgment is then held to be only *prima facie* evidence of the demand; but when it comes in collaterally, or the defendant relies upon it under the *exceptio rei judicatæ*, it is then received as conclusive." Kent, C. J., *Smith v. Lewis*, 3 Johns. 157, 169, 3 Am. Dec. 469; *Monroe v. Douglas*, 4 Sand. Ch. 126, 181; *Williams v. Preston*, 3 J. J. Marsh. 600, 20 Am. Dec. 179. The only American case apparently questioning the conclusiveness of a foreign judgment when offered as a defense which has been discovered is *Burnham v. Webster*, 1 Woodb. & M. 172, Fed. Cas. No. 2,179. The general expressions used by the distinguished author of the opinion in this case, if carried out, would render a foreign judgment of little value, and would, it has been said, "destroy the force and effect of judicial proceedings, and make the judgments of a foreign tribunal, no matter how high its rank, or how binding its decisions, within its own jurisdiction, of little greater effect than the original contract or promise sued upon." *McMullen v. Richie* (C. C.) 41 Fed. 502, 8 L. R. A. 268. But the precise point in the case to which the decision is expressly limited is not in opposition but in support of the general ground upon which, in such case, the foreign judgment has been held conclusive. In that case, in answer to a suit upon a promissory note, the defendant offered a judgment in a suit in New Brunswick, in which the plaintiff declared upon the note then in suit, with others, and had judgment only for the others. The plaintiff offered to prove that, before the former case was submitted to the jury, the note then in suit was by agreement withdrawn, and was not submitted to the jury, but by mistake the counts upon this note were not struck from the declaration before judgment. The evidence, if true and admissible, established that the former judgment was not an adjudication as to the note in suit, and the only point in fact decided was that the plaintiff could show what was in fact adjudicated in the former suit. *Hohner v. Gratz* (C. C.) 50 Fed. 369, is within the general exception

that rights under a foreign law will not be enforced to the injury of the citizens of the forum. The subject-matter and the parties in the two suits were different, and the principle of *res judicata* did not apply. *Dunstan v. Higgins* (N. Y.) 20 L. R. A. 677, note (s. c., 33 N. E. 729, 34 Am. St. Rep. 431).

Both upon reason and all the authorities, it is clear that a plea of former adjudication, except as a merger of a cause of action, is sustained by proof of such adjudication in a foreign as well as a domestic tribunal. The supreme court of the United States, by a bare majority, has considered that the effect to be given to a former judgment is determined by the treatment given our judgments in the courts of the country whose judgment is under consideration; that courts are required to do, not as justice and reason require, but as they are done by. *Hilton v. Guyot*, 159 U. S. 113, 16 Sup. Ct. 139, 40 L. Ed. 95. But this question does not arise in this case, because the courts of Ontario hold judgments of courts of the United States conclusive upon the merits. *Ritchie v. McMullen*, 159 U. S. 235, 16 Sup. Ct. 171, 40 L. Ed. 133; *Fowler v. Vail*, 27 U. C. C. P. 417, 4 Ont. App. 267. The contrary contention of the plaintiffs is founded upon earlier cases which are based upon a statute (23 Vict. c. 24, § 1) which was repealed by 39 Vict. (1875, 1876) c. 7. *Fowler v. Vail*, *supra*.

The effect of a foreign judgment upon the same subject-matter, as establishing the defense of *res judicata*, is the only question now involved. The tendency of the later American cases seems to be to follow the modern English doctrine as to foreign judgments generally. *Rankin v. Goddard*, 54 Me. 28, 89 Am. Dec. 718; *Id.*, 55 Me. 389; *Fisher v. Fielding*, 67 Conn. 91, 34 Atl. 714, 32 L. R. A. 236, 52 Am. St. Rep. 270; *Lazier v. Westcott*, 26 N. Y. 146, 82 Am. Dec. 404; *Dunstan v. Higgins*, 138 N. Y. 70, 33 N. E. 729, 20 L. R. A. 668, 34 Am. St. Rep. 431; *Baker v. Palmer*, 83 Ill. 568; *Roth v. Roth*, 104 Ill. 35, 44 Am. Rep. 81; *Hilton v. Guyot*, *supra*; *Ritchie v. McMullen*, *supra*; 5 Eng. R. Cas. 746; 1 Freem. Judgm. § 597. To what extent the doctrine of these cases is the law of this state, need not now be determined. It is stated as a fact agreed that the judgment pleaded was upon the merits of the issue presented. The issue presented in that case, as in this, was the defendants' liability for the destruction of the plaintiffs' property. It may be the fact was agreed to upon a different view by one of the parties, at least, as to what was the issue presented by the case. But, regardless of the agreed fact, it is apparent from the facts stated that the judgment was upon the merits, and was an adjudication of the plaintiffs' right to recover the damages claimed in this suit. The plaintiffs were not defeated because the action which they brought was not a legal remedy for the wrong claimed (*Kittredge v. Holt*, 58 N. H. 191), nor upon the ground that the form of their action was misconceived (*Meredith Mechanic Ass'n v. American Twist Drill Co.*, 67 N. H. 450, 39 Atl. 330), but upon the merits of their claim. The matter

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upon which they proceeded by their declaration, and which the defendants denied by their plea, was the defendants' liability for the loss complained of. This was the issue. *King v. Chase*, 15 N. H. 9, 41 Am. Dec. 694; *Metcalf v. Gilmore*, 63 N. H. 174. The decision of this question, when the same question as to the same goods is again raised, concludes all matters of fact or law which were or might have been proved or urged in support of or against the decision reached. *Metcalf v. Gilmore*, 63 N. H. 189.

If the plaintiffs, in the exigencies of their case as then presented, and in view of their claim that the question was determined by the Canadian statute, thought it wise not to offer proof of New Hampshire law, they must abide by the result so long as that judgment remains unreversed. If the result was due to accident, mistake, or misfortune, which is not claimed, the proper tribunal in which relief should be sought would seem to be the high court of justice of Ontario. A foreign law will not be given effect when it contravenes some established and important policy of the state of the forum, or would involve injustice and injury to the people, of the state whose courts are appealed to. *Minor*, *Confl. Laws*, 9; *Story*, *Confl. Laws*, § 38. It is urged that the policy of this state does not permit common carriers to release themselves from liability by negligence. Assuming this to be so, it only follows that, in rendering the judgment, a mistake was made as to the law of New Hampshire, which does not detract from the force of the judgment as an adjudication, especially when, as in this case, the court is led into error by the failure of the complaining parties to inform it as to the foreign law. *Godard v. Gray*, L. R. 6 Q. B. 139, 5 Eng. R. C. 726. A domestic judgment pleaded could not be answered by an averment that it was founded upon a mistaken admission of the parties as to the law. There is no reason why such an averment should avail against a foreign judgment. The plaintiffs are not citizens of this state. The defendants are sued here because found here. Their presence in this state is under our laws. In a sense, they are citizens here. Public policy, forbidding an application of the principles of comity toward the subjects or laws of a foreign country to the injury of our own citizens, would seem to require us to protect our own citizens from repeated suits upon the same matter. A citizen who has been compelled to litigate a matter in a foreign country, and take there the chance of an unfavorable decision, ought not to be again required to litigate the same question at home. No rule of public policy authorizes such a travesty upon fundamental principles of justice and law. Upon the question raised as to the validity of the contract releasing the defendants from liability for negligence, no opinion is expressed. The defendants' plea of former adjudication states a defense to this action. Upon the facts stated, they are entitled to judgment.

Judgment for the defendant. All concurred.

ST. LOUIS S. W. RY. CO. OF TEXAS *v.* CAMPBELL.*(Court of Civil Appeals of Texas, June 28, 1902.)*

[69 S. W. Rep. 451.]

Injury to Passenger—Degree of Care.*

Objection that a railroad company which carried plaintiff's wife and child in an unheated car in cold weather, without water, and compelled the wife to stand and hold the child, whereby they were made sick, was not required "to use that high degree of care which would have been exercised by very cautious, prudent, and competent persons under similar circumstances," was untenable.

Same—Duty to Ascertain That Train Stops at Destination.†

The mere fact that a railroad company receives a passenger on a train without protest, and that the passenger does not know that the train does not stop at the station for which he holds a ticket, does not entitle the passenger to damages, but he must also show that he exercised ordinary care to ascertain that the train was the proper train.

Appeal from district court, Hunt county; H. C. Connor, Judge.

Action by V. O. Campbell against the St. Louis Southwestern Railway Company of Texas. From a judgment for plaintiff, defendant appeals. Reversed.

E. B. Perkins, Geo. S. Perkins, and D. Upthegrove, for appellant.

Evans & Elder, for appellee.

LOUISVILLE & N. R. CO. *v.* MITCHELL.*(Supreme Court of Alabama, June 28, 1902.)*

[32 So. Rep. 735.]

Death by Wrongful Act—Wanton or Willful Injury—Pleading.

A complaint alleging that defendant's engineer wantonly or intentionally caused the death of plaintiff's intestate, in that he wantonly or intentionally ran the locomotive through the town rapidly and without warning, with knowledge that persons were, or would likely be, on the tracks, does not charge a wanton or willful injury, but mere negligence; as it does not show the engineer had actual knowledge of deceased's peril.

Trespasser—Person Walking on Track.‡

A person who goes on a railroad track, though in accordance with the custom of those living near it, to walk on it, without objection from the railroad company, is a trespasser.

Contributory Negligence—Crossing Track without Looking.

One who starts to cross a railroad track so near an approaching train, which he could have seen, that he is struck before he gets across, is guilty of contributory negligence.

*As to the degree of care required of carriers of passengers, see monograph appended to West Chicago St. R. Co. *v.* Tuerk (Ill.), 1 R. R. R. 1, 24 Am. & Eng. R. Cas., N. S., 1.

As to a carrier's of passengers duties with respect to vehicles, see monograph appended to Herbert *v.* St. Paul City Ry. Co. (Minn.), 3 R. R. R. 152, 26 Am. & Eng. R. Cas., N. S., 152.

†See Gulf, C. & S. F. Ry. Co. *v.* Moorman (Tex.), 11 Am. & Eng. R. Cas., N. S., 157, and note, 162 et seq.

‡See foot-note appended to Gulf, C. & S. F. Ry. Co. *v.* Matthews (Tex.), 1 R. R. R. 580, 24 Am. & Eng. R. Cas., N. S., 580.

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Appeal from circuit court, Jefferson county; A. A. Coleman, Judge.

Action by Sallie Mitchell, administratrix, against the Louisville & Nashville Railroad Company. Judgment for plaintiff. Defendant appeals. Reversed.

The complaint originally contained three counts, and a fourth count was added by amendment. On the trial of the cause, the court gave the affirmative charge for the defendant as to the first, second, and fourth counts of the complaint; and the cause was tried upon issues made up under the third count of the complaint. The averments of negligence as contained in the third count of the complaint are shown in the opinion.

The defendants demurred to the third count upon the following grounds: "First. For that said count is inconsistent and repugnant. Second. For that the said count avers that the defendant wantonly or intentionally caused the death of plaintiff's intestate, and then undertakes to state the facts under which the death was caused and said facts, so stated, fail to show wanton or intentional negligence. Third. For that it is not shown by the court that the plaintiff's intestate was lawfully upon defendant's track, and no facts are stated which show that the defendant owed any duty to plaintiff's intestate at the time and place of the alleged injury. Fourth. For that the facts, as alleged, that the defendant's agent or servant had knowledge or notice that persons were, or would likely be, upon the track of the said defendant, is not sufficient to charge the defendant with wanton or willful negligence in failing to see said persons or keep a lookout for them. Fifth. For that it appears by the count that the plaintiff's intestate was a trespasser upon the defendant's track, and the defendant owed no duty to the plaintiff's intestate to keep a lookout for him, nor is it averred or shown that the defendant knew, in time to stop the train and to prevent the accident to said intestate, that the said intestate was upon the track." This demurrer was overruled, to which ruling of the court the defendant duly excepted. Thereupon the defendants pleaded the general issue and several special pleas setting up the contributory negligence of the plaintiff.

Plaintiff demurred to the pleas setting up the contributory negligence of the plaintiff, upon the ground that such contributory negligence was no answer to the wantonness or intentional wrong as claimed in the third count of the complaint. These demurrers were sustained. The other facts of the case necessary to an understanding of the decision on the present appeal, are sufficiently shown in the opinion.

There were verdict and judgment for the plaintiff, assessing her damages at \$9,000.

Thos. G. & Chas. P. Jones, J. M. Falkner, and Walker, Tillman, Campbell & Porter, for appellant.

C. P. Beddow and Bowman & Harsh, for appellee.

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HARALSON, J. 1. Count 3 of the complaint was intended to be one for wantonness or willfulness, and was so treated on the trial. Against it, as a count of this character, a demurrer on several pertinent grounds was interposed, which was overruled.

The count alleges, that "defendant through its servant or agent in charge or control of said locomotive engine, wantonly or intentionally caused the death of plaintiff's intestate in the manner following, viz.: Said servant or agent, with knowledge or notice that numerous persons were or would likely be upon the tracks of said railroad in said town or village of Elmore, and would be in great peril of their lives from the rapid running of said engine through said town or village, without proper and sufficient warning or notice of the approach of said engine, wantonly or intentionally ran said engine through said town or village with great rapidity and without proper or sufficient warning or notice of the approach of said engine, and as a proximate consequence thereof, said engine ran upon or against plaintiff's said intestate in said town or village, and so injured him that he died."

While the count avers that the servant or agent of the company in charge of the engine wantonly or intentionally caused the death of plaintiff's intestate, it sets out in particularity in what the wantonness, and the intention to inflict the injury, consisted. The whole count must be construed together, and when so construed, the wantonness which in the first part of the count was averred in general terms, will be found to consist, if at all, in the facts particularly set up and relied on to show it. This averment of facts undertakes to point out specifically in what the wantonness, or intention of the servant or agent of the defendant to inflict the injury, consisted. Stripped of all unnecessary verbiage, the wanton or intentional act set up in this count is, that the engineer wantonly or intentionally ran said engine through said town or village, with great rapidity and without sufficient warning or notice of the approach of the engine," with knowledge or notice that numerous persons were or would likely be upon the tracks of said railroad—as a proximate consequence of which wanton or intentional act of running the engine rapidly, without proper or sufficient warning, the deceased was killed. This was not an averment of an intention to injure intestate, and, therefore, is not the equivalent of willfulness; nor is it an averment of a reckless disregard as to probable consequences, such as would make it wantonness on the part of the engineer.

In *Railroad Co. v. Martin*, 117 Ala. 382, 23 South. 237. it was said: "The mere intentional omission to perform a duty, or the intentional doing of an act contrary to duty, although such conduct be culpable and result in injury, without further averment, falls very far short of showing that the injury was intentionally or wantonly inflicted. Unless there was a pur-

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pose to inflict the injury, it cannot be said to be intentionally done; and unless an act is done, or omitted to be done, under circumstances and conditions known to the person, that his conduct is likely to, or probably will result in injury, and through reckless indifference to consequences, he consciously and intentionally does a wrongful act, or omits an act, the injury cannot be said to be wantonly inflicted." So, again, in *Railroad Co. v. Orr*, 121 Ala. 489, 26 South. 35, under a count which alleged that a train by which the killing was done, was, at the time, running at a dangerous rate of speed, through an incorporated city or across a public street, along which persons in large numbers were continually passing, and that no whistle was sounded or other danger signal given, and that the death of the intestate was the result of the carelessness, negligence and recklessness of the defendant, the court said: "The running of a train [under the conditions mentioned] does not necessarily involve an intention on the part of the trainmen to kill, or such reckless disregard of probable consequences as would amount to wantonness."

"It is only when the employees of the company operating the train fail to exercise reasonable care, to avoid injuring him, after the trespasser has been discovered and his peril of injury becomes apparent, that they are held to be guilty of wantonness or recklessness such as will overcome the contributory negligence of the trespasser." *Haley v. Railroad Co.*, 113 Ala. 649, 21 South. 360.

From this review of the count, it appears that it falls short of averring wantonness or willfulness in inflicting the injury complained of; that it charges no more than that the engineer wantonly or intentionally ran said engine through said town or village of Elmore, without proper or sufficient warning or notice of the approach of said engine, and is, therefore, no more than a count for mere negligence.

2. As to persons walking on or crossing a railroad track, it is held, that "the mere fact that persons living in the neighborhood of a railroad track have become accustomed to use it to walk upon (or across) without any objection on the part of the railroad company, does not in any manner alter or change the duty of the railroad company to such persons. They are simply trespassers" (*Glass v. Railroad Co.*, 94 Ala. 586, 10 South. 217); and "one who is injured in consequence of being negligently on a railroad track cannot recover, unless the railroad employees are guilty of such gross negligence or recklessness as amounts to wantonness or intention to inflict the injury; and that this wantonness and intention to do wrong can never be imputed to them, unless they actually know (not merely ought to know) the perilous position of the person on the track, and with such knowledge, fail to resort to every reasonable effort to avert disastrous consequences. And this doctrine applies to densely populated neighborhoods in the country, and to the streets of a town or city, as to the

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solitudes of the plains or forest." *Nave v. Railroad Co.*, 96 Ala. 267, 11 South. 391; *Railway Co. v. Lamb*, 124 Ala. 172, 26 South. 969; *Railroad Co. v. Robbins*, 124 Ala. 113, 27 South. 422, 82 Am. St. Rep. 153; *Railroad Co. v. Crawford*, 89 Ala. 240, 8 South. 243; *Railway Co. v. Foshee*, 125 Ala. 199, 27 South. 1006.

In the case last cited, after announcing the well understood doctrine, that it is the duty of a person approaching the track of a railway for the purpose of crossing it, to stop and look and listen if need be, for the approach of a train, and that the omission of this duty followed by injury in collision with a train, locomotive or car, while attempting thus heedlessly to cross over the track, is a matter of law negligence on the part of the person so contributing to the result, as to defeat his action counting on the injury as having been produced by the simple negligence of the company or its employees, the court states what seems to be axiomatic, that "It is not possible to conceive that any foot traveler need or could with the proper use of his senses ever go upon a railway in ignorance of the approach of a train sufficiently near to strike him before he crosses over it. No curve even in a deep cut that a train can be operated upon, can be so acute as to deprive him of the opportunity while standing beside the track, to refrain from attempting to cross in front of it."

3. The facts of this case without conflict are, that Elmore station is a village of about 300 inhabitants, and is not a scheduled station for the train that passed,—the fast mail. The crossing at which plaintiff's intestate was killed, was not a street or public thoroughfare. The public crossings, of which there were two, were above and below the depot, some 200 yards or more. The tracks of the railroad, running north and south at this point, were fenced; the fences opened by two gates, one on the east and the other on the west, and a pathway from one gate to the other ran across the railroad tracks, which path was used without objection on the part of the railroad company, so far as appears, by people, generally, of Elmore or from the country, who desired to go from one part of the village to the other, and was much frequented for such purposes. At no time was it used, so far as appears, as a matter of right but only for convenience without objection on the part of the railroad company. The train, as the evidence tends to show, ran through, at from 40 to 60 miles an hour, as estimated by different witnesses; that one coming in at the east gate, could see up the track, north, about half a mile, and not so far when outside of the gate; that there is a curve eastward in the track coming from the north, before reaching the depot, which curve was some 200 or 300 yards from the depot. Intestate approached the track from the east gate, and the evidence tends to show that he looked up the track north as he crossed the switch track,—which is a few feet away, on the east from the main line. One witness testified,

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that he told him to look out or the train would kill him, but intestate made no reply and went on and was caught and killed just before he got across the main line. There was no evidence that the engineer saw the deceased before the collision occurred, or knew that he was in proximity to the track.

Treating the third count, as we must, as one for simple negligence, and not for wantonness or intentional injury of the deceased, it is apparent that under the principles above stated, the plaintiff's intestate was guilty of negligence, which proximately contributed to his own death, and, on the case if tried upon such a count, the affirmative charge might have been properly given for defendant.

Reversed and remanded.

DOUGLASS *v.* OHIO RIVER R. CO.

(*Supreme Court of Appeals of West Virginia, June 7, 1902.*)

[41 S. E. Rep. 911.]

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Cattle Guards—Breach of Covenant to Maintain—Compensatory Damages.

Compensatory damages cannot be recovered of a railroad company for breach of a covenant to construct and maintain necessary cattle guards, where the landowner fences off his remaining land on both sides of the railroad right of way, and the land between such fences occupied by the right of way is not used for stock, and the division line between the land of the grantor and an adjoining owner is partly unfenced, so as to allow cattle to pass from the adjoining owner to the land occupied by the railroad, and it is not shown that cattle have passed along the railroad either way through the division line, and no damages are shown, unless it be, possibly, extra labor to attend cattle passing over a private crossing at the division line, no outlay being shown.

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Same—Same—Same.

Compensatory damages cannot be recovered of a railroad company for breach of a covenant to fence its track, when the land through which the railroad passes is used, not for stock, but only for cropping, and no damages are shown otherwise than omission by the owner to graze stock on the land because of his fear of possible injury to it from train, or loss of estimated profits by grazing over those from agriculture, which might have been realized if fences had been made.

Same—Same—Same—Limitation.

The statute of limitations will not bar an action against a railroad company upon a covenant in a right of way grant to build and maintain a crossing or fence, the action being merely for such failure; but, if actual damage result from such failure, then the statute will begin to run from the date of such damage, in an action for compensatory damages.

Same—Same—Same.

An action for compensatory damages cannot be sustained against a railroad company for failure to build fences or cattle guards under an agreement to do so, merely for such failure. There must be actual loss from such failure, as its proximate cause.

Same—Same—Speculative Damages.

Mere speculative and conjectural estimates of profits which might have been made, or of the loss of gains and profits which might have been made, are not a legitimate basis upon which to fix damages. *James v. Adams*, 8 W. Va. 569.

*Douglass v. Ohio River R. Co***Breach of Contract—Nominal Damages.**

Where a mere breach of contract is shown, without actual damage calling for compensation, nominal damages may be recovered from the mere fact of such breach of contract; but, if compensatory damages are demanded for actual damage, the plaintiff must in some way show by evidence facts and data affording means by which a jury can safely ascertain and fix the amount of damages. A jury cannot go by mere arbitrary conjecture or estimate. *Watts v. Railroad*, 19 S. E. 521, 39 W. Va. 196, 23 L. R. A. 674, 45 Am. St. Rep. 894; *Robinson v. Railroad Co.*, 21 S. E. 727, 40 W. Va. 583.

(Syllabus by the Court.)

Error from circuit court, Wood county; L. N. Tavenner, Judge.

Action by Hiram Douglass against the Ohio River Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed.

H. P. Camden, for plaintiff in error.

V. B. Archer and McLuer & McLuer, for defendant in error.

BRANNON, J. Hiram Douglass made a deed to the Ohio River Railroad Company, granting it a right of way through two tracts of land in Jackson county; and Douglass brought an action of covenant in the circuit court of Wood county against the company to recover damages for the breach of a number of covenants contained in said deed, and recovered a verdict and judgment against said company. There were propounded to the jury a number of special questions upon the trial, requiring the jury to respond to the claim of damages for each breach of covenant assigned in the declaration; and the jury having, in answer to such questions, allowed damages for only two breaches of covenant, or, rather, under two special questions, we have to consider only the matters touched by those two particular questions.

One of the tracts of land is referred to in the case as tract No. 1; the other, as tract No. 2. The right of way deed contained a clause requiring the company to "make and maintain all necessary cattle guards and crossings on the land," and the declaration averred a failure to make such cattle guards and crossing; and one of the special questions directed the jury, in case it should award damages for failure of the company to construct and maintain cattle guards at or near the Brownell line on tract No. 1, to specify what amount was allowed by the jury for such failure; and the jury answered this question by finding an allowance of \$466.66 for that failure. Can this finding be sustained? This tract No. 1 contained 315 acres. The railroad passed through it so as to leave about 295 acres on the east side of the track, and 20 acres on the west side. At the time of the construction of the road, tract No. 1 was in inclosure, and used for farming and grazing purposes; that part through which the railroad was made being through lands used for agricultural purposes. In 1886 Douglass built a fence clear through this tract from the Brownell line to the Wheatstone line, thus cutting off all his

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land on the west side of the railroad from it, all lying on the west side of the railroad, including his residence, barn, garden, and truck patch. After the date of the right of way deed mentioned above, Douglass made a second deed by which he conveyed another 60-foot strip of land running through the entire tract from the Brownell line to the Wheatstone line, binding on the right of way conveyed by his first deed on the east. The first deed (the one for the right of way) dates 8th January, 1885; the second deed, 17th August, 1886. The railroad was constructed in 1886 and 1887. This strip was conveyed for depot purposes, and upon it a depot and stock yard were used by the railroad company and the public. Plainly, it was the intention of Douglass and the railroad company that this strip of ground should lie open for the public use. Now, this strip of ground completely cut off the land of Douglass on the east side of the railroad from the railroad. It was the absolute property of the company. In conveying it, Douglass reserved only a private right of way over it at the Brownell line. On the east side of this strip Douglass laid off town lots, and sold some of them, thus manifesting a plain intent that this strip should be a public street; but, aside from this intention, his deed gave the company complete ownership and control over that strip. Douglass fenced off the balance of his land on the east side of the railroad, thus cutting it off from all of the balance of his land throughout its entire length. He put a gate in the fence on the east of the railroad strip. Thus he fenced off from the railroad all his land on the east and all his land on the west of the railroad, making a narrow tract of land between the two fences. At the Brownell line there was a division fence between the lands of Brownell and Douglass. When the railroad was built, cutting through this fence, there remained on the west side of the track about 15 feet of it, extending from the track to a public highway, where it connected with a broken-down fence. When the railroad was constructed, Douglass moved this 15 feet of fence away to a point 20 feet from its former place, and made it a part of the fence inclosing his dwelling house. The railroad did not touch the fence on its east side, nor that on its west side, only passing through that at the Brownell line. There were no cattle on the ground covered by the railroad and the 60-foot strip. There was no use for a cattle guard at the Brownell line, so far as any use of the land between the fences on the east and west sides of the railroad required. There could be no damage as to that from the want of a cattle stop at the Brownell line. There is no evidence whatever of any invasion of cattle from Brownell's land upon the land of Douglass, and he proved no damage from that source. Moreover, Douglass took away all the division fence between him and Brownell west of the track, and left a little of his land there uninclosed, and this would allow the passage of cattle. Considering the situation of the land, I see no evi-

dence of any damage to Douglass for the want of a cattle stop in the Brownell line from the construction of the road up to the bringing of the suit, because the lands of Douglass were cut off on both sides of the railroad, and the land between their fences was not used for stock, and needed no cattle guard. The situation of the land as made by Douglass himself, or, rather, its condition, dispensed with the need of a cattle guard in the Brownell line. What need of a cattle guard there? There were no cattle grazing on that part of the land of Douglass, and no damage from the invasion of it by stock from Brownell's land. And besides Douglass removed the division fence west of the railroad track, and thus left the land open, and a cattle guard on the Brownell line would not have stopped stock from going over that line. Where, then, is the actual damage as to the land between the fences of Douglass to the east and west of the railroad? A guard there was not required for the lands to the east and west, because they were cut off by fences. It may be that Douglass would be entitled to a guard in the line between him and Brownell if his land along the railroad were used for agricultural or grazing, but they are not; and we cannot say that a guard would be necessary there, owing to the use to which the land along the railroad was put, and the fact that the land which Douglass used was cut off by fences. As the right of way deed called for guards only where necessary, I do not see that a guard there is required, in the true spirit of the right of way deed. Douglass claims two cattle guards at this point. One of them must be in the Brownell line; the other, across the private crossing from the Brownell line. In no point of view can he demand this second guard, as a private crossing does not call for a cattle guard. *Clark v. Railroad Co.*, 39 W. Va. 732, 20 S. E. 696. Another reason against any claim for a cattle guard at this private crossing is that the 60-foot strip conveyed by Douglass to the company does not reserve any right to Douglass to make a wing fence across it up to any cattle guard. It cannot be contended for a moment that it was ever intended that a fence should obstruct that 60-foot strip. The prior right of way deed could not be used to affect the later deed for the 60-foot strip; but the question is whether the later deed does not modify the former, wherein the latter calls for a cattle stop at this point. We may say that Douglass would have a right to one cattle stop in the Brownell line to keep cattle from going into Brownell's land while being driven from land east of the railroad across the railroad to the west or back of it; but this could be but a mere nominal thing, for the reason that the cattle would have to have a man in charge to keep them from going upon the railroad track and this 60-foot strip.

As things have been since the construction of the railroad, I can see no damage recoverable for the want of a cattle stop in the Brownell line. Douglass gave no evidence of damage

for want of this stop, except a general statement of extra labor in passing cattle over the railroad; but he gave no statement of expenditures, or the number of cattle kept by him, or in what years,—in fact, no data of definite character by which to fix or measure damages,—and any estimate would be simply arbitrary. We might as well say \$500 as \$100. The evidence must furnish means of fixing the amount of injury, and measuring compensation for it. *Watts v. Railway Co.*, 39 W. Va. 196, 19 S. E. 521, 23 L. R. A. 674, 45 Am. St. Rep. 894; *Robinson v. Railroad Co.*, 40 W. Va. 583, 21 S. E. 727. The evidence afforded no ground for the allowance of compensatory damages for failure to make and maintain a cattle guard at the Brownell line. I notice that the sum found by the jury for the default of the company in this respect covers two cattle guards. Plainly, there was no right to a second cattle guard, and any allowance for it entering into the sum found would be erroneous, even if any could be allowed for one cattle guard. For want of evidence to form a basis for damages, mere arbitrary opinions seem to have been adopted.

Evidence of mere opinions of witnesses was given to show that such cattle guards were necessary. I do not think this was admissible. "If the facts can be placed before a jury, and they are of such nature that jurors generally are just as competent to form opinions in reference to them and draw inferences from them as witnesses, then the opinion of experts cannot be received in evidence as to such facts. The opinion of a witness who neither knows nor can know more about the subject than the jury, and who must draw his deduction from facts already in possession of the jury, is not admissible." It cannot be claimed that the evidence of Vosburg was admissible under the law above stated, found in *Overby v. Railway Co.*, 37 W. Va. 524, 16 S. E. 813. Vosburg's evidence was not admissible as an expert. Opinions of other witnesses as to necessity of cattle guards was not admissible. "The opinions of witnesses should never be received if all the facts can be ascertained and made intelligible to the jury, or if they are such as men in general are capable of comprehending and understanding." *State v. Musgrave*, 43 W. Va. 672, 28 S. E. 813; 1 *Greenl. Ev.* § 440; *Ferguson v. Hubbell*, 97 N. Y. 511, 49 Am. Rep. 544. Opinion is not competent upon the question whether a railroad should be fenced at a certain place. *Railway Co. v. Hale*, 93 Ind. 79. The evidence to sustain this claim was insufficient, under principles above stated, and the instructions specified in bill of exceptions No. 18 should have been given. The instructions specified in bill of exceptions 14 should not have been given.

The court refused an instruction found, in bill of exceptions 20, to the effect, that the deed for the 60-foot strip gave no right to Brownell for cattle guards, or wing fences from cattle guards, across said strip, and that Douglass had no right to build, or require the company to build, cattle guards and

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wing fences over said strip. The court refused to give it as asked, but added the words, "unless the jury believes that same or part thereof was provided for in agreement sued upon, and that said agreement is in force and effect in such respect." The addition is erroneous. That second deed spoke for itself. Its construction was for the court, not the jury. The whole instruction, as given, seems to allow the jury to consider oral evidence to find whether the requirement of cattle guards in the first deed was still in force, whereas whether it had been done away with by the second deed was a question for the court. The court told the jury by this instruction that, if the second deed did not provide for cattle guards and wing fences, they could consider the first deed on the question whether Douglass had a right to build cattle guards and wing fences over the said 60-foot strip. Surely he had not such right, because the second deed gave absolute title to the company to that strip, and it could not be thus invaded by Douglass. Douglass reserved nothing from that strip but a crossing, and that exception shows that there was no other right reserved to Douglass. He could not close it by a fence, or require the company to do so. He had no title left him in that strip. The first deed could not detract from the later deed without some exception in that later deed.

The defendant asked an instruction that cattle guards are such contrivances as will prevent cattle from passing along the right of way into or out of an improved and fenced field, and their purpose is to prevent cattle from passing into and out of improved and fenced fields along the right of way, and that, if cattle guards would not have prevented cattle from entering or coming out of the improved fields of Douglass on tract No. 1 from the time the road was built to the institution of the suit, the jury should find for the defendant as to cattle guards referred to in the special question. The court refused this instruction asked, and added the words, "and that the plaintiff sustained no damages for want of same." This addition is erroneous. If the cattle guards would not have prevented the passage of cattle, how could damage result from the want of cattle guards? If damage cannot be attributed to the defendant's fault, how can he be chargeable? If two gates are open, through either of which cattle can pass, does the fault of keeping one open solely and alone cause the loss? This instruction bore on the question, also, whether the cattle guard was really necessary.

The defendant asked an instruction (found in bill of exceptions No. 22) that if the right of way and the 60-foot strip adjacent to the right of way through tract No. 1 were granted for station purposes, and fenced off from the adjoining land of Douglass on both sides of the track by fences on the division lines between the company and Douglass on the east and west sides of the track from Brownell's line to Wheatstone's line, on the east side of the track, and through the

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length of the inclosure of Douglass on the west side, and if such fences were insufficient from the time they were built down to the suit to prevent cattle from going from the right of way upon the inclosed land of Douglass, and to prevent cattle from coming out of his inclosed land onto the right of way, then cattle guards were not necessary at or near the Brownell line or the Wheatstone line, so long as said fences were there. The court refused to give the instruction in the form asked, but modified it by the addition, "and if the jury further believe that the parties agreed upon a crossing at Brownell, but did not agree upon any cattle guards at Brownell line." There was no evidence that there was any agreement for cattle guards at that particular point. The question was whether, under the right of way, in the condition in which the land then was, a cattle guard was really necessary, and whether Douglass had a right to cattle guards after his second deed conveying the 60-foot strip to the company, and whether after an agreement (which the evidence tended to establish) that there was to be a street along the east side of the depot grounds bounding town lots which Douglass sold, the parties could have contemplated that the land was to be closed or incumbered with fences and cattle guards. The modification is objectionable on the score that there was no evidence to show any agreement such as that mentioned in the modification. The court may have meant to put to the jury the question whether the first deed did not create an agreement for cattle guards, but if so, that question was a legal question, not to be left to the jury. Furthermore, surely the right of way deed gave only one cattle guard at that point, and did not give another cattle guard across the crossing from the Brownell line. And it seems to me that if the fences named in the instruction were sufficient up to the date of the suit to prevent cattle from passing, as put by the instruction, there could be no damage, except merely nominal damages, even though there were an agreement to build cattle stops. If there were no damage, how could there be a recovery? If those fences were sufficient for the purposes stated, as long as they stood the cattle stops were not necessary. Cattle stops are to prevent actual damage. I think the instruction should have been given in the form asked. In any view, the modification could not apply to a second cattle stop at the private crossing.

I do not think the action was barred by limitation, because the contract was continuous,—to build and maintain cattle stops. The jury found \$633.33 damages for the failure of the company to construct fences and undercrossing on tract No. 2. The deed for right of way bound the company to build and maintain fences on both sides of the railroad, and also make an undercrossing. The company contends that the suit is barred by limitation. I do not think so, because the duty was both to build and maintain fences, that being a never-

ending duty. I do not see how the court can say that the act of construction is a distinct act, and because that, viewed singly, would be barred, the company would only be liable for failure to maintain the fences,—only the cost of maintenance. We cannot separate construction from maintenance, and say that only the duty of maintenance is beyond the statute of limitation. Maintenance of a fence cannot be accomplished unless the fence has been constructed. The one duty goes along with the other, and we will not separate them. But I do not see that omission to make fences or cattle guards, alone, calls for any damage,—certainly not for compensatory damages. If there could be an action for nominal damages simply for such omission, as I suppose there can be, I do not see how it would be barred under a covenant to build and maintain them; but, when actual loss occurs from that omission as the proximate cause, limitation runs from the date of the loss, as to compensatory damages, and the date of the construction of the road, or when the fences or guards should have been made, is immaterial.

We think that the plaintiff showed only a right to nominal damages, not compensatory damages, because he showed no actual loss from the omission to build and maintain fences and crossings,—no loss computable in law. The fencing and crossing were only for use if the land was used for grazing. It had no grass upon it. The plaintiff neither put cattle upon it, nor appears to have had any cattle to put upon it. He used it every year for grain. He had no fencing on two sides of the field. It very plainly appears that he really did not desire to use the land for grazing. Why does it so appear? Because, though the company did build fences three years before this suit began,—good fences, as the plaintiff admits,—he did not put a hoof of stock upon the land, but kept on cropping it. His whole action shows that, as the land was first-class Ohio river bottom land, he preferred to use it for grain. As he had no cattle there, how did he suffer any loss, and where is the justice of paying him damages when he showed no loss? If he had had cattle there, they could have got water from Mill creek and a drain on the land. He drained and tiled the land for agricultural purposes. The company, it is true, did not comply with the letter of its bond, and is liable to nominal damages. Such failure of duty will not alone give right to compensatory damages. There must be both a broken duty, and an actual loss therefrom,—a computable loss, a measurable loss, not one merely conjectural, or that can be guessed at. "If the company fails to perform an agreement to fence, and animals are killed by reason thereof, the measure of damages is not what it would cost to erect the fence, but the value of the animals killed or injured, or other damage done; or, in other words, the company will be liable for all damages which proximately flow from its failure to perform its contract duty." 3 Elliott, R. R. § 1188.

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There must be actual damage done, to warrant compensatory damages. 12 Am. & Eng. Enc. Law, 1073.

Douglass made profits from this land every year by cropping. Evidence was admitted to prove that by grazing the land he could have made a certain sum more yearly than by graining the land. This evidence was improper and unavailing, because it proposed an improper basis for an allowance of damages. Profits by grazing, or any other business to be carried on in future, are dependent on numerous contingencies, and any estimate of future profits can only be conjectural, speculative,—simply guesswork. This process of getting at damages is not allowed by law. *Beatty Lumber Co. v. W. U. Tel. Co.* (1902) 41 S. E. —, and cases there cited. The United States supreme court, in *Howard v. Manufacturing Co.*, 139 U. S. 199, 11 Sup. Ct. 500, 35 L. Ed. 147, held that expected profits from grinding wheat and selling its flour could not be taken into consideration in an action for failure to finish a mill at a time agreed upon.

Douglass claimed that he did not put cattle on the land from fear that they would be killed by trains. Loss from that cause would be purely conjectural. Such loss, though possible, cannot be considered where we have to assess damages as actual,—based on actual loss. The cattle might not have been hurt. If hurt, when hurt the company would have to pay their value. Shall we make it pay for cattle not hurt, not even on the premises? Again, the evidence discloses no certain criterion for assessment of damage. A jury must have definite evidence by which to find a certain sum as compensation for actual loss, before it can render a verdict for compensatory damages. For a broken contract, merely, it can find nominal damages, but not compensatory; for the very term "compensatory damages" implies that there must be actual loss before compensation can be given, and there must be definite basis given by the evidence upon which a jury can define and fix the amount of the loss; otherwise any assessment is without law and against law. If the plaintiff cannot show such a basis, it is his misfortune; his evidence fails to show a loss of such substantial, tangible cast as that we can take hold of it, and weigh and fix it in dollars. A jury is never permitted to grope in the dark, and merely surmise, a proximate, or guess at damages. *Watts v. Railroad Co.*, 39 W. Va. 196, 19 S. E. 521, 23 L. R. A. 674, 45 Am. St. Rep. 894; *Guinn v. Railroad Co.*, 46 W. Va. 151, 33 S. E. 87, 76 Am. St. Rep. 806. Had any stock been killed for want of fences, or perished for want of a crossing, or if the plaintiff had shown any special actual loss, he could recover; but, as it is, where is his real loss? As there were no fences, we do not see that the want of a crossing could be a basis of damages, even if there had been cattle on the land. Therefore we are compelled to say that the evidence is not of that character to justify the verdict. It is against law, touching the measurement of damages.

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Under these principles, it was improper to allow Douglass to answer the question (given in bill of exceptions 5) as to what, in his judgment, had been his damages from the failure to fence the railroad right of way on tract 2, in view of its usefulness for grazing. This question called for mere opinion, and that not based on any facts by which damages could be measured. And the land was not used for grazing.

The evidence of Hardpole, excepted to in bill of exceptions 6, was improper. He was asked to say whether Douglass had been damaged, taking into consideration the usefulness of the land for grazing. The question called for mere arbitrary estimate, founded on no certain facts, and gauged by a test that did not exist, under the evidence in the case,—the use of the land for grazing.

It was error not to exclude evidence (specified in bill of exceptions 10) that Douglass was afraid to pasture cattle on the land because he was afraid that they would be killed by trains. I have above stated reasons against this evidence.

The instruction given for the plaintiff noted in bill of exceptions 16 was improper. It told the jury that, if Douglass was prevented from pasturing stock by reason of the company's failure to fence and make an undercrossing for stock, the plaintiff was entitled to recover such damages as the jury might believe from the evidence the plaintiff had sustained. No evidence presented a foundation for this instruction. What prevented him from pasturing the land? If he had done so, and had suffered loss, then there could be recovery. As he did not so use the land, there is no rule or principle by which to fix damages, except by guess. And besides, the instruction combined both the failure to fence and make a crossing in the estimation of damages, and thus give damages for both, whereas, there being no fences, the absence of a crossing could not be an element in fixing damages. And the instruction ignores the fact that Douglass did, after the grant of the right of way, convey to another company the lower part of the tract, where the crossing was to be, reserving no right to cross.

The instruction given for the plaintiff preserved in bill of exception 17 told the jury that, if the company failed to make the fences and crossing, that fact alone called for such damages as the jury might believe from the evidence had been sustained by the plaintiff. The instruction was improper. The mere failure to make a fence and crossing, alone, without attendant loss, ascertainable from some certain principle or basis, and not from mere guess, would not legally call for damages. On principles above stated, the instruction was improper.

The court refused an instruction (given in bill of exceptions 23) to the effect that as the plaintiff had conveyed to another company a portion of the lower part of tract No. 2, not reserving the right to cross over said portion to get to an undercrossing on the lower end of the track, it was not nec-

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essary, after such conveyance, for the company to keep an undercrossing on the lower end of the tract, but the company might abandon and fill up the crossings from the time of such conveyance. The court modified it to the effect that it was not necessary to keep open the undercrossing on that portion of the lower end of the tract conveyed to the other railroad company. I hardly think this instruction was proper. It depends on the question whether, in fact, the call for such crossing was limited to the part sold. This depends upon the nature of the tract of land. I do not see that the call for the crossing was limited to the small piece of land conveyed away by Douglass. I do not see that his failure to reserve a passage over that piece to a crossing elsewhere would absolve the company from maintaining a crossing elsewhere. The company claims that it commenced to make a crossing under the grade on this piece, and Douglass objected to its being made there, and that this absolved the company from further duty to make a crossing elsewhere. It does not seem so to me. What mattered it to the company where the crossing was unless a change of location would entail unreasonable expense? Wherever Douglass elected to have the crossing, he would be bound by such election.

For these reasons, we reverse the judgment, set aside the general and special verdicts, and remand the case for new trial.

BUDGE v. MORGAN'S L. & T. R. & S. S. Co.

(Supreme Court of Louisiana, Feb. 17, 1902.)

[32 S. E. Rep. 535.]

Care Required of Master—Appliances.

Masters are not insurers. They are liable to their servants for the consequences, not of danger, but of negligence; and negligence, in cases where the servant is injured by reason of defective appliances, consists of the failure of the master to exercise due care that the appliances furnished for the use of his servants shall be safe when furnished, and shall be maintained in a safe condition.

Same—Same—Maintenance—Inspection.

Whatever may be the duty of the master as to the methods to be adopted for ascertaining originally whether the appliances so furnished are suitable and safe, due care requires him, especially in the use of dangerous appliances, or where the service in which they are used is dangerous, either by himself, or by some other, selected for the purpose,—in either case one competent and qualified,—to inspect and look after the condition of such appliances, and see that they are kept in repair.

Same—Same—Nonassignable Duties.

This duty is personal to the master, and must be continuously performed by him, or by those whom he selects to represent him; and he is liable for its neglect, whether by his representatives or by himself, the danger resulting therefrom not being assumed by his servants as incidental to their employment.

Same—Inspection of Foreign Cars—Assumption of Risk.*

A railroad company drawing the cars of another company over its

*See notes at end of case.

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road owes a duty to its employees in reference thereto. It is bound to inspect such cars, the same as its own, and is responsible for the consequences of such defects as would have been disclosed by ordinary inspection, as it is its duty either to remedy them or to refuse to take the cars. The employee no more assumes the risks of such defects than of those in the cars belonging to his employer.

Same—Car Inspectors—Experts.

Men without scientific knowledge and without practical experience in the handling of moving cars and trains, who may be employed as car inspector, and charged with the duty of seeing that the parts and appliances of the cars are safe and sound and in their proper positions, do not thereby become qualified as experts in the matter of the causes which may operate to derail a car or to prevent its trucks from working properly.

Same—Same—Same.

It is a fair presumption that railroad companies have no desire to subject their employees to unnecessary risks, or, upon the other hand, to waste money by incumbering their cars with useless contrivances, but that they endeavor to obtain cars which, being the safest and most serviceable, costs the least money. When, therefore, an inspector, such as those above referred to, undertakes to decide that an appurtenance for which scientific knowledge has provided a particular place will discharge its function as well somewhere else, or that it may be dispensed with, he places himself in antagonism to the position to which his employer, with greater knowledge and greater interest, is already committed.

Same—Same—Same.

The opinions of car inspectors, not experts in the running of cars, do not prove that it is as safe to operate a freight car with a hanger pin out of its sockets and a nut missing from a bolt which holds a friction plate in position as if those parts were properly adjusted; and, as a matter of fact, it is not as safe, and it is negligence to tolerate a system of inspection which proceeds upon the contrary theory.

Excessive Verdict.

Verdict and judgment for \$12,500 for the loss of a leg amended by reducing the amount to \$6,000.

(Syllabus by the Court.)

Appeal from judicial district court, parish of St. Mary;
A. C. Allen, Judge.

Action by George Budge against the Morgan's Louisiana & Texas Railroad & Steamship Company. Judgment for plaintiff, and defendant appeals. Modified.

D. Caffery & Son, for appellant.

Foster, Milling, Godchaux & Sanders, for appellee.

NOTES.

DUTY OF RAILROAD COMPANIES, AS EMPLOYERS, TO FURNISH SAFE FOREIGN CARS.

I. General Rule.**A. Statements of General Rule.**

1. Care Required in Inspecting Company's Own Cars the Test.
2. Nonassignable Duty.
3. Duty Not Confined to Cars to Be Only Locally Handled.
4. Cars Switched from Another Road.
5. Absence of Obligation to Repair No Defense.
6. Possession for Only Brief Period No Defense.
7. Statutory Duty to Haul without Delay No Defense.

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8. Contract with Other Company Cannot Relieve from Liability.
9. Liability of Quarry Company to Its Employees.
- B. Illustrations.
 1. Negligence.
 - a. Injury to Brakeman—Defective Couplings.
 - b. Injury to Brakeman—Loose Bolt in Car Ladder.
 - c. Defective Handhold.
 - d. Defective Draw Bars.
 - e. Defective Brake Beam.
 - f. Absence of Bumpers.
 - g. Defective Stirrup.
 - h. Chargeable with Notice of Defects.
 - i. Borrowed Cars.
 - j. Condemned Cars—Tags.
 2. Absence of Negligence.
 - a. Defective Couplings—Statutory Duty to Haul.
 - b. Mismatched Couplings—Negligence of Fellow Servant.
 - c. Not Required to Have Only Cars of Same Height.
 - d. Defective Handhold.
 - e. Projection of Load.
- II. Limitations of and Exceptions to General Rule.
 1. Latent Defects.
 2. Reliance upon Apparent Good Condition of Car—Construction Tests Not Required.
 3. Need Not Investigate Method of Loading.
 4. Rule Not Applicable to Persons Unloading Cars on Their Sidings.
 5. Foreign and Domestic Cars—Comparison between Degrees of Care.
 6. Degree of Care Required Limited by Exigencies of Business.
 7. Appliances Need Not Be Most Approved.
 8. Negligence of Connecting Line before Delivery of Car Not Imputable to Company.
 9. Cars Loaded with Explosives—Duty to Warn Employees.
 10. Injury to Negligent Conductor.
 11. Ordinary Inspection Held Not Sufficient.
 12. Company's Duty Fulfilled by Employing Competent Inspectors.

I. GENERAL RULE.

A. STATEMENTS OF GENERAL RULE.

A railroad company is bound to inspect the cars of another company used by its road, just as it should inspect its own cars. It owes this duty as master, and is responsible for injuries to its employees resulting from such defects as could have been discovered by ordinary inspection. When cars come in from another road which have defects discernable by ordinary examination, it must either remedy such defects or refuse to take the cars.

United States.—Baltimore, etc., R. Co. v. Mackey, 157 U. S. 72, 15 Sup. Ct. 491; Felton v. Bullard, 37 C. C. A. 42, 94 Fed. 781, 42 Ohio L. J. 218, 14 Am. & Eng. R. Cas., N. S., 547; O'Neil v. St. Louis, Iron Mountain & Southern Ry. Co. (C. C.), 9 Fed. 337; Railroad Co. v. Meyers, 22 C. C. A. 268, 76 Fed. 443, 445; Texas & P. Ry. Co. v. Archibald, 170 U. S. 665, 18 Sup. Ct. 777.

Arkansas.—Railway Co. v. Gaines, 46 Ark. 555.

Colorado.—Denver, T. & Ft. W. R. Co. v. Smock, 23 Colo. 456, 48 Pac. 681.

Illinois.—Chicago, etc., R. Co. v. Armstrong, 62 Ill. App. 235; Chicago, etc., R. Co. v. Avery, 8 Ill. App. 133; Chicago & A. R. Co. v. Bragonier, 11 Brad. (Ill. App.) 516; Chicago, etc., R. Co. v. Gillison, 72 Ill. App. 207; Illinois Cent. R. Co. v. Barslow, 94 Ill. App. 206; Sack v. Dolese, 35 Ill. App. 636.

Indiana.—Chicago, St. L. & P. R. Co. v. Fry, 131 Ind. 319, 28 N. E. 989; Louisville, N. A. & C. R. Co. v. Bates, 45 N. E. 108, 146 Ind. 564.

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Kansas.—Atchison, etc., *R. Co. v. Penfold*, 57 Kan. 148, 45 Pac. 574; *Missouri Pac. R. Co. v. Barber*, 44 Kan. 612, 24 Pac. 969, 44 Am. & Eng. R. Cas. 523.

Kentucky.—Louisville, etc., *R. Co. v. Williams*, 95 Ky. 199, 24 S. W. 1, 44 Am. St. Rep. 214; *Louisville & N. R. Co. v. Veach* (Ky.), 46 S. W. 493.

Louisiana.—*Bomar v. Louisiana N. & S. R. Co.*, 42 La. Ann. 983, 8 So. 478.

Massachusetts.—*Bowers v. Connecticut River R. Co.*, 162 Mass. 312, 38 N. E. 508; *Mackin v. Railroad Co.*, 135 Mass. 201, 15 Am. & Eng. R. Cas. 196; *Spaulding v. W. N. Flynt Granite Co.*, 159 Mass. 587, 34 N. E. 1134.

Michigan.—*Smith v. Potter*, 46 Mich. 258, 9 N. W. 273, 41 Am. Rep. 161.

Minnesota.—*Fay v. Minneapolis, etc., R. Co.*, 30 Minn. 231, 15 N. W. 241, 11 Am. & Eng. R. Cas. 193; *Moon v. Northern Pac. R. Co.*, 46 Minn. 106, 48 N. W. 679, 24 Am. St. Rep. 194.

Mississippi.—*Illinois Cent. R. Co. v. Price*, 72 Miss. 862, 18 So. 415.

Missouri.—*Bender v. St. Louis, etc., R. Co.*, 137 Mo. 240, 37 S. W. 132; *Gutridge v. Missouri Pac. R. Co.*, 94 Mo. 468, 4 Am. St. Rep. 392, 7 S. W. 476; *Mateer v. Missouri Pac. R. Co.* (Mo. 1891), 15 S. W. 970.

Nebraska.—*Chicago, B. & Q. R. Co. v. Curtis*, 51 Neb. 442, 71 N. W. 42.

New York.—*Eaton v. New York Cent., etc., R. Co.*, 163 N. Y. 391, 57 N. E. 609, reversing 14 N. Y. App. Div. 20; *Goodrich v. New York Cent., etc., R. Co.*, 116 N. Y. 398, 22 N. E. 397, 15 Am. St. Rep. 410, 41 Am. & Eng. R. Cas. 259; *Gottlieb v. New York, etc., R. Co.*, 100 N. Y. 462, 3 N. E. 344, affirming 29 Hun (N. Y.) 637, 24 Am. & Eng. R. Cas. 421; *Jones v. Railroad Co.*, 28 Hun 364, 32 N. Y. 628; *McDonald v. Fitchburg R. Co.*, 19 App. Div. 577, 46 N. Y. Supp. 600; *Miller v. Railroad Co.*, 99 N. Y. 657.

North Carolina.—*Leak v. Carolina Cent. R. Co.*, 124 N. Car. 455, 32 S. E. 884; *Mason v. Richmond, etc., R. Co.*, 111 N. Car. 482, 16 S. E. 698, 32 Am. St. Rep. 814, 18 L. R. A. 845.

North Dakota.—*Bennett v. Northern Pac. R. Co.*, 2 N. Dak. 112, 49 N. W. 408, 48 Am. & Eng. R. Cas. 182.

Pennsylvania.—*Dooner v. Delaware, etc., Canal Co.*, 164 Pa. St. 17, 30 Atl. 269; *McMullen v. Carnegie*, 158 Pa. St. 518, 27 Atl. 1043.

Rhode Island.—*Jones v. New York, etc., R. Co.*, 20 R. I. 210, 37 Atl. 1033.

Tennessee.—*Louisville, etc., R. Co. v. Reagan*, 96 Tenn. 128, 33 S. W. 1050.

Texas.—*Dooner v. Delaware, etc., Canal Co. v. Carlton*, 60 Tex. 397; *Missouri Pac. R. Co. v. White*, 76 Tex. 103; *Eddy v. Prentice*, 8 Tex. Civ. App. 58, 27 S. W. 1063; *International, etc., R. Co. v. Kernan*, 78 Tex. 294, 22 Am. St. Rep. 52, 14 S. W. 668; *Jones v. Shaw*, 16 Tex. Civ. App. 290, 41 S. W. 690; *St. Louis, etc., R. Co. v. Putnam*, 1 Tex. Civ. App. 142, 20 S. W. 1002.

England.—*Richardson v. Great Eastern R. Co.*, 1 C. P. D. 342, 3 Ry. & C. T. Cas. XVII.

Other Statements of the Rule.

A railroad company is under a legal duty not to expose its employees to dangers arising from such defects in foreign cars as may be discovered by reasonable inspection before such cars are admitted into its train. *Baltimore & P. R. Co. v. Mackey*, 157 U. S. 72, 15 Sup. Ct. 492.

In this case it is said in the opinion: "The question as to the duty of a railroad corporation to take due care that foreign cars hauled by it shall be in such condition as to be safely handled by its own employees was carefully considered by the court below. Mr. Justice Hagner, after observing that the great through trains, especially of freight cars, are composed of cars belonging to different roads, the proportion of such cars belonging to the particular road over

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which they are passing being very small, said: 'They come from all portions of our country, and often from Canada and Mexico. They are transported along each successive road for hire, and only for that consideration. The employees of such road are obliged to handle every car in the train in the same manner, without respect to its ownership, and are exposed to the same dangers from defects of construction or mechanical appliances that may attend the management of the cars belonging to the road that employs them. It would be most unreasonable and cruel to declare that, while the faithful workman may obtain compensation from a company for defective arrangement of its own cars, he would be without redress against the same company if the damaged car that occasioned the injury happened to belong to another company.' "

A company drawing cars of another over its road is bound to see that they are in good condition, and reasonably safe for the use of its employees. *Louisville & N. R. Co. v. Reagan*, 96 Tenn. 128, 33 S. W. 1050.

In *Mateer v. Missouri Pac. Ry. Co. (Mo.)*, 15 S. W. 970, it is said in the opinion: "It was not incumbent on the defendant to receive and move the car of another company if it were not in a reasonably safe condition, but when defendant did accept it for transportation, and introduced it into one of its moving trains, on which plaintiff was directed to perform his services as brakeman, we think defendant brought it within range of the rule devolving on the master the duty to use ordinary care to furnish his employees with a place to work which shall be reasonably as safe as the nature of the employment permits. *Dayharsh v. Railroad Co. (1891)*, ante, 554 (decided at this term). Freight trains, under existing laws, are necessarily composed of a mixed company of cars of various owners. If defendant, having made up such a train, mans it with his own operatives, and requires them to perform the work upon it for which it has hired them, it becomes responsible for the exercise of ordinary care towards them, as described. *Gutridge v. Railway Co. (1887)*, 94 Mo. 468, 7 S. W. Rep. 476; *Jones v. Railroad Co. (1882)*, 28 Hun 364, affirmed (1883) 92 N. Y. 628; *O'Neil v. Railroad Co. (1881)*, 9 Fed. Rep. 337; *Railroad Co. v. Avery (1884)*, 109 Ill. 314. The circumstance that any car is a so-called 'foreign car' may, in some instances, be admissible in evidence as bearing on the issue of ordinary care; for such care depends on the facts and circumstances of each particular case. Defendant is not liable for every hidden defect in a car, and must perform its duties with due regard to the demands of its business as a living artery of commerce. The measure of its obligations is the standard of care of a person of ordinary practical prudence in the same situation.' "

An employer who introduces, without notice to his employee, a foreign and defectively constructed car into the train involving an unexpected or unanticipated danger, through the introduction of which the employee, while using the care and diligence incident to his employment, meets with an accident, is liable in damages. *O'Neil v. St. Louis, Iron Mountain & Southern Ry. Co. (C. C.)*, 9 Fed. 337.

Under the common law a railway company is responsible to its employees for all defects in foreign cars which would be disclosed by a reasonably careful inspection before admitting them into its trains. *Fulton v. Bullard (C. C. A.)*, 14 Am. & Eng. R. Cas., N. S., 547.

1. Care Required in Inspecting Company's Own Cars the Test.

While it is not incumbent on the receiving company, on the receipt of a car for running over its road, to make tests to discover hidden defects in the construction, or in the materials used in the construction, still it is bound to inspect foreign cars just as it would, and is required to, inspect its own, after they have been in use. While it is not bound at all hazards to furnish safe machinery, cars, and other appliances, it is liable to servants for injuries resulting from defects which are known or ought to have been known, and where the injury

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could have been prevented by such care. *Guttridge v. Missouri Pac. R. Co.*, 94 Mo. 468, 7 S. W. 476, 13 West. Rep. 644.

In *Jones v. New York, N. H. & H. R. Co.*, 20 R. I. 210, 37 Atl. 1033, 11 Am. & Eng. R. Cas., N. S., 414, it is said: "There is a wide diversity of opinion in relation to the obligation of a railroad company to inspect the cars of other companies received by it for transportation. The cases relating to the subject are collected in 3 Elliott, R. R. § 1279, notes. It seems to us that the better view as well as that sustained by the weight of authority, is that laid down in *Gottlieb v. Railroad Co.*, 100 N. Y. 462, 3 N. E. 344. This view is that a railroad company 'is bound to inspect foreign cars just as it would inspect its own cars'; that 'it owes the duty of inspection as master, and is at least responsible for the consequences of such defects as would be disclosed or discovered by ordinary inspection. When cars come to it which have defects visible or discoverable by ordinary inspection, it must either remedy such defects, or refuse to take such cars. So much, at least, is due from it to its employees. The employees can no more be said to assume the risks of such defects on foreign cars than on cars belonging to the company. As to such defects the duty of the company is the same as to all cars drawn over its road.' The court adds that this rule is neither onerous, inconvenient, nor impracticable. It requires, before the train starts, and while upon its passage, the same inspection and care as to all the cars on the train. The defect complained of in the present suit was one which could have been discovered by reasonable inspection, and one, therefore, which it was the duty of the defendant, under the rule stated, to have ascertained and remedied. Having failed in its duty in this respect, it is liable to the plaintiff for the injuries to him which have ensued."

A person or corporation using the cars or appliances of another person or corporation, as to its employees, uses such cars or appliances charged with the same duty as to inspection as if they were his or its own. *Union Stock-Yards Co. v. Goodwin*, 57 Neb. 138, 77 N. W. 357, 12 Am. & Eng. R. Cas., N. S., 502.

The amount of care required of a railroad company to inspect cars coming from other roads to be merely loaded and returned is not less than that as to cars to be sent out upon its own road. *Texas & P. R. Co. v. Archibald* (C. C. App. 5th C.) 75 Fed. 802, 41 U. S. App. 567, 21 C. C. A. 520.

The defendant received into its service from another railway company a freight car which proved to be in disrepair, and which it neglected to inspect and repair within a reasonable time thereafter. The plaintiff, a brakeman, in attempting to couple the car in question with another car, was severely injured in consequence of its defective and imperfect condition, which was not known to him, but was discoverable upon proper inspection: *held*, that, as respects such defects, the company were answerable for the same degree of care and diligence in the management and use of a foreign car received into its service as in the case of its own cars in like circumstances. The duty to provide suitable instrumentalities for its employees to work with, cannot be delegated to a servant so as to relieve the company from responsibility, and this duty extends to the machinery, cars, and railway track upon or in connection with which they are employed. *Fay v. Minneapolis & St. L. Ry. Co.*, 30 Minn. 231, 15 N. W. 241, 11 Am. & Eng. R. Cas. 193.

The duty of inspecting foreign cars is a duty due from the master to his servant, and that the master is responsible to the servant for all defects which would be disclosed by a reasonably careful inspection. The well-known course of business pursued by carriers in this country involves so large a use of foreign cars as to make it inadmissible that any distinction should be recognized between the duty of caring for the safety and protection of employees engaged in operating such cars and that exacted in respect to cars owned or controlled by the carrier. Employees can no more be said to assume

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the responsibility for injuries due to the defective condition of foreign cars than they can be said to assume the risk arising from defects in domestic cars which might have been discovered by proper inspection. In the one case, as much as in the other, the inspector is discharging the duty of the master to his servants, and for his negligence in this particular the master is responsible. The question is one of general, and not local, law unless controlled by statute. It is, therefore, a question for the courts of the United States to decide upon their own judgment as to the common law controlling the question. *Railroad Co. v. Baugh*, 149 U. S. 368, 13 Sup. Ct. 914; *Railroad Co. v. Hambly*, 154 U. S. 349, 14 Sup. Ct. 983.

2 Nonassignable Duty.

Where a brakeman receives an injury, by reason of a defect in a car and the negligence of the car inspector, the doctrine of fellow servants does not obtain; and the rule is not changed because the car is a foreign car, belonging to a connecting line, and being transported as such. *St. Louis, A. & T. R. Co. v. Putnam*, 1 Tex. Civ. App. 142, 20 S. W. 1002. See also, *Railroad Co. v. Baugh*, 149 U. S. 368, 13 Sup. Ct. 914; *Railroad Co. v. Hambly*, 154 U. S. 349, 14 Sup. Ct. 983.

A brakeman on a railway train was injured through a defect in a foreign car running upon the road of the defendant company. The defendant's car inspector negligently failed to discover such defect and report for repairs: *held*, that the negligence of the car inspector in this respect was the negligence of the company, and the doctrine of coservice was not applicable. *International & Great Northern R. Co. v. Kernan*, 78 Tex. 294, 14 S. W. 668, 44 Am. & Eng. R. Cas., N. S., 607, 22 Am. St. Rep. 52.

3. Duty Not Confined to Cars to Be Only Locally Handled.

In *Texas & P. Ry. Co. v. Archibald*, 170 U. S. 665, 18 Sup. Ct. 777, it is said in the opinion: "This general duty of reasonable care as to the safety of its appliances resting on the railroad, the instructions in question proposed to limit by confining its performance solely to such foreign cars as are received by a railroad for the purpose of being hauled over its own road; in other words, the proposition is that, where a car is received by a railroad only for the purpose of being locally handled, the railway, as to such local business, is dispensed from all duty of looking after the condition of the cars by it used, and may, with complete legal impunity, submit its employees to the risk arising from its neglect of duty. To this length the proposition plainly goes, as is shown by its context, and is additionally illustrated by the argument at bar. The argument wants foundation in reason, and is unsupported by any authority,—in reason, because, as the duty of the company to use reasonable diligence to furnish safe appliances is ever present, and applies to its entire business, it is beyond reason to attempt by a purely arbitrary distinction to take a particular part of the business of the company out of the operation of the general rule, and thereby to exempt it, as to the business so separated, from any obligation to observe reasonable precautions to furnish appliances which are in good condition. Indeed, the argument, by which the proposition is supported is self-destructive, since it admits the general duty of the employer just stated, and affords no reason whatever for the distinction by which it is sought to take the case in hand out of its operation. The contention is without support of authority, since the cases cited to sustain it are directly to the contrary. They are: *Baltimore & Potomac Railroad Co. v. Mackey*, supra, and two New York cases, *Gottlieb v. Railroad Co.*, 100 New York 462, 3 N. E. 344; *Goodrich v. Railroad Co.*, 116 N. Y. 398, 22 N. E. 397,—both of which were cited approvingly in the Mackey Case. The theory upon which in the argument at bar it is claimed that the cases cited overthrow the very doctrine which in truth they announce is based upon the use of words in the Mackey Case,

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'admitted into its train.' Taking this as a premise, it is said the duty of a railroad to exercise reasonable diligence to furnish safe appliances exists only as to cars 'admitted into its train,' that is, cars which it receives and transports in one of its trains, and does not obtain as to cars which it receives and handles in its yards for local purposes only. It is obvious from a mere casual reading of both the Mackey Case and the New York cases relied upon that the duty on the part of the railroad which they inculcate applies to all cars used by the road in its business. In addition the case of *Flannigan v. Railroad*, 45 Wis. 103, is cited. But that case gives no support whatever to the proposition. There a car, which had been broken and damaged, was put upon a spur track. To repair it, it became necessary to move it, and, with the knowledge that the car was broken, employees of the road took charge of it to remove it to the repair shop. The ruling was that under such circumstances the employee could not recover because of the defective condition of the car, and the case therefore but illustrates the general rule already referred to." *Texas & P. Ry. Co. v. Archibald*, 170 U. S. 665, 18 Sup. Ct. 777.

4. Cars Switched from Another Road

The duty of a railway company towards an employee, to inspect cars coming from other roads, is not limited to cars which are to be hauled over its own road, but extends to cars which it switches from another road, to which they are to be returned after loading. *Texas & P. R. Co. v. Archibald*, 170 U. S. 665, Adv. S. U. S. 823, 42 L. Ed. 1188, 18 Sup. Ct. 777.

5. Absence of Obligation to Repair No Defense.

The mere fact that the company is not required to repair defects in foreign cars does not relieve it from the obligation to inspect them. *Atchison, T. & S. F. R. Co. v. Penfold*, 57 Kan. 148, 45 Pac. 574.

6. Possession for Only Brief Period No Defense.

That railroad cars received by one railroad company from another are only used by the former for a short time, or carried a short distance, will not relieve it of its duty to its employees of inspecting such cars. *Atchison, T. & S. F. R. Co. v. Penfold*, 45 Pac. 574, 57 Kan. 148.

7. Statutory Duty to Haul without Delay No Defense.

A railroad company is chargeable with negligence towards its employees in transporting obviously defective and dangerous cars of another company over its road, notwithstanding the provision of Miss. Const. § 184, requiring all railroad companies to receive and transport each other's cars without unnecessary delay or discontinuation. *Illinois C. R. Co. v. Price*, 72 Miss. 862, 18 So. 415.

8. Contract with Other Company Cannot Relieve from Liability.

A railway corporation, with respect to the cars of other companies which it allows to come into its yard, and which, while there, are to be moved and handled by its employees, is bound to use due diligence and care in seeing that the cars are safe to be so handled by its servants; and such railway company cannot divest itself of this duty to its servants for their safety and protection, by a contract with such other companies whose cars are used that the latter shall keep them in repair. The general rule is, that the employer is bound to use due diligence in providing and maintaining safe machinery and instrumentalities to be handled and used by his employees without regard to the ownership of the same. *Chicago, B. & Q. R. Co. v. Avery*, 17 Am. & Eng. R. Cas. 649, 109 Ill. 314.

9. Liability of Quarry Company to Its Employees.

The fact that a quarry company does not use its own cars to run its product to the railroad, but the railroad's own cars, and that it has to take what cars it can get, does not exempt it from liability to one of its workmen injured by the defects of such car. *Spaulding v. W. N. Flynt Granite Co.*, 159 Mass. 587, 34 N. E. 1134.

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B. ILLUSTRATIONS.

1. Negligence.

a. Injury to Brakeman—Defective Couplings.

In an action by a brakeman to recover for injuries received while uncoupling cars, it appeared that one of the cars belonged to another railroad company, and had originally been equipped with drawbars having a safety lug that had been broken off several days before the car was inspected by defendant's inspectors; that the deadwood was so worn that it offered no impediment to a jar on the springs, and that portions of the deadwood had been split off; that while plaintiff was uncoupling the car, and when the engineer gave slack, plaintiff's hand, which was on the coupling pin, was rammed into the broken place, and crushed; that before the train moved there was a space of but 9 inches between the cars, whereas the ordinary distance was 20 inches; that plaintiff had not seen the car, and had not been warned of any defect, nor had he been called upon to examine the coupling; that some of the railroads had drawbars with these lugs attached, while others used the drawbars without any attachment: *held*, that a demurrer to the evidence was improperly sustained. *Bender v. St. Louis & S. F. Ry. Co.*, 137 Mo. 240, 37 S. W. 132.

b. Injury to Brakeman—Loose Bolt in Car Ladder.

Where a railroad company receives a foreign car, and places it in one of its trains and a brakeman is injured while mounting the car by the pulling out of a bolt which held a round of the ladder in place, the company is liable if, by the use of ordinary care, it could have discovered the defect, and negligence may be inferred from the nature of the defect. *Mateer v. Missouri Pac. Ry. Co. (Mo.)*, 15 S. W. 970.

c. Defective Handhold.

In *Jones v. Railroad Co.*, 28 Hun 364, 32 N. Y. 628, plaintiff's intestate, a brakeman, was attempting to climb upon a freight car, and one of the iron rings, which was defective, broke and he fell to the ground and was killed; and it was held that the defendant was liable, although the car belonged to another company. See also, *Miller v. N. Y. C. & H. R. R. Co.*, 99 N. Y. 657.

d. Defective Draw Bars.

In *Bennett v. Northern Pac. R. Co.*, 2 N. Dak. 112, 49 N. W. 408, 48 Am. & Eng. R. Cas. 182, it appeared that plaintiff was injured while coupling an engine to a foreign car because there was not sufficient space for his body between them. The draw bars of the engine and of the car were unusually short, leaving a space of only about 10 inches between the end of the car and of the engine when the drawbars came together, whereas the usual space is from 24 to 30 inches. In this case it is said in the opinion: "The first important fact in the history of the accident was the stepping of the plaintiff upon the foot board of a switch engine to ride down upon it to a flat car standing upon a curved switch, for the purpose of aiding in coupling the engine to the car in order to transfer it to another track. The car did not belong to defendant, but was owned by the Union Tank Line Company. This fact is of no moment, however, as the defendant was bound to inspect this foreign car the same as one of its own cars. *Goodrich v. New York Cent. & H. R. R. Co.*, 116 N. Y. 398, 41 Am. & Eng. R. Cas. 259; *Gottlieb v. New York, L. E. & W. R. Co.*, 100 N. Y. 462, 24 Am. & Eng. R. Cas. 421; *International & G. N. R. Co. v. Kernan (Tex.)*, 44 Am. & Eng. R. Cas. 607; *Bomar v. Louisiana, N. & S. R. Co.*, 42 La. Ann. 983; *Fay v. Minneapolis & St. L. R. Co.*, 30 Minn. 231, 11 Am. & Eng. R. Cas. 193; *O'Neil v. St. Louis, I. M. & S. R. Co.*, 9 Fed. Rep. 337; *Missouri Pac. R. Co. v. Barber*, 44 Kan. 612, 44 Am. & Eng. R. Cas. 523; *Guttridge v. Missouri Pac. R. Co.*, 94 Mo. 468."

e. Defective Brake Beam.

It is the duty of a railroad company to inspect a freight car, and to see that it is reasonably fit for service before it is received from another company, and, in the event that a freight car is received

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with a brake beam in such a defective condition that a brakeman whose duty it is to couple the foreign car with those used by the company receiving it, is injured in the attempt to make such coupling and the brakeman had no knowledge of the defective condition of the brake beam, and it could not be readily seen, the company that employs him and received such car in a defective condition is liable for his injury. *Missouri Pac. R. Co. v. Barber*, 44 Am. & Eng. R. Cas. 523, 44 Kan. 612, 24 Pac. 969.

f. Absence of Bumpers.

A railroad company is liable for injuries to a brakeman crushed between two cars, one of which was a foreign car, unprovided with bumpers, which he was suddenly called upon in the nighttime to couple, and of the condition of which he could not have previously informed himself. It cannot be said that it was his duty to examine the car for bumpers before attempting to couple them. *Mason v. Richmond & Danville R. Co.*, 53 Am. & Eng. R. Cas. 183, 111 N. Car. 482, 32 Am. St. Rep. 183.

g. Defective Stirrup.

In an action for injuries to defendant's brakeman, alleged to have resulted from a defective "stirrup" provided for his use, it was proper to instruct that the appliance was attached to a foreign car was no defense to defendant's liability for defects in foreign cars used by it being the same as for defects in its own cars. *Leak v. Carolina Cent. R. Co.*, 124 N. Car. 455, 32 S. E. 884, 14 Am. & Eng. R. Cas., N. S., 739.

h. Chargeable with Notice of Defects.

Plaintiff was employed in making up trains in a yard, and was injured while making a coupling of a car belonging to another company, which it seemed had been out of order for several days: *held*, that if the company permitted the car to be run into the yard in a dangerous condition for several consecutive days, so that in the exercise of a high degree of care it might have known of its condition in time to have avoided an injury, then it was liable, if the employee was without fault, whether it owned the car or not. *Chicago, B. & Q. R. Co. v. Aviary*, 8 Ill. App. 133.

i. Borrowed Cars.

In *Jetter v. Railroad Co. (N. Y.)*, 2 Abb. Ct. App. Dec. 458, the defective car causing the injury belonged to another company, and the judge writing the opinion said: "The party assuming to use it was responsible for its fitness to the use to which it was put. If the brakes were defective, the defendants were legally chargeable with any consequences that resulted from such defect while they were using the car for their own purposes," and that "Railroad companies cannot escape responsibility for any defective carriages by borrowing them from one another."

j. Condemned Cars—Tags.

A railroad company which has had transient cars of other companies in its use or employment regularly inspected, condemned, and ordered to be sent to the shops for repairs, and has had them regularly tagged so as to warn employees of that fact, does not fully discharge its duty towards one engaged in the performance of night service as a car coupler unless the tags are of such size and character as to bring the condemnation of the cars to his attention, or he is otherwise informed of the fact. *Meyers v. Illinois C. R. Co.*, 49 La. Ann. 21, 21 So. 120.

l. Absence of Negligence.

a. Defective Couplings—Statutory Duty to Haul.

According to the doctrine prevailing in South Carolina, it is not, per se, negligence for a railroad company to take from a connecting road a car not provided with suitable appliances for coupling, So. Car. Gen. St. sec. 1471, requiring companies "to deliver with due diligence all cars wholly or partly loaded with freight consigned to

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points on connecting roads." Nor is it, per se, negligence when the car is constructed on the old plan, so that the coupling must be made from above, for the company to put it on the train without notice of the peculiarity to its brakemen. *Simms v. South Carolina R. Co.*, 31 Am. & Eng. R. Cas. 199, 26 S. Car. 490, 2 S. E. 486.

b. *Mismatched Couplings—Negligence of Fellow Servant.*

A brakeman was killed while attempting to couple a freight car belonging to the road by which he was employed and a car belonging to another road, by reason, as alleged, of a dissimilarity in the couplings of the two cars: *held*, that the railroad company was not liable. *Kelly v. Wisconsin Central R. R. Co.*, 63 Wis. 307, 21 Am. & Eng. R. Cas. 633. In this case it is said in the opinion: "The difference in the elevation of the coupling irons of this foreign car and the caboose or other cars of the defendant's road would not have been very easily or readily observed when they were distant from each other, and yet the company is sought to be held liable for its want of ordinary care in not knowing this difference when consenting to take this foreign car into its train. When the car and the caboose were brought nearly together, this difference could have been at least much more readily seen and observed by comparison. The company is charged with negligently endangering the lives of its brakemen by not knowing of this difference, and, if presumed to know of it, in allowing this car to be attached to its train; and the intestate is alleged to have been in the use of proper care when he endangers his own life by not seeing, observing, or knowing of such difference in the elevation of the coupling-irons. Did not the intestate have the same, if not superior, means of knowing this difference, as or to that of the company? If the negligence of the intestate and that of the company, in this respect, are equally balanced, ought the plaintiff to recover? The duty of the company to know of this difference is not absolute, and it is not presumed to know of it as a matter of law."

* * * The liability of the railway company in such cases does not depend upon its general and absolute duty to furnish safe and proper machinery and other appliances with which its employees may work, but upon its knowledge, actual or presumed, that such coupling appliances will not properly fit and connect with each other. I have therefore briefly compared the means of knowing this unfitness of the coupling apparatus which the company and the intestate had, in order to see whether the greater negligence should be imputed to the company rather than to the intestate. It does not appear from the complaint that the company had not in their employ at the time suitable persons to make inspection of all such foreign cars and ascertain their fitness to go into its trains, and it is presumed that such persons were so employed, and that other employees of the company caused the foreign car in this case to be upon the side track ready to be coupled to the caboose. If, therefore, there was any negligence on the part of any one in not ascertaining beforehand that their couplings would not meet, it must have been the negligence of the co-employees and fellow servants of the intestate, for which the company is not liable.

Same.

The fact that a switchman, while making a coupling of his company's car to a foreign car, is injured by reason of the difference between the couplings of the two cars, is not sufficient to impute negligence to the company, the foreign car being in good order and sound condition, since railroad companies are required by the Missouri constitution (art. 12, § 13) to receive the cars of other companies. *Thomas v. Missouri Pac. R. Co.*, 53 Am. & Eng. R. Cas. 146, 109 Mo. 187, 18 S. W. 980.

A railroad is not negligent as to its employees in receiving and drawing cars of another company equipped with double buffers while its own are equipped with single buffers. *Chicago, B. & Q. R. Co. v. Curtis*, 51 Neb. 442, 71 N. W. 42, citing *Pittsburg & L. E. R. Co.*

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v. Henly, 48 Ohio St. 608, 29 N. E. 575; *Michigan C. R. Co. v. Smithson*, 45 Mich. 212, 7 N. W. 791; *Hathaway v. Michigan C. R. Co.*, 51 Mich. 253, 16 N. W. 634, 12 Am. & Eng. R. Cas. 249; *Indianapolis, B. & W. R. Co. v. Flannigan*, 77 Ill. 365; *Baldwin v. Chicago, R. I. & P. R. Co.*, 50 Iowa 80; *Kohn v. McNulta*, 147 U. S. 238, 13 Sup. Ct. 298.

It is not negligence for a railroad company to use, in regular transportation, cars constructed with uneven couplings or deadwoods, whether such cars are its own, or belong to another company. *Pennsylvania Co. v. Ebaugh*, 144 Ind. 687, 4 Am. & Eng. R. Cas., N. S., 200, 43 N. E. 936. The following decisions sustain the rule that it is not negligence for a railway company to use, of its own or those of another company, in regular transportation, cars constructed with uneven couplings or deadwoods: *Railroad Co. v. Smithson*, 45 Mich. 212, 7 N. W. 791, 1 Am. & Eng. R. Cas. 101; *Smith v. Potter*, 46 Mich. 258, 2 Am. & Eng. R. Cas. 140, 9 N. W. 273; *Railroad Co. v. Gildersleeve*, 33 Mich. 133; *Hulett v. Railway Co.*, 67 Mo. 239; *Railway Co. v. Black*, 88 Ill. 112; *Railway Co. v. Asbury*, 84 Ill. 429; *Railroad Co. v. Flannigan*, 77 Ill. 365; *Whitwam v. Railroad Co.*, 58 Wis. 408, 17 N. W. 124; *Kelly v. Wisconsin Cent. R. Co.*, 63 Wis. 307, 23 N. W. 890, 21 Am. & Eng. R. Cas. 633; *Way v. Railroad Co.*, 40 Iowa 341; *Baldwin v. Railroad Co.*, 50 Iowa 680; *Railway Co. v. Higgins*, 44 Ark. 293, 21 Am. & Eng. R. Cas. 629. Many of these cases illustrate the impracticability of transferring freight from the car of one company to that of another at each change of railway line or system; the absence of any regulation by which the cars of all lines or systems are required to be of uniform construction; and the propriety of the rule which requires the brakeman, whose duty involves the coupling of cars, to increase his care in proportion to the necessarily increased dangers from the varied forms of construction as they come under his observation in the course of business.

In the case of *Railroad Co. v. Smithson*, supra, in an opinion by Judge Cooley, the proposition is made clear that, when the course of business brings together two cars of different companies, the brakeman must use his own eyes for notice that such cars have deadwoods upon them, or that the couplings are not of equal height.

c. Not Required to Have Only Cars of Same Height.

In *Norfolk & W. R. Co. v. Brown*, 91 Va. 668, 22 S. E. 496, it is said in the opinion: "To hold that a railroad company was negligent in supplying safe and suitable machinery to its servants unless every car in a train was of the same height, would, in our opinion, be requiring an extraordinary degree of care on its part. The effect of such a requirement would be to compel such company to have all its own cars changed to or made the same height, or to have only cars of the same height placed in the same train. It would also be required to have the railroad companies whose cars pass over its line to make their cars of the same height, or put only those of the same height in the same train, or to transfer all freight at its terminal points to other cars, or cease to do business with connecting lines. Such a rule would be impracticable, as well as expensive and burdensome to the railroad company, and would require the company to exercise not reasonable, but extraordinary care, in supplying and maintaining suitable machinery and instrumentalities to its servants in the performance of the work required of them, and that, too, when the defect complained of was obvious and patent, and could be seen as easily by them as by the master."

d. Defective Handhold.

A railway company that properly inspects foreign freight cars used in "through" transportation is not liable for an injury to a brakeman who, by reason of a defective handhold, falls under the car. *Keith v. New Haven & N. R. Co.*, 23 Am. & Eng. R. Cas. 421, 140 Mass. 175, 3 N. E. 28, explained in *Peaslee v. Fitchburg R. Co.*, 152 Mass. 155,

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25 N. E. 11, not followed in *Little Rock & M. R. Co. v. Moseley*, 56 Fed. 1009.

e. Projection of Load.

Where a railroad company furnishes safe cars and a competent car inspector, it is not liable to a brakeman for injuries received while attempting to couple a properly constructed car, "which has been accepted by the inspector from another company for transportation onto another car, by reason of the projection over the end of the car so inspected of a portion of the lumber with which it is laden. *Dewey v. Detroit, G. H. & M. R. Co.*, 97 Mich. 329, 52 N. W. 942, 56 N. W. 756.

II. LIMITATIONS OF AND EXCEPTIONS TO GENERAL RULE.

1. Latent Defects.

In *Louisville & N. R. Co. v. Williams*, 95 Ky. 200, 24 S. W. 1, this court says, that where one railroad company receives the cars of another on the line of its road for transportation, it is the duty of the company taking them to make careful superficial inspection of their condition, such as an ordinarily prudent man engaged in such business would make for the protection and safety of the employees required to handle cars.

In respect to foreign cars, the company transporting them does not warrant that they are free from latent defects which a thorough testing would disclose; but its only duty, as to its employees, in regard to such cars, is to have them properly inspected. *Chicago & A. R. Co. v. Bragonier*, 11 Bard. (Ill. App.) 516.

It is the duty of a railroad company receiving foreign cars to make a careful superficial examination of their condition; and to warn its employees when it is patent that such cars are so constructed as to render them more than ordinarily dangerous. *Louisville & N. R. Co. v. Veach*, 20 Ky. Law Rep. 403, 46 S. W. 493, 11 Am. & Eng. R. Cas., N. S., 24.

2. Reliance upon Apparent Good Condition of Car—Construction Tests Not Required.

In *Ballou v. Railroad Co.*, 54 Wis. 257, 11 N. W. 559, it was held that one railroad company receiving a loaded car from another and running it upon its own road is not bound to repeat the tests which are proper to be used in the original construction of such a car, but may assume that all parts of the car which appear to be in good condition are so in fact. The judge writing the opinion said: "In such a case it would seem, upon principle, that the company so receiving a loaded car from another company is entitled to the benefit of the presumption that such a car had been properly constructed of suitable material, and had passed the inspection of some one of ordinary skill in such matters, and that it was reasonably fit for the use to which it was devoted when so received."

It is not incumbent upon a railroad company receiving a foreign car for transportation over its road, to repeat the tests which are proper to be used in the original construction of the car, but it may assume that all parts of the car which appear upon ordinary examination to be in good condition are in such condition; but the duty of exercising ordinary care requires a more careful inspection of an old and dilapidated car than of one in the appearance of which there is nothing unusual. *Louisville, N. A. & C. R. Co. v. Bates*, 45 N. E. 108, 146 Ind. 564.

3. Need Not Investigate Method of Loading.

A railroad company is not liable to its employees for failing to inspect cars received from another line, so as to see that they are properly loaded. *Mexican C. R. Co. v. Shean* (Tex.), 18 S. W. 151; *Galveston, H. & S. A. R. Co. v. Farmer*, 73 Tex. 85, 11 S. W. 156; *Dewey v. Detroit, G. H. & M. R. Co.*, 97 Mich. 329, 52 N. W. 942, 56 N. W. 756.

4. Rule Not Applicable to Persons Unloading Cars on Their Sidings.

The rule which requires railroad companies to inspect cars received

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from other companies, and to see that they are in good and safe condition for their employees to handle, does not apply to companies or persons on whose sidings loaded cars are delivered for the purpose of permitting the owner of the siding to unload the freight, even though the sidings of such person or company may be extensive in number and great in length. *McMullen v. Carnegie, etc., Co.*, 158 Pa. St. 518, 27 Atl. 1043.

5. Foreign and Domestic Cars—Comparison between Degrees of Care.

The duty of a railroad company to its employees in respect to appliances on cars received from other roads is not higher than that in respect to appliances on its own cars. *Dooner v. Delaware & H. Canal Co.*, 171 Pa. 581, 26 Pitts. L. J. N. S. 227, 33 Atl. 415.

6. Degree of Care Required Limited by Exigencies of Business.

A railroad company owes its employees the duty of inspecting cars owned by and received from other companies, which such employees are required to use, where there is time and opportunity for such inspection, and is liable to them for injury resulting from defects in such cars, which should have been discovered by ordinary inspection. *Atchison, T. & S. F. R. Co. v. Penfold*, 45 Pac. 574, 57 Kan. 148.

In *Ballou v. Chicago, M. & St. P. Ry. Co.*, 54 Wis. 257, 11 N. W. 559, 41 Am. Rep. 31, it is said, in the opinion: "In *Baldwin v. Railway*, 50 Iowa 680, it was held that 'it does not constitute negligence for a railway company, in the ordinary course of business, to receive and transport the cars of other roads, in general use, which may not be constructed with the most approved appliances, and the transportation or use of such cars by the company is one of the risks which an employee assumes in undertaking the employment.' In such case it would seem upon principle that the company so receiving a loaded car from another company is entitled to the benefit of the presumption that such car had been properly constructed of suitable material, and had passed the inspection of some one of ordinary skill in such matters, and was reasonably fit for the use to which it was devoted when so received. See *Davis v. Railroad*, 20 Mich. 105. Certainly a railroad company is not required, under all circumstances, to make use only of the safest known appliances and instruments, and to be held responsible for any failure to discard what is not such, and supply its place with something better and safer. *Ft. W., I. & S. R. R. Co. v. Gildersleeve*, 33 Mich. 133. To hold in such a case that a railway is liable, and to apply such a rule to a company receiving a loaded car from another railroad, would in many instances operate as a prohibition upon interstate commerce. The company is not to be treated as a guarantor of the sufficiency and safety of the cars and machinery of the train, but as responsible only where the injury is without fault of the employee, and the result of the neglect of that ordinary and reasonable care and diligence in furnishing sufficient and safe cars and machinery for the train, which appertains to that particular branch of business. *M. R. & L. E. Railroad Co. v. Barber*, 5 Ohio St. 541."

A railroad is not liable for injuries to servants caused by hidden defects in a foreign car received for transportation over its road, which could not be discovered by such inspection as the exigencies of traffic will permit. *Louisville, N. A. & C. R. Co. v. Bates*, 146 Ind. 564, 45 N. E. 108.

Where a car with a defective brake staff did not belong to the defendant, but to another railroad company, and was only temporarily in use by the defendant, and came to it loaded, the fact that the car had been in possession of the defendant for nearly two weeks prior to the accident was not of itself sufficient to charge the defendant with notice of the defects. The inspection which a company is required to make of a foreign car tendered it by another company for transportation over its lines must be made with reasonable care, so as to furnish its employees with reasonably safe appliances for use in the discharge of their duties; but it cannot be held liable for hidden defects which could not be detected by such an inspection as the exi-

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gencies of traffic will permit. *Chicago, St. L. & P. R. Co. v. Fry*, 131 Ind. 319, 28 N. E. 989.

The defendants had a junction at P., at which they received from other lines a great number of trucks, which they, being bound by law to give facilities for through traffic, were compelled to forward with dispatch to their destination. The defendants when a foreign truck came on their line, caused it to undergo such a general examination as could take place without causing an undue delay; that is to say, the tires of the wheels were tapped with a hammer, and the truck generally looked over for defects. A foreign truck loaded with coal, belonging to the B. wagon company, came on to defendants' line at P. and there underwent the usual examination, when a defect in one of the springs and a crack in the woodwork were discovered. The truck was shunted, upon the discovery of the defects, in order that it might be repaired by the wagon company to which it belonged. The defect in the spring, which was the only pressing defect, was repaired, and the truck was handed over to the defendants, and sent on by them to its destination. On the way an accident, by which the plaintiff was injured, happened through the existence of a crack in one of the axles of the truck. It was stated in evidence that by a minute examination of the truck the crack in the axle might have been discovered. The defect in the axle was entirely unconnected with the defects previously discovered: *held*, that the defendants were not bound to do more in the way of examining the foreign truck on its arrival at P. than they had done, and inasmuch as the defects discovered on such examination were entirely unconnected with the defect that caused the accident, they were not responsible by reason of their failing, upon the discovery of such defects, to enter upon a more minute examination of the truck. *Richardson v. Great Eastern R. Co.*, 1 C. P. D. 342, 3 Ry. & C. T. Cas. XVII.

The remarks of Jessel, M. R., in this case, on the duty of the company as to the inspection of foreign cars is instructive. He says: "The real question is whether the company were guilty of negligence in not making a more minute examination; for there is no doubt that the crack, having reached the surface, might have been discovered by a sufficiently minute examination. We must look to what is reasonable in reference to the exigencies of the case. The company cannot stop all foreign trucks (cars) and empty them for the purpose of a minute examination. If they were entitled to do so, it would practically destroy the right given by the statute (8 & 9 Vict., c. 20, s. 92) to other companies of having the through traffic forwarded, and give a monopoly to the company itself. The suggestion that they should do this is too absurd to bear discussion. It cannot be said that it is obligatory on the company so to treat the foreign trucks as to destroy the very object for which they were sent to the line, viz. for the purpose of through traffic. There must be some reasonable limit to the amount of examination required, and the substantial question was whether the mode of examination adopted by the company was reasonably satisfactory. It appears to me that the jury did answer that question substantially in defendant's favor."

Same—Care Required in Inspecting Own Cars Not Practicable.

Railroad corporations should require, at their peril, foreign cars received for transit on their roads, as well as their own cars, to be reasonably inspected by competent agents, but trainmen are chargeable with notice that the same degree of care used by the company in the inspection of its own cars is not practicable in the case of foreign cars. *Alabama G. S. R. Co. v. Carroll (C. C. A.)*, 9 Am. & Eng. R. Cas., N. S., 759.

In this case it is said in the opinion: "There is no question but that railroad corporations should require, at their peril, cars, their couplings and appliances, to be reasonably inspected by competent agents, and that the ordinary employee may rely on such inspection, not that this applies to cars received for through transit from other roads as well as its own; but it does not follow that what may be

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reasonable inspection for a home car shall be demanded as alone reasonable for a foreign car, received for through transit. The time, place, and general opportunity for inspection, and the fact that the foreign car comes to hand as one actually on trial, showing its fitness, all should be considered, in view of the rapid transit now furnished by the railroad companies, and demanded by the business public. Every trainman of ordinary intelligence and experience knows that there is and must be a decided difference in the inspection possible between the home cars and the foreign cars on through trains, and it is not unreasonable to hold that what necessary risks attend the inspection of the latter are risks of the service. We are aware that the adjudged cases are not wholly with us on the matter of the inspection required of foreign through cars, but, until the supreme court of the United States shall speak to the contrary, we must hold with those cases which recognize the actual situation,—the actual way the business is and must be carried on, if carried on at all,—rather than with those cases which tend to make the railroad companies absolute insurers against all the risks of a well-known dangerous employment.

7. Appliances Need Not Be Most Approved.

In *Baldwin v. Railroad Co.*, 50 Iowa 680, it was held that it does not constitute negligence for a railroad company in the ordinary course of business to receive and transport the cars of other roads in general use which may not be constructed with the most approved appliances.

A railroad company fully discharges its duty toward its employees as to appliances on its own cars or those received from other companies if they are such as are in ordinary use, though they are not the best or safest for the purpose. *Dooner v. Delaware & H. Canal Co.*, 171 Pa. 581, 26 Pitts. L. J. N. S. 227, 33 Atl. 415.

8. Negligence of Connecting Line before Delivery of Car Not Imputable to Company.

The duty of a railroad company to inspect cars coming from a connecting line is to be measured by what it ought to have done while the cars were in its possession, and not before, as the negligence of the connecting line before the delivery of the cars cannot be imputed to it. *Illinois Cent. R. Co. v. Barslow*, 94 Ill. App. 206.

9. Cars Loaded with Explosives—Duty to Warn Employees.

Foley v. Chicago, etc., Ry. Co., 48 Mich. 622, 12 N. W. 879, 42 Am. Rep. 481, was an action for negligence causing the death of the plaintiff's intestate, a switchman in the defendant's employ. The deceased had been sent by the defendant to switch a car owned by another railroad company, to be loaded with nitroglycerine by the servants of that company. Owing to the negligence of those servants there was a fatal explosion. The plaintiff contended that the defendant was negligent in not notifying the deceased of the danger into which they sent him. The defendant had judgment and this was affirmed, the court observing: "The question then seems to be this: Whether defendant, in complying with a proper request from another railroad company to run for it a short distance one of its cars, to be loaded with an article which was safe when properly handled, but exceedingly dangerous when carelessly handled, was bound to assume that negligence on the part of those handling would occur, and bound to take measures for the protection of its servants on that assumption? And if this question shall be answered in the affirmative, the further question will be presented: What measures of protection could the defendant take short of absolute refusal to remove the car at all? The switchman knew what was to be loaded and had a general knowledge of its qualities; but more particular and specific information to him on that subject would have been entirely without value. He was not to handle the nitroglycerine, and he could exercise no control over the action of those who were. Caution from him on the subject would not be likely to receive attention from the men

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whose business it was, and who handled it constantly. The only caution to decedent which could have been of the least service would be the caution to keep away altogether. If he was entitled to this, it necessarily follows that defendant should have refused altogether to move the car over its track. But it was not claimed on the argument that this could have been properly or even lawfully done."

On the other hand: In *O'Neil v. St. Louis, Iron Mountain & Southern Ry. Co.*, 9 Fed. 337, it was held by Treat, D. J., in the federal circuit of the Eastern district of Missouri, that where an accident occurs to an employee of a railroad company in consequence of the introduction of a foreign and defectively constructed car into the train on which he is employed, he may maintain an action of damages against the company therefor. The court said: "It is of great importance to hold employees on railroad trains to the fullest measure of duty, for on their skill and fidelity life and property depend; and it is equally important for their protection that their employers shall furnish them with reasonably adequate and safe appliances whereby they can perform their duties with safety to themselves and to the lives and property at stake. To relax the rules so that the employer may escape liability, would be as detrimental to public interests as if the rules by which the employee is to be governed were to be relaxed in favor of the latter. An employee, as charged in this case, must be supposed to know the nature of the employment, and to possess the skill and diligence requisite for the proper discharge of his duties. He takes the hazard of the employment. Still if the employer introduces without notice to the employee some new and unusual machinery involving an unexpected or unanticipated danger, through the introduction of which the employee, while using the care and diligence incident to his employment, meets with an accident like that in question, it is not unreasonable to hold that the employer should answer therefor in damages."

10. Injury to Negligent Conductor.

Conductors of freight trains, who are required by the rules of the company to inspect all cars which they pick up in transit, cannot maintain action for injuries caused by their failure to do so. *Richmond & D. R. Co. v. Dudley*, 90 Va. 304, 18 S. E. 274.

11. Ordinary Inspection Held Not Sufficient.

A requested instruction that, if the jury found that the cars injuring plaintiff, in a suit against a railroad for injuries, were foreign cars, "then it was only required of defendant to make an ordinary inspection for any defects discernible by ordinary examination," was properly refused, since the law requires a master to furnish suitable appliances, whether they are his property or that of another. *Youngblood v. South Carolina & G. R. Co.* (S. Car.), 20 Am. & Eng. R. Cas., N. S., 623.

In this case it is said in the opinion: "The language of Mr. Chief Justice Simpson, who delivered the opinion of the court in *Wallingford v. Railroad Co.*, 26 S. Car. 258, 2 S. E. 19, is applicable to this case. He says: The responsibility of a common carrier is to transport safely and securely, which includes, as to railroad common carriers, the necessity of having safe appliances, cars, machinery, etc., and we know of no principle of law which would allow them, when damage is done by a defective car, to shield themselves upon the ground that said car belongs to and was used by another company. When the car here was received by the defendant, it was adopted as a part of defendant's train, and defendant then became fully responsible for its character, etc., as if it was its own car. It is true, that was not a case involving the relation of master and servant. The law, however, requires a master to furnish suitable appliances for his employees, and we see no reason why he should shield himself behind the fact that they were the property of some one else.

12. Company's Duty Fulfilled by Employing Competent Inspectors.

The inspection of cars merely for the purpose of ascertaining

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whether they can be hauled to their destination is a part of the executive details of the operation of the train; and there is no liability of the railroad to its employees for its negligent performance, if it has used due care in the selection of the persons performing such duty; and the fact that they are foreign cars cannot affect the railroad's liability. *St. Louis, I. M. & S. Ry. Co. v. Brown*, 67 Ark. 295, 54 S. W. 865, 16 Am. & Eng. R. Cas., N. S., 441.

In *Little Miami R. Co. v. Fitzpatrick*, 42 Ohio St. 318, it is said in the opinion: "The car alleged to be defective in this case, as the testimony tends to show, was the car of another company on its way home; but admitting the duty of the company was the same as if it had been its own car, this duty was to employ competent and careful inspectors and repairers. If that were done, its duty to other operatives of the road was performed."

In *Mackin v. Railroad Co.*, 135 Mass. 201, 15 Am. & Eng. R. Cas. 196, it was held that the defendant was bound as a common carrier to receive and draw cars brought to it from other roads, but that its obligation to draw such cars did not extend to such as were unsafe, and that as to cars so received it simply owed its employees the duty of employing competent inspectors.

In *St. Louis, etc., Ry. Co. v. Brown* (Ark.), 16 Am. & Eng. R. Cas., N. S., 441, it is said in the opinion: "The inspection of cars on the way to their destination is cursory, and made for the purpose of ascertaining whether they be roadworthy, and can be hauled without unnecessarily imperiling the safety of the trainmen. It is temporary, and is for the purpose of ascertaining whether the cars can be hauled to their destination, and is a part of the 'executive details' of the operation of the train; and, like other acts necessary to be performed by the trainmen to haul the train, there is no liability of the railroad company to its employees for its negligent performance. If care and diligence have been exercised in the selection of competent persons for that duty, a negligence by them in the performance of it is a risk of the employment that the co-employee takes when he enters the service. *Slater v. Jewett*, 85 N. Y. 61; *Holden v. Railroad Co.*, 129 Mass. 268."

But in *Felton v. Bullard* (C. C. A.), 37 C. C. A. 14, 2 Ohio L. J. 218, 14 Am. & Eng. R. Cas., N. S., 547, 94 Fed. 781, it was held: The mere fact that the company had hired a competent person to inspect foreign cars does not prove that it had discharged its duty to its employees with respect to such cars.

A. R. Y.

DROUIN v. BOSTON & M. R. Co. et al.

(*Supreme Court of Vermont, Caledonia, Aug. 21, 1902.*)

[52 Atl. Rep. 957.]

Eminent Domain—Necessity of Taking—Right to Question.

A railroad company having taken land, and, on notice and hearing, had it appraised by commissioners, pursuant to the provisions of its charter and Acts 1849, No. 41, from which no appeal was taken, and the award of the commissioners having been paid by the company and accepted by the landowners, it is too late, after the lapse of 50 years, to raise the question of the necessity of the taking.

Same—Regularity of Proceedings—Estoppel.

Any failure of a railroad company to furnish the landowners, before the appraisal, a description of the land taken, as required by Acts 1849, No. 41, § 17, should be urged as objection to the condemnation proceedings before the commissioners, and before accepting payment of award; and, not having been, regularity of the proceedings in this respect cannot be questioned.

Right of Way—Adverse Possession—Land within Roadway.

Land contiguous to the center line of the recorded location survey of

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a railroad company, and within the boundaries of the land condemned, as shown by the recorded award of the commission, though outside the track, and not occupied by the company, is within V. S. 3745, providing that no person shall acquire, by adverse possession, title to lands belonging to a railroad company lying within the limits of its roadway, as recorded in the town clerk's office.

Same—Same—Same—Constitutionality of Statute.

V. S. 3745, providing that no person shall acquire by adverse possession title to lands belonging to a railroad company, lying within the limits of its roadway, does not attempt to grant a special privilege to a private corporation, in contravention of Const. c. 1, art. 7, but makes an exception of land set apart for public use from the operation of the statute of limitations.

Appeal in chancery, Washington county; Munson, Chancellor.

Bill by Joseph O. Drouin against the Boston & Maine Railroad Company and others. From a decree dismissing the bill, the orator appeals. Affirmed.

Argued before ROWELL, C. J., and START, WATSON, and HASELTON, JJ.

May & Simonds, for orator.

Young & Young and Harry Blodgett, for defendants.

START, J. The orator asks for a decree removing an alleged cloud from the title to the land in dispute. The defendants claim title by virtue of the charter of the Connecticut & Passumpsic Rivers Railroad Company, the locating survey, dated May 8, 1854, the condemnation of the land for a right of way for its railroad, July 3, 1856, the payment of the award of the commissioners to Solomon Andrews and J. P. Bancroft, the then owners of the land, and from the construction and operation of a railroad over the land condemned. The orator claims title under a deed from Andrews and Bancroft to John M. Hancock, dated June 23, 1859, in which the land conveyed is bounded on the east by land of the Connecticut & Passumpsic Rivers Railroad Company, and the ownership of the land in controversy is dependent upon the location of this line. The orator concedes that the defendants are entitled to hold, as against him, a strip of land in front of his lot, extending west from the center line of the locating survey $2\frac{1}{2}$ rods, and that the land in question is within the boundaries of the land taken by condemnation proceedings; but he contends that the railroad corporation could not and did not lawfully take to exceed $2\frac{1}{2}$ rods of land each side of the center line of its survey, and that his east line is the west line of such limit. The defendants claim that the corporation could and did take a strip of land extending west 6 rods and east $2\frac{1}{2}$ rods from the center line. It is found that at the time of making the survey of 1854 and the condemnation proceedings in 1856 the character of the surface of the land in dispute was entirely different from what it is at the present time. It then consisted of a steep point of land, extending from low, marshy land on the east in a sharp rise

toward the west, across the westerly line of the land in dispute, to an elevation of from 60 to 70 feet above the marsh. To the north of this piece of land the marsh extended a long distance. The survey, in going north, pierced this point of land at a point from 15 to 20 feet, at its greatest height, above the surface of the marsh. The company constructed its road substantially on the line of this survey, and in doing so removed all the soil it conveniently could from the land in dispute to the level of the bed of its road; and most of the soil so removed was used in making the fill across the marsh just north of the land in dispute. The charter of the Connecticut & Passumpsic Rivers Railroad Company was granted in 1835, and by its terms the road was to be constructed, furnished, and put in operation within 15 years; and the company was authorized to construct a single, double, or treble railroad track over the land in question, of any suitable width or dimension, to be determined by the corporation, and to enter upon and take possession of and use all such lands and real estate as might be indispensable for the construction and maintenance of its railroad and the accommodations requisite and appertaining thereto. No. 37, Acts 1835, §§ 1, 4, 7, 9. Under these provisions the company was authorized to take so much of Andrews and Bancroft's land as was indispensable for the construction, maintenance, and accommodation of its road. Section 12, No. 41, Acts 1849, provides that every railroad corporation may lay out its road not exceeding five rods wide; and, for the purpose of cutting embankments and procuring stone and gravel, may take as much more land, within the limits of its charter, in the manner provided in said act, as may be necessary for the proper construction and security of the road. Section 13 provides, in part, that every railroad corporation may purchase or otherwise take any lands or material necessary for the purpose of making or securing their railroad. Section 14 provides that no land or material without the limits of the road shall be taken without the permission of the owner thereof, unless the commissioners, on application of the corporation and notice to the owner, shall first prescribe the limits within which land or material shall be so taken as aforesaid. Section 15 provides for condemnation proceedings; section 16 for an appeal, and also provides that no appeal shall be taken by the landowner after accepting the amount of the award. Section 1 provides that all railroad companies that have been or shall hereafter be incorporated under the authority of this state shall have all the powers and privileges, and be subject to all the duties, liabilities, and other provisions, contained in the act respecting such corporations, so far as the same are consistent with their respective charters. Under sections 12, 13, and 14 of this act the company could take so much of Andrews and Bancroft's land without the five-rod limit and contiguous thereto, for the purpose of its road, as commissioners should adjudge to be

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necessary for the proper construction and security of the road. By No. 55 of the Acts of 1843 the act of 1835 was revived, and all the powers, privileges, and immunities granted in the original act were regranted to the Connecticut & Passumpsic Rivers Railroad Company, and the time for completing the road was extended for 15 years from the passage of the act; and the act also provided that a failure to complete the road within the time limited should not work a forfeiture of any of the privileges or benefits granted by the acts upon such parts of the road as should be completed within the time aforesaid. This enactment had the effect to continue in force the authority and rights granted to the railroad company by its original charter, to construct and put in operation a railroad, and to take land for that purpose, until October 31, 1858; and at the time of the condemnation proceedings the company had a right to take for the purposes of its road so much of the land in controversy as was indispensable for the construction, maintenance, and accommodation of the same. The location of the land with reference to the surveyed center of the road, and its character, at the time of the condemnation proceedings, was such that it could be lawfully taken for the construction and security of the road under the charter or under the act of 1849. The award of the commissioners shows the boundaries of the land, that it was taken for the purposes of the road, that the company and landowners were not able to agree on the amount of damages therefor, and that the commissioners, on application, notice, and hearing, appraised the same; and the case shows that thereupon their award was recorded in the town clerk's office, and the damages paid by the company and accepted by the landowners. Section 15 of the act last cited provides that upon the payment by a railroad company of the damages determined upon by the commissioners, with the costs and charges thereupon accruing, the company shall be deemed to be seised and possessed of all such lands and other property as shall have been appraised by the commissioners. The condemnation proceedings, payment of the award, and construction of the road were after the passage of this act, and, in so far as appears, were in conformity to its provisions, and to the charter, and within the extended time for the completion of the road. Under these circumstances and conditions, and in view of the enactments before cited, and the lapse of time, it will be presumed, if necessary, that it was conceded or adjudged, under the provisions of the charter, or of the act of 1849, that the land was indispensable or necessary for the construction, maintenance, security, and convenience of the road. The company having taken the land, and, on notice and hearing, had the same appraised by commissioners, pursuant to the provisions of its charter and the act of 1849, from which no appeal was taken, and the award of the commissioners having been paid by the company and accepted by the landowners, it is too late, after the lapse of

nearly 50 years, for the orator to be heard upon the question of the necessity for the taking.

The orator further contends that the condemnation proceedings are void, because the company did not cause the location of its road to be recorded in the town clerk's office, and did not, 10 days before the appraisal, furnish the landowners a plan or description of the land taken, as is required by sections 17 and 33 of No. 41 of the Acts of 1849. These objections are not sustained. The location of the road was recorded in the town clerk's office in 1854, and before the condemnation proceedings; and it does not appear whether a plan or description of the land taken was furnished to the landowners before the appraisal. If the provisions of the act of 1849 are, within the meaning of section 1 of the act, consistent with the defendant's charter, and were not complied with, the failure to do so should have been urged as objections to the condemnation proceedings before the commissioners, and before accepting payment of the award of damages. By not seasonably urging these objections and accepting payment of the award, the right to do so was waived; and the orator cannot now be heard upon the question of the regularity of the proceedings in these respects. *Rand v. Town of Townsend*, 26 Vt. 670. We therefore hold that by the taking of the land, the payment and acceptance of the land damages awarded by the commissioners, and the construction and operation of the road, the railroad company became seised and possessed of the land in controversy for the purposes of its railroad. *Hill v. Railroad Co.*, 32 Vt. 68; *Eldridge v. Smith*, 34 Vt. 484.

The orator further insists that he has acquired title to the land in dispute by adverse possession, and contends that the same is not within the limits of the defendant's roadway, within the meaning of No. 27 of the Acts of 1855, now found in V. S. 3745, which provides that no person shall acquire title to lands belonging to a railroad corporation, where such lands lie within the limits of the roadway of such corporation, as recorded in the town clerk's office, by reason of adverse possession. "Roadway," within the meaning of this enactment, includes such lands taken by the corporation, contiguous to the center line of its road, as shown by the record in the town clerk's office, as the corporation could lawfully take for the purposes of its roadway by condemnation proceedings. *Railroad Co. v. Chaffee*, 71 Vt. 84, 42 Atl. 984, 48 Atl. 699; *Vermont Cent. R. Co. v. Town of Burlington*, 28 Vt. 193. We have seen that the corporation could take the land by condemnation proceedings under its charter or the act of 1849 for the purposes of its roadway; that the land is contiguous to the center line of the locating survey, as recorded in the town clerk's office; and that it is within the boundaries of the land taken by condemnation proceedings, as shown by the award of the commissioners, which is

recorded in the town clerk's office where the land is situate. It is therefore considered that the record in the town clerk's office shows the limit of the roadway opposite the orator's lot, within the meaning of the statute; that the land in dispute is within that limit; and that by reason of the statute the orator has not acquired title to the land, as against the defendants, by adverse possession. The case of *Railroad Co. v. Chaffee*, before cited, was an action of ejectment for land within the limits of the survey of the plaintiff's road that had been taken by condemnation proceedings in 1848. It did not appear that the plaintiff company ever occupied any part of the land which was outside the railroad track, and it was held that there was no abandonment of such land by the plaintiff, and that the defendant could not acquire title, as against the plaintiff, by adverse possession.

It is further contended by the orator that the act of 1855 is in contravention of article 7, c. 1, of the constitution of Vermont, in that it undertakes to grant a special privilege to a private corporation. This contention is not sustained. The act excepts land owned by a railroad corporation within the limits of its roadway, as V. S. 3506, does land within the limits of a highway, and V. S. 1223, lands given, granted, sequestered, or appropriated to public, pious, or charitable uses, from the operation of the statute of limitations, because of the public use to which it is appropriated. The exception is not a grant of a privilege to a private corporation, but an exception of land set apart for a public use from the operation of the statute, and is within the range of legislative authority. *Town School Dist. of Brattleboro v. School Dist. No. 2 of Brattleboro*, 72 Vt. 451, 48 Atl. 697; *University v. Reynold's Ex'r*, 3 Vt. 542, 23 Am. Dec. 234; *Thorpe v. Railroad Co.*, 27 Vt. 140, 62 Am. Dec. 625; *Colton v. City of Montpelier*, 71 Vt. 413, 45 Atl. 1039. While the title to land taken by a railroad corporation by condemnation proceedings for the purposes of its roadway is vested in the corporation for certain purposes, it is private property only in a qualified sense. *Sharpless v. Mayor, etc.*, 21 Pa. 147, 59 Am. Dec. 759; *Beekman v. Railroad Co.*, 3 Paige, 45, 22 Am. Dec. 679; *Insurance Co. v. Heiss*, 141 Ill. 35, 31 N. E. 138, 33 Am. St. Rep. 273; *Vermont Cent. R. Co. v. Town of Burlington*, 28 Vt. 193.

The defendants are not estopped from claiming title to the land in dispute. The essential elements of an estoppel are not found. The boundaries of the land were easily ascertainable from an examination of the records in the town clerk's office and a measurement from the center line of the road. It does not appear that any party or purchaser in the orator's chain of title ever took the trouble to do this, or to make any inquiries of the officials of the railroad companies. No fences or other erections were made by either of the defendants to mark the west boundary of the railroad land that were calcu-

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lated to mislead the orator or any of the grantors in his chain of title; nor is there any claim or finding that any of the officials of the companies, or any one in their behalf, at any time said or did anything which misled the orator or any person under whom he claims. It is not found that any of the officials of the companies knew that the erections were on railroad land, nor that they were negligent in not knowing. It is found that the sectionmen knew of the occupancy of the land, but it is not found that they knew of the erections before they were completed, nor that they knew whose land they were on. There are no facts or circumstances found from which we can hold that the officials of the companies remained silent at any time when they were bound to speak, nor from which it can be held that the orator, or any of those under whom he claims, did or omitted to do anything in reliance upon any sayings, acts, or omissions of the officials of the companies. Under these circumstances the orator is not in a situation to invoke the doctrine of estoppel. To estop one from declaring the truth, his conduct must not only have been such as would lead the other party to believe that the fact was otherwise than the truth, but such other party must show affirmatively that he has relied upon the conduct of the party against whom he invokes the doctrine of estoppel, and been induced by it to act or refrain from doing so. *Clement v. Gould*, 61 Vt. 573, 18 Atl. 453; *Robinson v. Morgan*, 65 Vt. 37, 25 Atl. 899; *Wells v. Austin*, 59 Vt. 157, 10 Atl. 405; *Gilbert v. Vail*, 60 Vt. 261, 14 Atl. 542; *Earl v. Stevens*, 57 Vt. 474; *Batchelder v. Blake*, 70 Vt. 197, 40 Atl. 34; *Kendall v. Tracy*, 64 Vt. 522, 24 Atl. 1118. The orator's case is one of ordinary adverse possession, and to presume a grant, or to hold that the defendants are estopped from asserting their title to the land, would, in effect, nullify the statute which excepts such lands from the operation of the statute of limitations.

Decree affirmed, and cause remanded.

LEE CLARK, Plff. in Err., v. MONROE D. HERINGTON.

(Submitted April 14, 1902. Decided June 2, 1902.)

[22 Sup. Ct. Rep. 872.]

Public Lands—Land Grants to Railroads—Indemnity Lands—Selection of Even-Numbered Sections in Place Limits.

Even-numbered sections of land within the place limits of the grant to the Union Pacific Railroad Company by the acts of July 1, 1862 (12 Stat. at L. 489, chap. 120), and July 2, 1864 (13 Stat. at L. 356, chap. 216), were not open to selection by the Missouri, Kansas, & Texas Railroad Company as indemnity lands in satisfaction of the grant by the act of July 26, 1866 (14 Stat. at L. 289, chap. 270), after the passage of the act of March 6, 1868 (15 Stat. at L. 39, chap. 20), doubling the price of the even-numbered sections of land within the place limits of the Union

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to the United States' within 10 miles on each side of Leavenworth road, 'shall not be sold for less than double minimum price of the public lands when sold,' nor be subject to sale at private entry until they had been offered at public sale to the highest bidder, at or above the increased minimum price; the privilege given to actual bona fide settlers, under the pre-emption and homestead laws, to purchase those lands at the increased minimum price, after due proof of settlement, improvement, cultivation, and occupancy; and the right accorded to settlers on such sections under the homestead laws, improving, occupying, and cultivating the same to have patents for not exceeding 80 acres each, are inconsistent with the theory that the even-numbered sections remaining to the United States, within the place limits of the Leavenworth road could be taken as indemnity lands for the railroad corporation."

While the two statutes making the Union Pacific railroad grants did not double the price of the even-numbered sections within the place limits, yet that was done by the act of March 6, 1868 (15 Stat. at L. 39, chap. 20), which in terms provided "that such sections shall be rated at \$2.50 per acre, and be subject only to entry under those (the pre-emption and homestead laws." The even-numbered sections within the place limits of the Union Pacific railroad grants were from that time therefore not open to selection as indemnity lands. It is true that this statute was not passed until after the grant to the Missouri, Kansas, & Texas Railroad Company, nor until after it had filed its map of definite location with the Secretary of the Interior, which appears from an agreed statement of facts to have been on January 7, 1868, but it was passed before the completed construction of the railroad and long before the selection made by the company, and it is familiar law that the title to indemnity lands is vested until an approved selection has been made, and that up to such time Congress has the power to deal with lands in the indemnity limits as it sees fit. As said in *Kansas P. R. Co. v. Atchison, T. & S. F. R. Co.*, 112 U. S. 414, 421, 28 L. Ed. 794, 797, 5 Sup. Ct. Rep. 212: "Until selection was made the title remained in the government, subject to its disposal at its pleasure." See also *Ryan v. Central P. R. Co.*, 99 U. S. 382, 25 L. Ed. 305; *Greenell v. Chicago, R. I. & P. R. Co.*, 103 U. S. 739, 26 L. Ed. 456; *Cedar Rapids & M. River R. Co. v. Herring*, 110 U. S. 28, 28 L. Ed. 56, 3 Sup. Ct. Rep. 485; *St. Paul & S. C. R. Co. v. Winona & St. P. R. Co.*, 112 U. S. 720, 731, 28 L. Ed. 872, 875, 5 Sup. Ct. Rep. 334; *Barney v. Winona & St. P. R. Co.*, 112 U. S. 228, 232, 29 L. Ed. 858, 860, 6 Sup. Ct. Rep. 654; *St. Paul City & St. P. R. Co. v. Chicago, M. & St. P. R. Co.*, 117 U. S. 405, 408, 29 L. Ed. 928, 929, 6 Sup. Ct. Rep. 790; *Wisconsin C. R. Co. v. Price County*, 133 U. S. 496, 511, 33 L. Ed. 687, 694, 10 Sup. Ct. Rep. 341; *United States v. Missouri, K. & T. R. Co.*, 141 U. S. 358, 375, 35 L. Ed. 766, 771, 12 S.

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Ct. Rep. 13; *Hewitt v. Shultz*, 180 U. S. 139, 45 L. Ed. 463, 21 Sup. Ct. Rep. 309; *Southern P. R. Co. v. Bell*, 183 U. S. 675, ante, 232, 22 Sup. Ct. Rep. 232.

It is contended by plaintiff in error that the selection by the railroad company, when approved by the Land Department, operated to convey the title as effectively as would a patent to it therefor; that the even-numbered sections within the place limits, although double minimum lands, were public lands and within the jurisdiction of the Land Department, and that hence the approval of the selection by the Land Department, even if erroneous, operated to vest the title in the company. But this is a mistake. The act of Congress provided in terms that such sections should be subject only to entry under the homestead and pre-emption laws, and the Land Department had no more power to turn one of those sections over to a railroad company than it had to grant lands in a military or Indian reservation. While the lands were within the jurisdiction of the Land Department for some purposes they were not for all. The mode of their disposal was limited, and the Land Department had no authority to ignore that limited mode and dispose of them in any other way. This general doctrine as to the limitation of the powers of the Land Department has been affirmed by this court in many cases and under different circumstances. *Wilcox v. Jackson ex dem. M'Connel*, 13 Pet. 498, 10 L. Ed. 264; *United States v. Stone*, 2 Wall. 525, 17 L. Ed. 765.

It is further contended that it was not within the power of the Land Department to cancel the selection by the company, after the conveyance of the land by the company, without notice to all the transferees, and in support thereof *Cornelius v. Kessel*, 128 U. S. 456, 32 L. Ed. 482, 9 Sup. Ct. Rep. 122; *Michigan Land & Lumber Co. v. Rust*, 168 U. S. 589, 42 L. Ed. 591, 18 Sup. Ct. Rep. 208, and *Hawley v. Diller*, 178 U. S. 476, 44 L. Ed. 1157, 20 Sup. Ct. Rep. 986, are cited. It is undoubtedly true, as held in those cases and others, that while the Land Department has full jurisdiction over the disposition of public lands,—a jurisdiction which may be exercised until the passing of the legal title by the issue of a patent or otherwise,—yet such jurisdiction cannot be exercised so as to destroy any equitable rights without notice to the claimants thereof. While that is true, the courts are not thereby debarred from an inquiry into and a determination of the validity of any equitable title. They do not assume any direct appellate jurisdiction over the rulings of the Land Department, and they accept the findings of that department as conclusive upon questions of fact. *Shepley v. Cowan*, 91 U. S. 330, 23 L. Ed. 424; *Quinby v. Conlan*, 104 U. S. 420, 26 L. Ed. 800. But, notwithstanding this, prior to the issue of any patent a party may have rights in the land of one kind or another which courts will enforce. Thus, where the full equitable title to land has passed from the government to an

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individual, the land is subject to state taxation, although no patent has issued. *Carroll v. Safford*, 3 How. 441, 11 L. Ed. 671; *Witherspoon v. Duncan*, 4 Wall. 210, 18 L. Ed. 339. Where, prior to the issue of a patent, land in possession of an individual is sought to be charged with state taxes, he may contest in the courts the liability of the land therefor on the ground that full equitable title has not passed to him, or that something yet remains to be done before the rights of the government are ended. *Kansas P. R. Co. v. Prescott*, 16 Wall. 603, 21 L. Ed. 373; *Union P. R. Co. v. McShane*, 22 Wall. 444, 22 L. Ed. 747.

Again, even before the acquiring of even an equitable title to the land as against the government, contracts made by actual settlers concerning their possessory rights and the title hoped to be acquired from the United States may be valid as between the parties thereto, and enforced in the courts. *Lamb v. Davenport*, 18 Wall. 307, 21 L. Ed. 759; *Stark v. Starr*, 94 U. S. 477, 24 L. Ed. 276.

Again, it is a well-known fact that many agricultural lands and many mining claims are held by their owners with only final receipts from the government and without the issue of any patent. Yet the rights which accompany title are exercised by the parties and enforced by the courts. It will be noticed that this is not an action to recover the possession of any land, or one to quiet the title thereto. It is simply an action to recover damages for the breach of a contract in respect to the land, and the decision, in no respect controlling the action of the officers of the Land Department, is simply a determination of the rights which the parties have acquired by proceeding in the Land Department. This is clearly a matter of ordinary judicial cognizance, and one which by no statute of Congress or rule of the common law is excluded from such cognizance. *Garland v. Wynn*, 20 How. 6, 15 L. Ed. 801; *Monroe Cattle Co. v. Becker*, 147 U. S. 47, 57, 37 L. Ed. 72, 77, 13 Sup. Ct. Rep. 217; *Turner v. Sawyer*, 150 U. S. 578, 37 L. Ed. 1189, 14 Sup. Ct. Rep. 192.

A final contention in this matter is that the plaintiff in error is an innocent purchaser for value, and that, therefore, he and his grantees are entitled to be protected in their title by virtue of the act of March 3, 1887 (24 Stat. at L. 556, chap. 376), and March 2, 1896 (29 Stat. at L. 42, chap. 39). It is a sufficient answer to this contention that this defense was not set up in the state courts, and that it does not appear anywhere in the record that Clark, to whom the railroad company conveyed, or any subsequent grantee in the chain of title, was a citizen of the United States, or had declared his intention to become a citizen, and hence the act of 1887, which purports to confirm alone the titles of citizens or those who have declared their intention to become citizens, has no application; that the act of 1896 also has no application because that refers only to cases of lands patented or certified, and the con-

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firmations of lands acquired by deed or contract from the party holding the patent or certificate, and here the railroad company never received any patent or certificate. In addition, prior to the passage of the act, a patent had been issued to Cox, and his title thus fully confirmed.

These considerations dispose of the only Federal question presented in the record, and, there appearing no error, the judgment of the Supreme Court of Kansas is affirmed.

MR. JUSTICE GRAY took no part in the decision of this case.

ILLINOIS CENT. R. CO. v. HOSKINS.

(*Supreme Court of Mississippi, June 10, 1902.*)

[32 So. Rep. 150.]

Right of Way—Defective Condemnation—Trespass.*

Where a railroad, in the condemnation of land for a right of way, fails to proceed in conformity with its legal power, all its acts on the land are trespasses, for which it is liable.

Same—Same—Ejectment.

Where a railroad company is in possession of land under a defective condemnation, it may be dispossessed by ejectment.

Same—Same—Punitive Damages.

Where a railroad has reason to believe that its possession of land is rightful under condemnation proceedings, but the proceedings were defective, it is not liable in punitive damages for its trespasses on the land.

Same—Same—Right to Remove Improvements.

Though a railroad, in taking possession of land and placing structures thereon, is a trespasser, because the condemnation proceedings were not in conformity with law, it is entitled to remove such structures.

Same—Same—Damages.

Where land is wrongfully occupied by a railroad, the owner in ejectment is entitled to damages to the land from the construction of the roadbed.

Same—Same—Same.

Where a railroad built a spur over plaintiff's land, in ejectment plaintiff was entitled, as compensation for the use, to a reasonable compensation for any use to which plaintiff might have put the land, and not to a portion of the freights that should have been earned in carriage of goods from the end of the spur over the same and to places on the main line.

Same—Same—Construction of Spur Track†—Damages—Freight.

That the spur was not an essential part of the main line did not entitle plaintiff to such freights as compensation.

Appeal from circuit court, Lincoln county; Robt. Powell, Judge.

"To be officially reported."

Action by S. W. Hoskins against the Illinois Central Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed.

*See notes, 6 Am. & Eng. R. Cas., N. S., 499; 3 Am. & Eng. R. Cas., N. S., xxiii.

†See note, 13 Am. & Eng. R. Cas., N. S., 448.

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Mayes & Harris, for appellant.

Harper & Potter, for appellee.

TERRAL, J. S. W. Hoskins brought an action of ejectment in the circuit court of Lincoln county against the Illinois Central Railroad Company for the N. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 6, township 7 N., range 9 E. Two thousand five hundred dollars was demanded for the use and occupation of it by the defendant. The defendant pleaded the general issue, and gave notice of valuable improvements put upon the land by it to the amount of \$100,000. These improvements constitute the roadbed and track of about 1,000 feet across said quarter section of land, being a part of its spur line from Brookhaven to a gravel pit beyond the same. The plaintiff had a recovery for his land, and also for \$1,800 for the use and occupation of it for six years, with an allowance of \$300 to defendant for its improvements. From a judgment entered in conformity with this verdict the Illinois Central Railroad Company appeals. The \$1,800 allowed for rent to plaintiff arose, as it is claimed, by reason of the freights which the company should have received from hauling gravel and lumber taken at the east end of the spur road over the spur line and over its main line, whithersoever carried; one-third of which freights, it is asserted, should be paid to the plaintiff, and which third was estimated, or rather guessed, to be \$1,800. The \$300 allowed to defendant for valuable improvements is the outcome of this 1,000 feet of railroad on plaintiff's land, which the evidence of a witness for the plaintiff showed it must have cost the defendant \$2,000 to construct, while that of a witness for the defendant showed its building to have cost more than \$3,400. This statement, considered in connection with the verdict, demonstrates, we think, the impropriety of the result here reached. The plaintiff should not have recovered \$1,800 for use and occupation, because no part of that sum arose from any use of the land to which the defendant could have devoted it, nor should the defendant have been allowed \$300 for the value of the structures put by it upon the land, which structures it is entitled to remove at its pleasure. It is a general rule of law that whatsoever chattels are attached to the realty with the manifest intent that they remain there, become part and parcel of it, and cannot be removed without the consent of the owner of the freehold to whom they are considered a gift; but to this rule there are exceptions, and among others is the superstructure of a railway company. Such a company exercises the right of eminent domain,—a governmental function,—and takes no freehold but a mere easement, and therefore cannot be said to have intended to attach its rails and ties and other appliances to the freeholds. They are constructed also for public use and enjoyment, and it is their quality in this respect that distinguishes the acts of the company in their construction from those of a trespasser or others; and, if the terms for acquiring this easement are

too onerous, it may remove its rails and ties, and pass in another direction. True, if it does not proceed in conformity with its power in the condemnation of the land for its right of way, and until it does so proceed, all its acts upon the land are trespasses, for which it is liable; and it may be put out of possession by ejectment. The defendant here had good reason to think it had acquired a right of way over this tract of land, and it therefore is not liable for punitive damages; but for all its acts upon the land, unless and until it acquires a right of way, it is responsible as a trespasser. This court, in *Railroad Co. v. Dickson*, 63 Miss. 380, 385, 63 Am. Rep. 809, approved the doctrine announced on this subject by the courts of Pennsylvania, Michigan, and Alabama. In *Justice v. Railroad Co.*, 87 Pa. 28, it is said: "The common-law rule is undoubted that a trespasser who builds on another's land, dedicates his structures to the owner. This case is not the case of a mere trespass by one having no authority to enter, but of one representing the state herself, clothed with the power of eminent domain, having a right to enter, and to place these materials on the land taken for a public use,—materials essential to the very purpose which the state has declared in the grant of the charter. It is true, the entry was a trespass by reason of the omission to do an act required for the security of the citizen, to wit, to make compensation or give security for it. For this injury the citizen is entitled to redress. But his redress cannot extend beyond his injury. It cannot extend to the taking of the personal chattels of the railroad company. They are not his, and cannot increase his remedy. The injury was to what the landholder had himself, not to what he had not. Then why should the materials laid down for the benefit of the public be treated as dedicated to him? In the case of a common trespasser the owner of the land may take and keep his structures *nolens volens*, but not so in this case; for, though the original entry was a trespass, it is well settled that the company can proceed in due course of law to appropriate the land, and consequently to reclaim and avail itself of the structures laid thereon. Another evident difference between a mere tortfeasor and a railroad company is this: the former necessarily attaches his structures to the freehold, for he has no less estate in himself; but the latter can take an easement only, and the structures attached are subservient to the purpose of the easement. A railroad company can take no freehold title, and when its proper use of the easement ceases the franchise is at an end. There is no intention in fact to attach the structure to the freehold. We have, therefore, these salient features to characterize the case before us, to wit: The right to enter on the land under authority of law to build a railroad for public use; the acquisition thereby of a mere easement in the land; the entire absence of an intention to dedicate the chattels entering into its construction to the use of the land; the necessity for their

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use in the execution of the public purposes; and lastly, the power to retain and possess these chattels and the structures they compose by a valid proceeding at law, notwithstanding the original illegality of the entry. There are some analogies bearing remotely on the questions before us, showing that property is not gained by the owner of the land because found upon it," etc. In *Railroad Co. v. Dunlap*, 47 Mich. 456, 11 N. W. 271, the supreme court (page 465, 47 Mich., and page 273, 11 N. W.) said: "We are of opinion that no error was committed in excluding from the compensation allowed to Dunlap the value of the railroad track laid upon the land. The railroad company, whether rightfully or wrongfully, laid this track while in possession, and for purposes entirely distinct from any use of the land as an isolated parcel. It would be absurd to apply to land so used, and to a railroad track laid on it, the technical rules which apply in some other cases to structures inseparably attached to the freehold." In *Jones v. Railway Co.*, 70 Ala. 227, 8 Am. & Eng. R. Cas., N. S., 383, Brickell, C. J., ably demonstrates that the necessary structures for a railroad, placed upon land by one having the power of eminent domain, continue, under all circumstances, the personal chattels of such one. This rule is announced in *Railroad Co. v. Le Blanc*, 74 Miss. 650, 673, 21 South. 760, where many of the authorities supporting it are cited with approval. The plaintiff shows a right to recover the premises from the defendant, and he is entitled to recover also of defendant, for its use and occupation, a reasonable compensation for any use to which it could reasonably have been put by the plaintiff, and a further sum to cover all damages done upon the land by the defendant in constructing a roadbed for its railway track. The plaintiff is to be compensated for all losses, but he should have no increased compensation by reason of its use as a part of the system of railroad operated by defendant. *Sullivan v. Lafayette Co.*, 61 Miss. 271; *Kille v. Ege*, 82 Pa. 102; *Bullock v. Wilson*, 3 Port. 382; *Sedg. Dam.* § 908. The appellee insists that these principles do not apply to this case because the 1,000 feet of roadbed here sued for is only a part of a short spur line, and not an essential or necessary part of defendant's main line; but the principle of law relating to the subject applies alike, we think, to both cases. Reversed and remanded.

COMMONWEALTH *v.* CAMDEN INTERSTATE RY. CO.

(*Court of Appeals of Kentucky, June 3, 1902.*)

[68 S. W. Rep. 628.]

Indictment for Nuisance—Improper Construction of Railroad in Street.*

An indictment against a railroad company for maintaining a nuisance

*See note, 1 Am. & Eng. R. Cas., N. S., 70.

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by obstructing a public street, which names the street obstructed, describing it as a public thoroughfare, sufficiently describes the place; and a charge that the road was so constructed that vehicles could not cross it is sufficient, without stating how high the rails were placed above the level of the street, or how deep were the spaces between the rails.

Same—Same.

Such an indictment need not allege that the road was operated contrary to an ordinance of the city, as the city would have no power to authorize a railroad company to operate its road so as to destroy the reasonable usefulness of the street to the public; and it is not to be presumed that the city has enacted an ordinance in violation of the general law of the land.

Appeal from circuit court, Boyd county.

"Not to be officially reported."

An indictment against the Camden Interstate Railway Company was dismissed, and the commonwealth appeals. Reversed.

M. M. Redwine and Clifton J. Pratt, for the Commonwealth.

Thos. R. Brown, for appellee.

GUFFY, C. J. The grand jury of Boyd county returned an indictment against the appellee which reads as follows: "The grand jury of Boyd county, in the name and by the authority of the commonwealth of Kentucky, accuse Camden Interstate Railway Company, a corporation, of the offense of creating and maintaining a public nuisance obstructing a public street and highway in the city of Catlettsburg, Ky., committed as follows: The said defendant on the 16th day of Sept., 1901, and on divers other days within one year before said date, in the county and circuit aforesaid did unlawfully create and maintain a public nuisance on a public highway in a public neighborhood, by so placing its ties and rails as to leave them above the level of the street, and by failing to fill between said ties and rails so as to enable vehicles and wagons to pass over them on Oakland avenue, a public thoroughfare in the city of Catlettsburg, Ky., to the great hindrance, delay, and inconvenience of the traveling public and many people who live in the neighborhood; said deft. being a corporation, and operating a street railway in said city and over said avenue under the laws of the commonwealth of Kentucky. Against the peace and dignity of the commonwealth of Kentucky." The defendant entered a general demurrer to the indictment, which was sustained by the court, and the indictment dismissed. From that judgment the commonwealth prosecutes this appeal.

The sole question presented for decision is as to the sufficiency of the indictment. It is the contention of appellee that the indictment does not state facts sufficient to constitute an offense. Objection is also urged against the indictment because it does not sufficiently specify the points of obstruction. We are, however, of opinion, that the charge that it

obstructed the street (naming it) sufficiently discribed the place. Nor do we think that the indictment should necessarily have stated how high the rails were placed above the level of the street, nor how deep the spaces between the rails. The indictment explicitly charges that it was so constructed that vehicles could not cross the road. If it should turn out in the evidence that the depressions and elevations were only such as reasonably attended the legal and proper construction and operation of a railway, it would, of course, follow that the defendant could not be guilty.

It is further insisted for appellee that the indictment fails to allege that the road was operated contrary to the ordinance of the city. We do not think such contention is tenable. The city would have no power to authorize the construction and operation of a street by a railway company in such a manner as to destroy its reasonable usefulness to the public. In other words, the street could not be entirely destroyed or rendered useless for public purposes simply to suit the convenience of a railway; and it may be fairly assumed that no such ordinance was ever enacted by the city, as a city will not presume to enact an ordinance in violation of the general law of the land. We are referred to the case of *Illinois Cent. R. Co. v. Com. (Ky.)* 47 S. W. 255; but that decision does not sustain appellee's contention, but, on the contrary, it is rather an authority against the contention. The appellant cites *Attorney General v. Booming Co.*, 34 Mich. 462; 16 Am. & Eng. Enc. Law, p. 927; 1 Bish. Cr. Law, § 769; 2 Bish. Cr. Law, § 1285,—which we think tend strongly to sustain the appellant's contention.

Our conclusion is that the court below erred in sustaining the demurrer to the indictment. Judgment reversed, and cause remanded, with directions to overrule the demurrer, and for proceedings consistent herewith.

CALUMET & C. CANAL & DOCK CO. v. MORAWETZ.

(*Supreme Court of Illinois, Feb. 21, 1902.*)

[63 N. E. Rep. 165.]

Damage to Adjacent Land from Construction of Another Track—Limitation—Accrual of Right of Action.

When a railway company, pursuant to municipal authority granted to it to lay two tracks in certain streets, lays one track, and several years thereafter a second track is laid, and the latter track causes damages to the property abutting on such streets, the statute of limitations does not run from the time of the granting of the authority, but from the time of the laying of the second track, causing the damage.

Same.

Where, in an action for damages to property abutting on certain streets, caused by defendant, a railway company, building and operating a second track in the streets, it appeared that the laying of the first track did not interfere with the access to such abutting property, while the second track and the operation of trains on it rendered such

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access impossible, and that engines passing on the second track threw smoke and cinders into the house on the abutting property, the evidence warranted the submission of the case to the jury.

Same—Elements of Damage—Instructions.

In an action for damages to property abutting on certain streets, caused by defendant, a railway company, building and operating a second track in the streets, instructions authorizing the jury, in estimating the damages, to consider the noise occasioned by the moving trains and the smoke and soot and cinders, if these damaged the property, and that the measure of damages sustained was the deterioration in value of plaintiff's property, though general, and authorizing the jury to consider all damages by reason of the operation of other tracks in the street, were not erroneous when the jury were instructed that plaintiff could recover no damages accruing from such other tracks.

Appeal from appellate court, First district.

Action by Balbina Morawetz against the Calumet & Chicago Canal & Dock Company. Plaintiff obtained judgment, which was affirmed by the appellate court, and defendant appeals. Affirmed.

This is an action on the case, brought on February 19, 1898, by appellee against the appellant company and the Chicago & Calumet Terminal Railway Company, to recover damages sustained by appellee, as the owner of lot 24 of block 3 in Taylor's Second addition to South Chicago, situated at the southeast corner of Ninety-Fifth street, and what is or has been variously known as "First Avenue," "Avenue A," and "Avenue O," in South Chicago, now in the city of Chicago, by reason of the construction of the easterly of two railroad tracks, which cross Ninety-Fifth street at an angle of about 45 degrees though slightly curved northeasterly and southwesterly, the easterly rail of the westerly track and both rails of the easterly track continuing at the same angle across First avenue south of the south line of Ninety-Fifth street, the tracks in question being constructed and operated along the side of an lot in front of appellee's premises. The trial was before the court and a jury, and resulted in judgment in favor of appellee and against appellant for the sum of \$1,500, the court having instructed the jury to find the Chicago & Calumet Terminal Railway Company not guilty. An appeal was taken to the appellate court, where the judgment of the circuit court was affirmed. The present appeal is prosecuted from the judgment of affirmance so entered by the appellate court.

The locus, in 1885, was in the village of Hyde Park, subsequently annexed to the city of Chicago. In 1885, as is alleged in the declaration, the appellant, the Calumet & Chicago Canal & Dock Company, procured an ordinance from the village of Hyde Park allowing it to construct, lay down, maintain, and operate with steam power not to exceed two railroad tracks, with all necessary side tracks and branches, from the Baltimore & Ohio Railroad tracks to the shore of Lake Michigan, and passing along and over First avenue adjacent to the premises in question, and passing over Ninety-Fifth street at a curve eastward from the intersection of First avenue with

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Ninety-Fifth street. The appellant laid one track, crossing Ninety-Fifth street diagonally in a northeasterly direction a short distance from appellee's premises in 1885; and in 1896 the Chicago & Calumet Terminal Railway Company, being then appellant's lessee, laid another track easterly from the first one, and parallel therewith, which has been continuously operated since its construction. Appellee's lot is situated on the corner of Ninety-Fifth street and First avenue, fronts north on Ninety-Fifth street, is 24 feet in width, and runs back 130½ feet in depth along First avenue. There is a house on the property, the lower part of which is 58 feet in length, and the upper part 44 feet in length, the entire building being 22 feet wide. In the rear is another building 16 by 18 feet, containing two families. The lower front part is a store, rented out at the time of the trial for a saloon. Appellee lives with her family in the upper part. The evidence tends to show that there are two switches west of the house, one about 25 feet from the side door and one further south; that there are four switches near the corner; that the distance from the northwest corner of lot 24 to the easterly track along the north side of the lot is 9.3 feet; that it is between 5 and 6 feet from the northwest corner of the platform in front of the house to the center of the track; that First avenue lies on the west side of lot 24, is 33 feet wide, and extends from Ninety-Fifth street to the south side of the alley in the rear of the lot; that the distance between the east track and the sidewalk on the west line of lot 24 is 9 feet; that there are three windows on the first floor on the west side and one door; that the windows are all on the south side of the door; that the door is very close to being opposite the switch; that there is no other door on the west side of the house; that there are four windows on the second floor, facing west, and three facing north; that there is a fence on the west side of the property inclosing about 9 feet of the street; that there is a platform over a ditch or gutter running along in front of the house, which platform extends about 22 feet north from the north line of the lot, and is somewhat raised above the level of the sidewalk, forming a bridge across the ditch, and was constructed for convenience of access from the roadway to the store, and for moving heavy articles into the store.

Jesse B. Barton, for appellant.

Lynden Evans, for appellee.

MAGRUDER, J. (after stating the facts). 1. The first point made by the appellant is that its plea of the statute of limitations should have been sustained. While counsel on either side state how the point thus made arises, yet we presume that it is based upon the refusal of the court to give to the jury the following instructions: "The jury are instructed that, if you find from the evidence that this suit was not commenced within five years from the date of the construction

and operation of the first track built by the defendant, the Calumet & Chicago Canal & Dock Company, under its ordinance, then the plaintiff in this case, as a matter of law, cannot recover any damages alleged in the declaration in this case, and you should find the defendants not guilty." Under the ordinance originally passed by the village of Hyde Park appellant had the right to construct and maintain two railroad tracks with necessary side tracks and branches, etc. One of these tracks it constructed in 1885 or 1888, or at some time prior to 1890; but it constructed the second track east of the first and nearer to the premises in question, in 1896. This suit was begun on February 19, 1898, and it is brought to recover damages to appellee's property for the construction of and operation of cars upon the east track alone. The east track having been constructed less than two years before the beginning of the suit, the court below committed no error in refusing to sustain the plea of the statute of limitations of five years. The passage of the ordinance was not the beginning of the damage to the property of appellee. It was not apparent, when the ordinance was passed, that it would ever be acted upon, or that both of the tracks allowed by the ordinance would ever be built. No damage is claimed for any act or thing done upon the first track, constructed before 1890. The damage done was the building of the second track immediately next and in front of appellee's premises in 1896, and the operation and switching of cars thereon. Until the second track was built, no damage was done. The contention of appellant seems to be that all damage ascribed to the building and operating of the road under the ordinance must be intended to have arisen at the time when the railroad company entered upon the streets and laid the first track. Certainly, the appellee is entitled to recover for damage done to her property by reason of the laying of the second track in 1896. It cannot be claimed that damage resulted to her from the passage of the ordinance authorizing the laying of the tracks. The mere grant of authority to construct the road does not do the damage, but the damage is done by the construction and operation of the road. When the property of an abutting owner is damaged, his right under the constitution to compensation is not confined to cases of illegal trespass, but may be caused by acts which are perfectly legal. The operation of the road upon a single track may leave a large portion of the street to the use of the general public, and thereby do but little harm, but the adding of one or more additional tracks may both interfere with the use of the street by the public and with the access of the abutting owner to his property. *Maltman v. Railroad Co.*, 41 Ill. App. 229.

The evidence is conflicting upon the question whether or not the premises were damaged by the construction and operation of the easterly track, but there was evidence enough to justify the court in submitting the question to the jury. The

evidence tends to show that before the second or easterly track was laid access to the store in appellee's building was easy, but that afterwards it became impossible; parties desiring to approach the front of the house or the side of the house finding it almost impossible to do so by reason of the switching and passing and repassing of cars, which were constantly going on. The evidence tends to show that appellee's ingress to and egress from her premises were seriously interfered with by the construction of the second track. The proof also tends to establish the fact that the engines threw smoke and cinders into the house, so that appellee could not dry her clothes after washing them without their becoming soiled with smoke, or open her windows without letting in smoke and cinders; that trains, in passing, shook the building, and, as one witness says, "threw cinders against it like hailstones." Many witnesses testified, not only as to the difficulty of access to the building, and the difficulty of ingress to and egress therefrom, but also that the engines of passing trains threw smoke, soot, and cinders into the house. No evidence was introduced by the appellant contradicting the testimony of appellee as to the frequent passing of locomotive engines, or the casting of smoke and cinders into appellee's premises. In *Railroad Co. v. Reich*, 101 Ill. 157, the action was case, brought against a railroad company to recover damages for injury to a five-acre lot on the corner of Fifty-Ninth street and Stewart avenue, in Chicago, by reason of the location and operation of certain railroad tracks on said avenue. The declaration there alleged the wrongful occupation of the avenue with four railroad tracks, so as to render it impassable for vehicles, and so as to deprive the appellee therein of ingress and egress to and from the premises. It also alleged that the company so carelessly and negligently managed and operated the road that large quantities of cinders, dust, and coal were thrown and cast upon the premises. The statute of limitations was pleaded there as here. It there appeared that the railroad company laid down its first track in 1858, its second track in 1869, and two other tracks in 1874. Proof was introduced tending to show damage to the market value of the plaintiff's property, and also special injury by being cut off from access to the property, and from dust, cinders, etc.; and in that case this court considered the question of damages from the building of additional tracks where the recovery of damages, if any, from former tracks was barred by lapse of time. In that case, after referring to the fact that two tracks had been laid in the street, but in such a way as not to appropriate the entire street, so that the public could use the balance of the street, the court said (page 176): "It did, in 1874,—less than two years before suit was brought,—occupy it by laying thereon two additional tracks, and, as the evidence tends to show, thereby completely excluded its use for ordinary street purposes, and on that side cut off appellee's access to his

lot." And it was there held that the lot owner had a right of action to recover damages by reason of such cutting off of access to his lot.

2. Complaint is made by appellant of the giving of certain instructions which were given by the trial court for the appellee. These instructions told the jury that if, from the evidence, they should find the defendant guilty, then, in estimating the damages, they might consider the noise occasioned by the moving of trains, and smoke and soot and cinders, if the jury should find from the evidence that smoke, soot, and cinders and the noise of moving trains damaged the plaintiff's premises; that, as a matter of law, if they should believe from the evidence that the plaintiff had sustained damage by reason of the acts of the defendant complained of, then the measure of damages was the deterioration in value of the plaintiff's premises resulting from the acts of the defendant; that, although the noise made by passing trains was a necessary incident to the proper operation of the railway, yet, in so far as such noise would have a tendency to render plaintiff's premises less valuable in the market, it was an element of damage which the jury might properly take into consideration, provided they believed from the evidence that the plaintiff's premises were damaged by the noise of passing trains, as complained of in the declaration; that, as a matter of law, if they should believe from the evidence that the defendant, the Calumet & Chicago Canal & Dock Company, laid or authorized the laying of the second or eastward track along the west side of the plaintiff's premises and crossing Ninety-Fifth street on a curve to the eastward, then the Calumet & Chicago Canal & Dock Company was liable for all damage which might result from the ordinary use to which said track might be put by any lessee of that company, or by any company operating the said tracks under any arrangement authorizing the operation thereof to which said company was a party. The doctrine announced in these instructions is sustained by the following cases decided by this court: *Railway Co. v. Leah*, 152 Ill. 249, 38 N. E. 556; *Railway Co. v. Nix*, 137 Ill. 141, 27 N. E. 81; *Railroad Co. v. Scott*, 132 Ill. 429, 24 N. E. 78, 8 L. R. A. 330; *Railroad Co. v. Reich*, 101 Ill. 157; *Rigney v. City of Chicago*, 102 Ill. 64; *Railway Co. v. Darke*, 148 Ill. 226, 35 N. E. 750. However, as we understand the argument of appellant's counsel, it does not deny the soundness of the doctrine of these instructions as announced in the cases above referred to, but the main objection made to them by counsel is that they should have been refused or modified so as to limit the jury to a consideration of only such acts or things as were done in the streets, or arising out of the use of such part of the tracks as were laid in the streets. The instructions are criticised as being general, and upon the alleged ground that under them the jury could consider all damages to the property by reason of the construction and

operation of all the tracks shown on the plat. If the instructions are justly subject to this criticism, the defect was cured by two instructions which were given on behalf of the appellant, and at its request. By these two instructions the jury were instructed that the plaintiff in the case had offered no evidence of damages occasioned by the construction or operation of the first track, and could recover no damages accruing therefrom, and that no damages were recoverable by the plaintiff to her property, described in the declaration, for any act or thing done on any other of the tracks of the defendant company except what was done on so much of the east or second track as was situated in or on Ninety-Fifth street and First avenue or Avenue O. By this latter instruction the court limited the jury to the damage complained of in the declaration. Complaint is made of an instruction, given by the court to the jury on behalf of the appellee to the effect that, as a matter of law, if they should believe from the evidence that the plaintiff had sustained damage by reason of the acts complained of in the declaration, then in assessing the damages they might consider all the facts which they believed from the evidence and their view of the premises contributed to produce such damage,—as that the property was in a permanently worse condition for yielding rent or income; that its use to the plaintiff was more dangerous, and that there was danger of fire from passing engines; and all other actual inconveniences and damages the property might sustain in its use, not only for the present, but for the future. As to the view of the premises by the jury, it is shown in the record that immediately before appellee testified in rebuttal it was agreed between counsel for the parties that the jury should be allowed to view the premises. The only part of the instruction which is criticised is that which is embraced in the last clause, to wit, "all other actual inconveniences and damages the property may sustain in its use, not only for the present, but for the future." This instruction, or an instruction substantially the same as this, was indorsed by this court in the case of *Railway Co. v. Nix*, supra. But, if this instruction was erroneous, we agree with the appellate court when they say in their opinion that the error in it was not sufficient to warrant a reversal, for the reason that the jury could not have been misled by it in view of other instructions. The instructions given to the jury were favorable to appellant, because they told the jury that in the recovery of damages in a suit against a railroad company for injuring the property fronting on the street in the city over which the railroad passes, where there is any liability at all, it is confined to the direct physical injury done to the property by the location and operation of the road. In other words, the jury were told in several instructions that damages for physical injury only could be recovered. And yet this court has held in a number of cases that the recovery should not be limited to direct

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physical injury only. *Lake Shore & M. S. Ry. Co. v. Chicago & W. I. R. Co.*, 100 Ill. 21, 3 Am. & Eng. R. Cas., N. S., 188; *Ringey v. City of Chicago*, 102 Ill. 64; *Railway Co. v. Leah*, 152 Ill. 249, 38 N. E. 556. In *Lake Shore & M. S. Ry. Co. v. Chicago & W. I. R. Co.*, supra, we said (page 33): "The limitation of the recovery of damages to those for the direct physical injury to the land was too restricted under the above-cited decisions of this court, which are to the effect that there should be compensation for all such incidental loss, inconvenience, and damage which may reasonably be expected to result from the construction and use of the crossing. And we think the above refused instruction asked by the defendants should have been given." In *Railway Co. v. Leah*, supra, we said: "It is next contended that it was error in the trial court to admit evidence in regard to noise made by appellant's trains in passing and repassing appellee's premises, and to permit witnesses to testify as to what effect the 'passing and repassing of appellant's trains would have upon appellee's property, taking every thing into consideration.' Appellant argues this claim on the theory that damages can be recovered only on account of a direct physical injury to the corpus or subject of property. This is a misapprehension of the law. It was material and proper that appellee should be permitted to prove the special disadvantages and annoyances which interfered with the full enjoyment by him of that use and benefit of his property to which the law entitles him,"—citing a number of cases.

(Question of appellate practice omitted.)

The judgment of the appellate court affirming the judgment of the circuit court is affirmed. Judgment affirmed.

PACIFIC STEAM WHALING CO. v. GRISMORE et al.

(*Circuit Court of Appeals, Ninth Circuit, June 2, 1902.*)

[117 Fed. Rep. 68.]

Carriers—Steamship—Accommodations for Passengers.*

A steamship is liable in damages to passengers who, although they were sold second-class tickets, were given only the accommodations of steerage passengers, and who suffered great discomfort from lack of proper food and water and from being overcrowded in unclean and badly ventilated quarters. While the obtaining of an inspector's certificate permitting the vessel to take more passengers than she actually carried may relieve her from prosecution for the statutory penalty for carrying an excessive number, it does not relieve her from liability to passengers for a violation of her implied agreement to furnish them with reasonable accommodations.

Admiralty Practice—Taking Testimony on Appeal.

The parties to a suit in admiralty should make reasonable effort to obtain all testimony material to the issues in the trial court, and the

*See notes at end of case.

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practice of taking further testimony after an adverse decision, to be used in the appellate court, is one not to be encouraged.

Carriers—Steamship—Delay in Landing Passengers' Effects.

Libelants contracted for the carriage of themselves and their baggage and effects by a steamship from San Francisco to Nome in the spring of 1900. There was no landing place at Nome, and all landing had to be done by means of lighters. The tickets provided that the voyage should end at the place of anchorage, and that the landing was no part of the contract. After they were put on shore libelants were compelled to wait in some cases 10 days, and until the ship had been to other ports and returned, before receiving their baggage, effects, and freight, by reason of which they suffered exposure, expense, and loss on account of the delay, which was due, to some extent at least, to the fact that the ship was unnecessarily overloaded: *held*, that the stipulation in the contracts did not exonerate the ship from liability in damages under the circumstances shown, even if enforceable within reasonable limits, owing to the condition of the port and the prevailing custom.

Appeal from the District Court of the United States for the Northern Division of the District of Washington.

For opinion below, see 110 Fed. 221.

Gorham & Gorham and Gorham, Brown & Gorham, for appellant.

P. P. Carroll and John E. Carroll, for appellees.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

HAWLEY, District Judge. In the court below three separate libels and one intervening libel were filed against the steamship Valencia to recover damages alleged to have been suffered by various libelants (11 in number) by reason of an alleged breach of contract for the transportation of themselves and their personal effects on the Valencia from the port of San Francisco to the port of Nome, Alaska, during the season of 1900. The causes were, after the trial, consolidated. The Valencia, according to the certificate of inspection made by the proper officers at San Francisco, Cal., had 37 state rooms and 128 berths, and was allowed to carry 503 passengers, viz.: "128 first-cabin, ——— second-cabin, and 375 deck or steerage passengers." A further certificate was obtained from the inspectors to the effect that the Valencia had provided accommodations for, and was authorized to carry, 99 second-cabin passengers. This, as will appear from the testimony hereinafter referred to, was an inadvertent error, and was intended for "99 second-class passengers." On her voyage from San Francisco the local inspectors at Seattle increased the limit of passengers which the Valencia was entitled to carry to 615. The evidence shows that each of the libelants who purchased "second-class" tickets in San Francisco paid therefor the sum of \$75, and from representations made to them understood that they were to have second-class accommodations on board the steamship; but as a matter of fact they were treated as steerage passengers and received no

other accommodations. The number of passengers at San Francisco was 475, and this number was increased by 15 from Seattle. The tickets purchased by the libelants had printed thereon, among other things:

"Ship's voyage and all responsibility under this contract end on arrival at usual place of anchorage. Landing is no part of this contract. This company will, where it may find it practicable, assist in landing without charge to passengers, but such act on its part shall not be deemed to be done under its contract, and in no case shall its liability for damage, injury, or loss of whatsoever nature exceed the value of the conveyance used in landing."

The damages sought to be recovered by the libelants herein are for failure on the part of the steamship company, and of its master, officers, and crew, to furnish second-class quarters (steerage being furnished instead); failure to furnish food equal to that furnished first-class passengers; failure to furnish proper and adequate accommodations, sufficient wholesome and properly cooked food and pure water; and the detention of libelants' effects on board for 10 days or thereabouts after the arrival of the vessel at Nome. The damages resulting therefrom are alleged to be for the suffering in health and mind, mental pain and worry, sickness and distress, loss of personal effects, and incapacity and deprivation of earning a livelihood, etc. The court below was of opinion that, while the various libelants exaggerated their grievances in many respects, the evidence in the case was indisputable that the passengers did suffer great discomfort for want of proper food, and that they were so crowded in their quarters, in which they had to sleep and where their meals were served, as to constitute a violation of the implied agreement of the carrier to provide reasonable accommodations for the number of passengers engaged to be carried, "and to not subject the passengers to such treatment as all men must condemn as inhuman." The court also found that there was considerable delay in landing the baggage and effects of the passengers at Nome, and rendered a decree in favor of certain libelants aggregating about \$2,700.

The case seems to have been fairly tried and to have received the careful attention of the presiding judge. A review of the evidence upon which the decree was based would serve no useful purpose. The testimony was not taken in the presence of the judge below, and for that reason we have examined it closely, and are of opinion that the district court arrived at the correct conclusion in regard thereto. Much of the evidence is of a sickening, disgusting, and unpleasant nature. After the decree was rendered the appellant obtained an order from this court permitting the taking of additional testimony,—a practice which, by the way, is becoming entirely too common. Parties should endeavor to procure all the testimony material to the issues presented by the pleadings

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in the first instance. The practice of bolstering up a lost cause by additional testimony ought not to be encouraged. But in this case the additional testimony has no special bearing upon the discomfort of the passengers on the voyage, but was offered to explain certain points discussed by the court as to the overcrowding of the ship, and, as appellant claims, to show that the permit of the United States inspectors of steam vessels, of date May 21, 1900, to carry an increased number of passengers on the steamship beyond the number allowed by the certificate of inspection then in force, was not requested or granted after the capacity of the steamship under her certificate of inspection had been oversold, but, on the contrary, it was before the capacity of the steamship had been reached by the sale of tickets, and before it was at all certain that the vessel's capacity would all be taken; that the permit issued for 99 additional second-cabin passengers was intended for 99 second-class passengers, and the use of the word "cabin" in lieu of "class" in the permit, indorsed on the certificate of inspection, was an inadvertent error in the office of the United States inspectors of marine vessels at San Francisco, where it was issued. This character of testimony might have some tendency to relieve the steamship company from censure or criticism to which it might otherwise be subject, and might be deemed sufficient to relieve the company against any prosecution for the statutory penalty for carrying an excessive number of passengers, but it does not relieve it from liability to the passengers if any damage to them was occasioned thereby. It is claimed that the conditions prevailing at Nome in 1900 were not such as to render void, as against public policy, a contract for transportation providing for delivery at anchorage and providing that landing was no part of the contract. Ordinarily, parties are bound by the strict letter of their contract. The general rule is that delivery of goods belonging to passengers must be in accordance with the customs and usage of delivery, and, if so made, the carrier will be discharged from responsibility. *Constable v. Steamship Co.*, 154 U. S. 51, 63, 14 Sup. Ct. 1062, 38 L. Ed. 903. But this general rule and the reasons upon which it is founded do not reach the conditions existing in the present case. The testimony fails to convince us that the baggage, freight, and personal effects of the libelants were delivered "as soon after the arrival as the conditions of the weather and sea in the open roadstead at Nome would permit," as claimed by the appellant. The steamship arrived at Nome on the night of June 17th, and the master testified that the passengers "were all ashore within 48 hours." His version of the delay in the landing of the baggage and freight appears from the following questions and answers:

"Q. Mr. Birt, one of the libelants, and Mr. White, an intervening libelant, complain that freight upon which he had paid fifty-two dollars charges, I think, goods and merchandise,

were not delivered to him until ten days after the seventeenth day of June, and until the ship had arrived at Nome and departed and gone to Golofnin Bay and York Bay and come back to Nome. A. That may possibly be. Q. Can you explain it? A. It was put on the beach, and he did not come after it. The freight was landed on the beach within seven days. I sailed from there on the twenty-fourth, with everything out. Q. Did you have occasion to land any Seattle or San Francisco shipments at Nome upon your return to Nome from Golofnin Bay or York? A. Yes, sir. Q. Why were not they landed on the first arrival? A. Because we could not get the lighters to take it. In the meantime we ran to Golofnin Bay. We could not get any lighters, we understood, for thirty-six hours, and we ran to Golofnin Bay, and were gone twenty-four hours, and came back and got one lighter, and they said they could not get us another for thirty-six or forty-eight hours, and in the meantime we went down to Cape York and landed the rest of the freight, and was back there in twenty-eight hours."

The testimony of the libelants shows that they were put to the expense and inconvenience of purchasing food and securing sleeping apartments in tents while waiting for the delivery of their own tents, provisions, machinery, tools, etc., and were also deprived of the opportunity of laboring or working ashore. The testimony in its entirety supports the views entertained by the lower court, that the libelants were subjected to unreasonable delay, privations, and losses that would not have occurred if the ship had not been "unnecessarily overloaded." The absence of lighters and the state of the weather were not the only causes of discomfort and delay. The trial court was called upon to deal with an exceptional case, arising at a time of great anxiety and excitement as well on the part of the passengers as on the part of the steamship company. Time and opportunity were important and valuable; neither could well brook delay. The task imposed upon the trial court of measuring the duty of the respective parties so as to be fair to all, in order to meet the ends of justice, was to some extent difficult. Under all the circumstances of this case, we are of the opinion that the carrier is not relieved from liability for the freight and baggage by reason of the language in the contracts that the landing should not be deemed a part of the voyage. The custom and usage of landing passengers on a bleak shore without the delivery of their baggage and effects until after the ship goes to other places to deliver other freight, and remains away for a week or more, if such custom existed, is one that should be more honored in the breach than the observance, and ought not to be sanctioned or encouraged by the courts. The law, as well as humanity, demands that reasonable efforts should be made by the carrier to protect the rights of passengers in this respect. In *Post v. Koch* (D. C.) 30 Fed. 208, *Benedict, J.*,

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said, "Landing is a part of the contract with a passenger. The privilege of contracting for a limitation of liability is allowable only within such limits as are just and reasonable and consistent with the sound policy of the law. *Mich. Cent. R. Co. v. Mineral Springs Mfg. Co.*, 16 Wall. 324, 18 L. Ed. 297. See, also, *The President* (D. C.) 92 Fed. 675. There is no division of the damages allowed to several libelants, and nothing in the record to show what proportion thereof was allowed for the delay in landing or of freight as distinguished from the discomforts of the passengers during the voyage. The allowance was for a lump sum to each libelant. The court explains the allowance as follows:

"The several sums awarded being, in my opinion, reasonable compensation for personal discomfort, extra expenses, losses of baggage and freight, and consequential losses on account of delay in delivering their baggage and freight; in fixing the amount of damages I have made due allowance for exaggerations in evidence, for contributory negligence on the part of the libelants, and for unnecessary expense to claimant in defending the ship, on account of claims for excessive damages."

The record does not, in our opinion, disclose anything which would justify this court in setting aside the decree. The decree of the district court is affirmed, with costs.

NOTES.

CARRIERS OF PASSENGERS—ACCOMMODATION DURING TRANSPORTATION.

- I. In General.
- II. Particular Accommodations.
 - A. In General.
 - B. Railroad and Street Railway Companies.
 1. In General.
 2. Chair Cars.
 3. When Passengers Are Carried on Freight Trains.
 - C. Carriers by Water.
- III. Providing Accommodations Inferior to Those Agreed Upon.
- IV. Classification and Separation of Passengers.
 - A. In General.
 - B. Separation of Male and Female Passengers.
 - C. Separation of White and Colored Passengers.
 1. In General.
 2. By Regulations of the Carrier.
 3. Statutes Requiring the Separation.
 4. Statutes Prohibiting the Separation.
 - a. State Laws.
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 - D. Exclusion of Passenger from Car Because of Bad Moral Character.
 - E. Equality of Accommodations.

I. IN GENERAL.

Among the duties of carriers of passengers for hire is that of providing for the safety and comfort of their passengers during transportation by furnishing them the usual and reasonable accommodations.

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modations which are incident to the mode of conveyance employed. *Werle v. Long Island R. Co.*, 98 N. Y. 650, 21 Am. & Eng. R. Cas. 429; *Duck v. St. Louis, etc., R. Co.* (Tex. Civ. App. 1901), 63 S. W. 891. While this duty is imposed upon the carrier by the common law, it has frequently been made the subject of statutory enactment. Thus it has been provided by statute that carriers shall furnish passengers with reasonable accommodations (Cal. Civ. Code, sec. 2184; Dak. Comp. L., sec. 3841; Mont. Civ. Code, 1895, sec. 2793; 1 S. Car. Rev. Stat., 1893, sec. 1710), with sufficient accommodations (Neb. Comp. Laws, 1893, c. 16, sec. 121, p. 312), and that they shall furnish sufficient accommodations for all passengers reasonably to be expected to require carriage at any one time (Cal. Civ. Code, sec. 2185; Dak. Comp. L., sec. 3893; Mont. Civ. Code, 1895, sec. 2895), or offering themselves as passengers a reasonable time before the advertised starting time of the conveyance. *Mansf. Ark. Dig.*, sec. 5475; *Ind. Rev. Stat.*, 1894, sec. 5185; *Kan. Gen. Stat.*, 1889, sec. 1212; *Ky. Stat.*, 1894, sec. 783; 1 *How. Ann. Mich. Stat.*, sec. 3324; *Miss. Ann. Code*, 1890, sec. 4306; *N. Mex. Comp. Laws*, 1884, sec. 2671; *N. Y. Laws*, 1850, c. 140, sec. 36; *N. Car. Code*, 1883, sec. 1963; *Sayles' Tex. Civ. Stat.*, art. 4226. But, in order to make the carrier liable to a passenger for its failure to furnish the accommodations which are reasonably necessary to the comfort and safety of passengers, it must, of course, appear that the passenger sustained damages in consequence of the carrier's omission of duty in this respect. *Henderson v. Galveston, etc., R. Co.* (Tex. Civ. App. 1897), 42 S. W. 1030.

II. PARTICULAR ACCOMMODATIONS.

A. IN GENERAL.

In the absence of express stipulations specifying the accommodations which are to be furnished passengers, it is a matter of great difficulty to enumerate the accommodations which are to be provided. Obviously, the sufficiency of particular accommodations must depend upon a great many considerations, among which may be mentioned the mode of conveyance employed, the length and duration of the journey, and the climatic and other conditions of the region traversed.

B. RAILROAD AND STREET RAILWAY COMPANIES.

1. In General.

A railroad or street railway carrying passengers is bound to exercise care not unduly to overload its conveyances (see section II of note to *Chicago, etc., R. Co. v. Morse*, 4 R. R. R. 215, 27 Am. & Eng. R. Cas., N. S., 215), to provide passengers with seats (see section III of the same note), and in some cases to heat its vehicles comfortably. See subdivision E. of section II of note to *Herbert v. St. Paul, etc., R. Co.*, 3 R. R. R. 152, 26 Am. & Eng. R. Cas., N. S., 152. In some of the United States railroad companies are required, by statute, to furnish their passengers with drinking water (*Ala. Code*, sec. 1155; *Conn. Gen. Stat.*, 1888, sec. 3540; *N. Y. Laws*, 1864, c. 582), and to equip night trains with good lights. *Ala. Code*, sec. 1155. And it may be, and ordinarily is, the duty of railroad companies to provide passenger coaches with water closets, and to keep them open at proper times. *Wood v. Georgia, etc., R. Co.*, 84 Ga. 363, 10 S. E. 967.

2. Chair Cars.

It is entirely within the power of a railroad company, which has equipped a train with first class cars for the accommodation of passengers entitled to first class passage, to have in the same train a chair car, wherein extra accommodations are afforded and extra services rendered for a reasonable extra compensation, and to exclude therefrom first class passengers who refuse to pay the additional charge. *St. Louis, etc., R. Co. v. Hardy*, 55 Ark. 134, 175, 17 S. W. 711, 52 Am. & Eng. R. Cas. 224; *Wright v. California, etc., R. Co.*, 78 Cal. 360, 20 Pac. 740. This right is not denied or restricted by a statute which limits the sum railways may charge for first class

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passage. *St. Louis, etc., R. Co. v. Hardy*, 55 Ark. 134, 17 S. W. 711, 52 Am. & Eng. R. Cas. 224. And an advertisement by a railroad company in which it is stated generally that free chair cars will be run upon its road, and specially that free chair cars will be run to a particular station, does not warrant the inference that the chair cars are free to all persons under all circumstances, or that they are free at all except to those taking passage to the station named; but if the inference can be drawn it will not warrant a recovery by a passenger who is denied free accommodations in a chair car, except upon a showing that he has been misled and has sustained some damage in consequence. *St. Louis, etc., R. Co. v. Hardy*, 55 Ark. 134, 17 S. W. 711, 52 Am. & Eng. R. Cas. 224.

3. When Passengers Are Carried on Freight Trains.

If a person takes passage upon a freight train, he cannot expect, and is not entitled to, the same accommodations that he would have upon a train carrying only passengers; by taking passage upon a freight train he impliedly agrees to accept, and be satisfied with, the accommodations usually afforded upon trains of that character when carrying passengers. See *Central R. Co. v. Smith*, 76 Ga. 209, 2 Am. St. Rep. 31.

C. CARRIERS BY WATER.

Very naturally the duties of carriers by water as to accommodations for passengers are different and usually more extensive than those of a carrier by land. But, in the absence of express stipulations specifying the accommodations which shall be provided, it is not easy to define the character of the accommodations which passengers have a right to expect, or the degree of discomfort to which they must submit. The accommodations must be reasonably sufficient, but their sufficiency cannot be determined by the fact that they are such as are furnished by particular carriers, or that they are such as are frequently afforded passengers. They must at least be such as are usually accorded to passengers on similar voyages in similar vessels, and such as are necessary to a reasonable degree of comfort, and to physical health and safety. *Sparks v. The Sonora*, Fed. Cas. No. 13,212; *Bailey v. The Sonora*, Fed. Cas. No. 746. It has been said that a contract for passage by water implies something more than ship room and transportation. It includes reasonable comforts, necessities, and kindness, and suitable food, and the common means of relief in case of sickness. *Gleason v. The Willamette Valley*, 71 Fed. 712; *Chamberlain v. Chandler*, 3 Mason (U. S.) 242, Fed. Cas. No. 2,575.

The accommodations furnished the different classes of passengers need not, of course, be of an equal degree of convenience and comfort; for passengers must be deemed to assume the inconveniences and discomforts which are usually and necessarily incident to travel in the manner which they have selected. However, while the reasonableness of particular accommodations may vary, accordingly as they are provided for one class of passengers or another, the duty to provide reasonable accommodations is a duty which the carrier owes to every passenger, whether in first cabin, second cabin, or steerage. *Bailey v. The Sonora*, Fed. Cas. No. 746.

When passengers go on board a vessel without any special contract providing for any particular kind of passage, or specifying the character of the accommodations to be furnished, knowing that all the cabin room has been taken and that there are no berths or room for passengers below deck, the circumstances establish a fair understanding that their ship room and quarters are to be on deck and are to be deemed reasonable accommodations. *Defrier v. Nicaragua*, 81 Fed. 745. But when a passenger has contracted for the exclusive use of a state room for himself and wife, it is a flagrant breach of contract for the carrier to put another male passenger in the room. *Morrison v. The John L. Stephens*, Fed. Cas. No. 9,847.

Ordinarily, steerage passengers are entitled to the use of the steerage-room, free from the risk or inconvenience of freight therein.

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Cases may arise in which the passengers are so few in number in proportion to the size of the room, that there can be no objection to some portion of its being used as a freight-room. But in such case, the carrier takes the risk, and it is his duty to so stow and secure such freight that the passengers will not be injured by it; nor can he require them to obey any arbitrary regulation with a view of diminishing such risk—for instance, to remain in their berths during the whole voyage or any unusual portion of it. *The Oriflamme*, 3 Sawy. (U. S.) 397, Fed. Cas. No. 10,572.

It has been said that, in the absence of a special contract to the contrary, deck, or even steerage, passengers are not entitled to be furnished with bedding. *Defrier v. The Nicaragua*, 81 Fed. 745. But in an action by a passenger, whom defendant had undertaken to carry between the ports of San Francisco and Portland, it was held that the contract included the duty of furnishing the passenger with a berth, unless there was a fair understanding to the contrary. *The Oriflamme*, 3 Sawy. (U. S.) 397, Fed. Cas. No. 10,572.

It is the duty of the carrier to provide passengers with a sufficient supply of wholesome food, unless there is a contract, or a fair understanding, to the contrary. *Young v. Fewson*, 8 C. & P. 55; *Defrier v. The Nicaragua*, 81 Fed. 745; *The D. C. Murray*, 11 Sawy. (U. S.) 416, 89 Fed. 508. If the food furnished passengers on a long voyage is such as is usually furnished on similar voyages, and is sufficient in quantity, and properly cooked, the fact that it is not so good, nor so well served, as on vessels making shorter voyages is not a ground for damages. *The President*, 92 Fed. 673. As was said by Lord Denman, C. J., in *Young v. Fewson*, 8 C. & P. 55: "There is no real ground of complaint, no right of action, unless the plaintiff has really been a sufferer; for it is not because a man does not get so good a dinner as he might have had that he is therefore to have a right of action against the captain who does not provide all that he ought. You must be satisfied that there was a real grievance sustained by the plaintiff."

III. PROVIDING ACCOMMODATIONS INFERIOR TO THOSE AGREED UPON.

A passenger who is furnished with accommodations inferior to those contracted for, is entitled to recover damages sustained in consequence. *Southern R. Co. v. Wood*, 114 Ga. 159, 39 S. E. 922, 23 Am. & Eng. R. Cas., N. S., 611; *Texas, etc., R. Co. v. Kingston* (Tex. Civ. App. 1902), 68 S. W. 518. A white woman, who has a first class ticket and is entitled to ride in the car set aside for white passengers, is entitled to recover damages for the discomfort and humiliation resulting from being compelled to ride in a car provided for, and occupied by, negroes. *Missouri, etc., R. Co. of Texas v. Ball* (Tex. Civ. App. 1901), 61 S. W. 327. Where plaintiff paid for first class ticket for himself and family, but by mistake of the ticket agent or otherwise, was given second class tickets, and, notwithstanding that he explained to the different conductors along the road the circumstances under which the second class tickets were delivered to him, was, with his family, compelled to travel in second class coaches, it was held that defendant was liable, although seats in the first class coaches could have been obtained by the payment of extra fare, and although, by regulations of defendant and the other lines over which plaintiff traveled, the conductors were bound to regard the tickets as the only evidence of the contract of carriage. *St. Louis, etc., R. Co. v. Mackie*, 71 Tex. 491, 9 S. W. 451, 37 Am. & Eng. R. Cas. 94, 10 Am. St. Rep. 766, 1 L. R. A. 667. But it has been held that where a passenger, by mistake of a ticket agent, was given a second instead of a first class ticket, and, against his protests, was forced by the conductor, to whom he did not explain the circumstances of the purchase of the ticket, to occupy a seat in the second class coach, no right of action accrued to him by reason of the conduct of the conductor, and for the mistake of the ticket agent he was

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entitled to no more than nominal damages. *Alabama, etc., R. Co. v. Drummond*, 73 Miss. 813, 20 So. 7.

IV. CLASSIFICATION AND SEPARATION OF PASSENGERS

A. IN GENERAL.

It is not only the right, but it is the duty of a passenger carrier to make all reasonable rules and regulations for the safety and comfort of passengers. And, while the carrier cannot capriciously discriminate between passengers on account of their nativity, color, social position or their political or religious beliefs, it is well settled that he may, in the exercise of the right and the performance of the duty to establish and enforce reasonable rules and regulations to classify and separate passengers by well defined characteristics which make the separation desirable, affording equal accommodations to passengers paying the same fare. The right of the carrier to separate his passengers is founded upon two grounds: his right of property in the means of conveyance, and the public interest. *Chicago, etc., R. Co. v. Williams*, 55 Ill. 185, 8 Am. Rep. 641; *Chester, etc., R. Co. v. Miles*, 55 Pa. St. 209, 93 Am. Dec. 744.

B. SEPARATION OF MALE AND FEMALE PASSENGERS

The right of a railroad company to set apart a car or compartment for the exclusive use of women and men accompanying them, and to exclude therefrom men who are unaccompanied by women, and are furnished equally good accommodations elsewhere on the line, has never been doubted. *Chicago, etc., R. Co. v. Williams*, 55 Ill. 185, 8 Am. Rep. 641; *Peck v. New York, etc., R. Co.*, 70 N. Y. 286, 8 Hun (N. Y.) 286; *Memphis, etc., R. Co. v. Benso*, 4 Tenn. 627, 4 S. W. 5, 31 Am. & Eng. R. Cas. 112, 4 Am. St. 776; *Bass v. Chicago, etc., R. Co.*, 36 Wis. 450, 17 Am. Rep. 497, 654, 24 Am. Rep. 437.

C. SEPARATION OF WHITE AND COLORED PASSENGERS
1. In General.

But, while the propriety of separating passengers according to color has never been seriously questioned, the classification and separation of passengers according to color has been prolific of litigation. Regulations of carriers assigning white and colored passengers to separate cars have frequently been attacked on the ground that they discriminate against colored passengers and are unreasonable, and on an additional ground that they violate the rights and privileges secured to persons of the colored race by the thirteenth and fourteenth amendments of the federal constitution. State laws requiring the separation of white and colored passengers have been assailed, not on the ground that they are inhibited by these amendments, but on the further ground that they violate the commerce clause of the constitution. And this last objection has even been urged against state laws which prohibit the separation of the two races.

2. By Regulations of the Carrier.

It is, however, well settled that, to prevent conflicts and collisions arising from natural and well known repugnances, which are likely to breed disturbances where white and colored passengers are brought together against their wishes, and to protect the interests of the carrier, a carrier of passengers may require white and colored passengers to occupy separate cars or compartments, or different parts of cars, if equal accommodations are furnished passengers of both races who pay the same fare.

United States.—*Houck v. Southern, etc., R. Co.*, 38 Fed. 226; *Wood v. Memphis, etc., R. Co.*, 23 Fed. 318, 21 Am. & Eng. R. Cas. 256; *Murphy v. Western, etc., R. Co.*, 23 Fed. 637, 21 Am. & Eng. R. Cas. 258; *The Sue*, 22 Fed. 843; *Green v. City of Bridgeton*, 90 L. J. 206, Fed. Cas. No. 5,754; *United States v. Dodge*, 1 Tex. 47, Fed. Cas. No. 14,976.

Alabama.—*Bowie v. Birmingham R. & Electric Co.*, 125 Ala. 27 So. 1016, 50 L. R. A. 632.

Kentucky.—*Ohio Valley R. Co. v. Lander*, 20 Ky. L. Rep. 913,

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47 S. W. 344, 882, rehearing denied in 20 Ky. L. Rep. 926, 48 S. W. 145. *Missouri*.—Chilton v. St. Louis, etc., R. Co., 114 Mo. 88, 21 S. W. 457, 58 Am. & Eng. R. Cas., 571, 19 L. R. A. 269.

Pennsylvania.—West Chester, etc., R. Co. v. Miles, 55 Pa. St. 209, 93 Am. Dec. 744.

South Carolina.—Smith v. Chamberlain, 38 S. Car. 529, 17 S. E. 371, 58 Am. & Eng. R. Cas. 558, 19 L. R. A. 710.

Tennessee.—Chesapeake, etc., R. Co. v. Wells, 85 Tenn. 613, 4 S. W. 5, 31 Am. & Eng. R. Cas. 111.

And, since the fourteenth amendment to the constitution of the United States is not directed against the individual invasion of individual rights, but is simply prohibitory of state legislation abridging the privileges and immunities of citizens of the United States (Civil Rights Cases, 109 U. S. 3, 3 Sup. Ct. 18; 27 L. Ed. 834), the provisions of the amendment are not violated by a railroad company in making and enforcing a regulation separating white and colored passengers. Chilton v. St. Louis, etc., R. Co., 114 Mo. 88, 21 S. W. 457, 58 Am. & Eng. R. Cas. 571, 19 L. R. A. 269. Nor is the setting apart of coaches for the exclusive use of colored passengers, which are equally as good as those used in the transportation of white passengers, violative of a provision in a state constitution to the effect that "no person can, on account of color, be subject in law to any other restraints or disqualifications in regard to any personal rights than such as are laid upon others under like circumstances." Chilton v. St. Louis, etc., R. Co., 114 Mo. 88, 21 S. W. 457, 58 Am. & Eng. R. Cas. 571, 19 L. R. A. 269.

3. Statutes Requiring the Separation.

In most of the states in which there is a large negro population, statutes have been enacted which require carriers of passengers to provide separate, but equal, accommodations for white and colored passengers, and prescribe a penalty for the failure to do so. Del. Rev. Code, p. 410, sec. 3; Fla. Rev. Stat. 1892, sec. 2268; Ga. Acts, 1890-91, vol. 1, p. 157, No. 750; Ky. Stat., 1894, secs. 795-801; La. Acts, 1890, No. 111; Miss. Ann. Code, 1890, secs. 1276, 3562; Tenn. Acts, 1891, c. 52, quoted in full in Smith v. State, 100 Tenn. 494, 46 S. W. 566, 41 L. R. A. 432; Tex. Rev. Stat., 1895, arts. 4509, 4516; Va. Acts, 1899-1900, c. 226 and c. 312. These statutes have frequently been assailed as unconstitutional, sometimes on the ground that they violate the thirteenth and fourteenth amendments, and sometimes on the ground that they violate the commerce clause, of the federal constitution.

But the contention that state enactments of this character conflict with the thirteenth and fourteenth amendments has proved unavailing, and, so far as there provisions of the federal constitution are concerned, the constitutionality of the laws have invariably been sustained. Plessy v. Ferguson, 163 U. S. 537, 16 Sup. Ct. 1138, 41 L. Ed. 257, affirming Ex parte Plessy, 45 La. Ann. 80, 11 So. 948, 58 Am. & Eng. R. Cas. 550, 18 L. R. A. 639; Anderson v. Louisville, etc., R. Co., 62 Fed. 46; Ohio Valley R. Co. v. Lander, 20 Ky. L. Rep. 913, 926, 47 S. W. 344, rehearing denied in 20 Ky. L. Rep. 926, 48 S. W. 145. Statutes of this character do not conflict with the thirteenth amendment, which abolished slavery and involuntary servitude, except as a punishment for crime, for the reason that "a statute which implies merely a legal distinction between the white and colored races—a distinction which is founded in the color of the two races, and which must always exist so long as white men are distinguished from the other race by color—has no tendency to destroy the legal equality of the two races, or re-establish a state of involuntary servitude." They do not conflict with the fourteenth amendment for the reason that, while the object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law, "in the nature of things, it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality, or a commingling of the two races upon terms

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unsatisfactory to either. Laws permitting, and even requiring, their separation, in places where they are liable to be brought into contact, do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power." *Plessy v. Ferguson*, 163 U. S. 537, 16 Sup. Ct. 1138, 41 L. Ed. 257.

A more serious question as to the constitutionality of these enactments arises in connection with the commerce clause of the federal constitution. The rule is that an act requiring the separation of white and colored passengers conflicts with the commerce clause of the federal constitution and is void if it applies to interstate passengers, but is a constitutional enactment if it applies only to domestic passengers, i. e., passengers whose transportation commences and ends within the state. *State v. Hicks*, 44 La. Ann. 770, 11 So. 74. Accordingly, these statutes, so far as they apply to passengers whose transportation begins and ends within the state where they are enacted, are not open to the objection that they interfere with interstate commerce. *Ohio Valley R. Co. v. Lander*, 20 Ky. L. Rep. 913, 926, 47 S. W. 344, 882, rehearing denied in 20 Ky. L. Rep. 926, 48 S. W. 145. In the leading case upon this point a railway company was indicted for a violation of a statute of Mississippi, enacting that all railroads carrying passengers should provide equal, but separate, accommodations for the white and colored races, by providing two or more passenger cars for each passenger train, or by dividing the passenger cars by a partition, so as to secure separate accommodations. It was held by the supreme court of Mississippi that the statute applied solely to commerce within the state. *Louisville, etc., R. Co. v. State*, 66 Miss. 662, 6 So. 203, 39 Am. & Eng. R. Cas. 399, 14 Am. St. Rep. 599, 5 L. R. A. 132. That view as to the effect of the statute, being the construction placed upon a state law by the highest court of the state, was accepted as conclusive when the case came before the supreme court of the United States, and the decision of the Mississippi court was upheld. *Louisville, etc., R. Co. v. Mississippi*, 133 U. S. 587, 10 Sup. Ct. 348. In answer to the contention of counsel that the act did affect and regulate interstate commerce, *Brewer, J.*, in delivering the opinion of the court, said: "Its provisions are fully complied with when to trains within the state is attached a separate car for colored passengers. This may cause an extra expense to the railroad company; but not more so than state statutes requiring certain accommodations at depots, compelling trains to stop at crossings of other railroads, and a multitude of other matters confessedly within the power of the state." But a statute of this character which applies to all passengers, and not alone to those whose transportation begins and ends within the state, violates the commerce clause of the federal constitution and is void. *Anderson v. Louisville, etc., R. Co.*, 62 Fed. 46; *State v. Hicks*, 44 La. Ann. 770, 11 So. 74. There is, however, a late Tennessee case in which it was held that a statute of this kind, though applicable both to intra and interstate travel, is not obnoxious to the commerce clause of the federal constitution. *Smith v. State*, 100 Tenn. 494, 46 S. W. 566, 11 Am. & Eng. R. Cas., N. S., 144, 41 L. R. A. 432. But as bearing upon the value of this case as authority, it may be noted that neither of the two above cited cases which directly involved the validity of such acts, when applicable to interstate passengers, was as much as referred to in the opinion.

When a statute requiring the separation of white and colored passengers contains a provision to the effect that the act shall not apply, among others, to officers in charge of prisoners, a white officer in charge of a colored prisoner may be denied the privilege of taking his charge into the coach set apart for white passengers. *Louisville, etc., R. Co. v. Catron*, 19 Ky. L. Rep. 1346, 43 S. W. 443.

The penalty imposed by statute for the failure to furnish separate cars or compartments for white and colored passengers, cannot be inflicted upon a railroad company because the employees of the com-

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pany in charge of a special train, chartered by individuals and furnished with separate cars for colored passengers, refuse to allow colored passengers to ride in the cars set apart for passengers of their race, and require them to ride in a baggage or tool car. *Louisville, etc., R. Co. v. Com.*, 99 Ky. 663, 37 S. W. 79.

4. Statutes Prohibiting the Separation.

a. State Laws.

Statutes have been enacted in a few of the United States which, in effect, forbid the separation of white and colored passengers. *McClain's Iowa Code*, sec. 5386, 5386, *Minn. Gen. Stat.*, 1894, sec. 8002; *Neb. Comp. Stat.*, 1893, p. 283, c. 14a, sec. 1; *N. Y. Laws*, 1881, c. 400; *Pa. Act of March 22, 1867*, P. L. 38. It is undoubtedly within the power of the state legislatures to enact laws of this kind, provided that they do not so operate as to interfere with interstate commerce. It has, however, been held that a state statute which, in effect, prohibits the separation of the two races by a carrier engaged in interstate commerce is invalid. Thus, in an action by a colored passenger to recover damages from the owner of a steamboat, which was engaged in interstate commerce, for refusing to plaintiff, who sought transportation from one point to another within Louisiana, accommodations in the cabin specially set aside for white passengers, a Louisiana statute prohibiting discrimination on account of color, and giving a right of action to the party injured for the violation thereof, was, so far as applicable to the facts of the particular case, held to be invalid on the ground that it was a regulation of interstate commerce. *Hall v. De Cuir*, 95 U. S. 485, 24 L. Ed. 547, reversing *De Cuir v. Benson*, 27 La. Ann. 1. A statute of this kind, so far as it affects the business of an interstate carrier, is obviously unconstitutional for the reason, as expressed by Mr. Chief Justice Waite, in delivering the opinion of the United States Supreme Court, that "it does not act upon the business through the local instruments to be employed after coming within the state, but directly upon the business as it comes into the state from without or goes out from within. While it purports only to control the carrier when engaged within the state, it must necessarily influence his conduct to some extent in the management of his business throughout his entire voyage. His disposition of passengers taken up and put down within the state, or taken up within to be carried without, cannot but affect, in a greater or less degree, those taken up without and brought within, and sometimes those taken up and put down without."

b. Acts of Congress.

But, while the states have a limited power to enact legislation of this kind, it is not within the power of the congress of the United States to invade the province of the state legislatures by enacting laws of this character to operate within the states. An attempt to do so was made by the act of congress known as the "Civil Rights Act," passed March 1, 1875 (18 U. S. Stat. at L. 335), entitling all persons within the jurisdiction of the United States to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances, on land or water, theaters, and other places of public amusement, and made applicable to citizens of every race and color, regardless of any previous condition of servitude. But, as to cases involving its violation arising within the states, the act was held to be unconstitutional and void, first by the United States district and circuit courts (*United States v. Washington*, 20 Fed. 630; *Smoot v. Kentucky, etc., R. Co.*, 13 Fed. 337; *Cully v. Baltimore, etc., R. Co.*, 1 Hughes [U. S.] 536, Fed. Cas. No. 3,466. But compare *United States v. Dodge*, 1 Tex. Law J. 47, Fed. Cas. No. 14,976), and finally by the supreme court of the United States, in what are known as the Civil Rights Cases, 109 U. S. 3, 3 Sup. Ct. 18, 17 L. Ed. 834, upon the ground that the fourteenth amendment was prohibitory upon the states only, and the legislation authorized to be adopted by congress for enforcing it was not direct legislation on matters respecting which the states were prohibited

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from making or enforcing certain laws, or doing certain acts, but was corrective legislation, such as might be necessary or proper for counteracting and redressing the effect of such laws or acts. In delivering the opinion of the court, Mr. Justice Bradley observed that the fourteenth amendment "does not invest congress with power to legislate upon subjects that are within the domain of state legislation, but to provide modes of relief against state legislation or state action of the kind referred to. It does not authorize congress to create a code of municipal law for the regulation of private rights, but to provide modes of redress against the operation of state laws, and the action of state officers, executive or judicial, when these are subversive of the fundamental right specified in the amendment. Positive rights and privileges are undoubtedly secured by the fourteenth amendment; but they are secured by way of prohibition against state laws and state proceedings affecting those rights and privileges, and by power given to congress to legislate for the purpose of carrying such prohibition into effect; and such legislation must necessarily be predicted upon such supposed state laws or state proceedings, and be directed to the correction of their operation and effect." The court expressly refrained from expressing any opinion as to the validity of the law in reference to cases arising in the territories or the District of Columbia, which are subject to the plenary legislation of congress in every branch of municipal regulation. And "whether congress, in the exercise of its power to regulate commerce among the several states, might or might not pass a law regulating rights in public conveyances passing from one state to another, is also a question which is not now before us, as the sections in question are not conceived in any such view."

Where an act of congress, authorizing a railroad company to extend its road into the District of Columbia, contained a provision to the effect that no person should be excluded from the cars of the company on account of color, it was held that the company had no power to make and enforce a regulation separating the colored from the white passengers. *Washington, etc., R. Co. v. Brown*, 17 Wall. (U. S.) 445, 21 L. Ed. 675.

D. EXCLUSION, OF PASSENGER FROM CAR BECAUSE OF BAD MORAL CHARACTER.

The carrier cannot classify passengers according to their moral character. Thus a woman, properly dressed and of orderly behavior, cannot be excluded from a car in which she is entitled to ride, merely because she is known or reputed to be of bad character. *Brown v. Memphis, etc., R. Co.*, 5 Fed. 499, 7 Fed. 51, 1 Am. & Eng. R. Cas. 247.

E. EQUALITY OF ACCOMMODATIONS.

In providing for the separation of passengers, the carrier is bound to furnish equal accommodations to all passengers who pay the same fare. Thus, in providing for the separation of white and colored passengers, the carrier is charged with the duty of furnishing the colored passengers with cars or compartments that are as safe and comfortable in their conditions and appointments as those which are furnished to white passengers paying the same fare. *Houck v. Southern, etc., R. Co.*, 38 Fed. 226; *Logwood v. Memphis, etc., R. Co.*, 23 Fed. 318, 21 Am. & Eng. R. Cas. 256; *The Sue*, 22 Fed. 843; *Gray v. Cincinnati, etc., R. Co.*, 11 Fed. 683. A carrier who fails to provide colored passengers with accommodations equal to those furnished white passengers, becomes liable to a colored passenger for damages suffered by him in consequence of the carrier's omission of duty in this respect. *Henderson v. Galveston, etc., R. Co.* (Tex. Civ. App. 1896), 38 S. W. 1136. And where the separation of the races is required by statute, the fact that the colored passenger, who is denied the accommodations afforded the white passengers, does not go into the coach set aside for whites will not be a defense to his action for damages. *Henderson v. Galveston, etc., R. Co.* (Tex. Civ. App. 1896), 38 S. W. 1136. But it has been held that, in order to

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entitle a negro passenger to recover in an action based upon the failure of the carrier to furnish colored passengers with accommodations equal to those furnished white passengers, it must appear that he sustained damages in consequence of the carrier's omission of duty in this respect. *Henderson v. Galveston, etc., R. Co.* (Tex. Civ. App. 1897), 42 S. W. 1030; *Norwood v. Galveston, etc., R. Co.*, 12 Tex. Civ. App. 561, 34 S. W. 180, 3 Am. & Eng. R. Cas., N. S., 395. However, a colored woman, who is denied admission into the women's car, although she holds a first class ticket, and required to ride in the smoking car, containing only men, some of whom are smoking, may, if there is room in the woman's car and the other car is not suitable for her to ride in, refuse to accept the accommodations, leave the train, and recover damages against the carrier. *Gray v. Cincinnati, etc., R. Co.*, 11 Fed. 683.

A colored passenger is denied the right of equal accommodations if he is unable to obtain a seat in the car set apart for colored passengers, in consequence of the conductor allowing the seats therein to be usurped, and the car to be crowded, by white passengers. *Williams v. International, etc., R. Co.* (Tex. Civ. App. 1902), 67 S. W. 1085. A negro passenger who is compelled to occupy a car which, unlike the cars in which white passengers are carried, is not equipped with a water closet, is entitled to recover damages for pain and suffering sustained in consequence of the carrier's omission of duty. *Henderson v. Galveston, etc., R. Co.*, (Tex. Civ. App. 1896), 38 S. W. 1136. A railroad company which has set apart on its trains a passenger car for the exclusive use of women, and men accompanied by women, but has not set apart a car for the exclusive use of colored passengers, cannot rightfully exclude a colored woman from the women's car, in which there are vacant seats, on account of her color, and require her to ride in a car occupied mostly by men. *Chicago, etc., R. Co. v. Williams*, 55 Ill. 185, 8 Am. Rep. 641. But a colored passenger who is excluded from a waiting room set aside for white passengers, in which no smoking and chewing is allowed, and required to wait in a room set aside for colored passengers, in which there is no smoking or chewing during the period of her occupancy, the accommodations are not unequal merely because those practices may have been permitted at some other time. *Smith v. Chamberlain*, 38 S. Car. 529, 17 S. E. 371, 58 Am. & Eng. R. Cas. 558, 19 L. R. A. 710.

A carrier of passengers by steamboat cannot rightfully exclude colored passengers from the regular table and require them to take their meals upon the guards of the boat or in the pantry. *Coger v. Northwestern, etc., Packet Co.*, 37 Iowa 145. But a colored passenger on a steamboat who refuses to remove from one table to another on being requested to do so because of objections to his presence on the part of white passengers, and whose supper is duly furnished him, cannot complain of discrimination because, upon his refusal to move, the white passengers are removed to the other table, leaving him alone. *McGuinn v. Forbes*, 37 Fed. 639.

In an early case brought by a colored passenger to recover damages for being refused passage in the cabin of defendant's boat, and required to accept a deck passage, in consequence of the enforcement against him of a rule or regulation which did not allow the use of the cabin to passengers of his race, a demurrer to defendant's notice of defense setting up the rule was overruled, on the ground that the reasonableness of the regulation was a mixed question of law and fact which could not be determined on demurrer. In its opinion, the court seems to recognize the right of the carrier, under some circumstances to refuse plaintiff cabin accommodations, though he was willing to pay therefor, without providing him with other accommodations equally good. *Day v. Owen*, 5 Mich. 520, 72 Am. Dec. 62. So far as the decision goes to this extent, it is certainly erroneous.

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BOYCE v. MISSOURI PAC. R. CO.*(Supreme Court of Missouri, Division No. 1, May 21, 1902.)*

[68 S. W. Rep. 920.]

Right of Way—Nature of Easement.

The easement of a railroad company in its right of way, of which it does not own the fee, is not an easement, in the strict, technical sense of the term, which is a right in common with the owner, but is, rather, in the nature of an interest in the land.

Same—Adverse Possession—Presumption of Lost Grant.

A railroad occupying private property as a right of way for the statutory period of limitations against actions to recover real property acquires the right to continue to use the way, under the conclusive presumption that possession was taken under a lost grant, though the statute, strictly speaking, does not apply to easements.

Same—Landowner's Knowledge of and Consent to Occupation—Presumed.

A railroad company, in ejectment against it by a lot owner to recover land which the company has appropriated, and publicly and notoriously used as a right of way for a period exceeding the period of limitations, is not charged with the burden of showing that the lot owner had knowledge of its possession, as the law implies that the owner had such knowledge, and consented to the occupation.

Same—Ejectment—Evidence of Landowner's Possession.

Where a landlord terminates the possession of tenants under a lease of a lot on which a railroad has wrongfully appropriated a right of way, and executes another lease to the tenant, he has such actual possession at that time as will render untenable a claim by him in ejectment to recover the right of way from the railroad, after limitations have run from the time of the execution of the last lease, that the possession was only adverse to his tenant's right,—and not to his own.

Same—Adverse Possession.

Const. art. 2, § 21, providing that private property should not be taken for public use without compensation, does not preclude a railroad company from acquiring an easement in a right of way by adverse possession.

Appeal from St. Louis circuit court; H. D. Wood, Judge.

Ejectment by Mary E. Boyce against the Missouri Pacific Railroad Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Clinton Rowell and Jos. H. Zumbalen, for appellant.

Henry G. Herbel and Martin L. Clardy, for respondent.

MARSHALL, J. Ejectment for the north half of city block No. 3,154 in the city of St. Louis. The petition is in the usual form. The ouster is laid as of January 1, 1893. The answer disclaims as to all except a strip 15 feet wide running from north to south through the land, and asserts ownership thereto in the defendant. The case was tried without the aid of a jury, and judgment entered for the defendant, from which the plaintiff appealed.

In 1862 Mrs. Octavia Boyce, mother of the plaintiff, owned the whole of block 3,154. On the 1st of June, 1862, she leased the whole block to James B. Eads for a term of three years, at an annual rent of \$200, with the option for a renewal term

for ten years more at a rental equal to 6 per cent. of the value of the land, to be fixed by arbitration. The lease to Eads was never renewed. In 1876 Mrs. Boyce died, and in 1879 the block was partitioned between Mary E. Boyce and John O'Fallon Delaney; the former being allotted the north half, and the latter the south half, of the block. In 1868 Eads sublet the whole block to the Missouri Zinc Company, and that company occupied it until April 19, 1880, when the Eads lease and the sublease to the zinc company were surrendered to Mary E. Boyce and John O'Fallon Delaney, and were canceled; and they, each for themselves, leased their respective parts thereof to the zinc company for a term ending May 1, 1890, and that company remained in possession under said leases until that time. Afterwards the property was rented to others. From 1862 to 1880 James M. Carpenter was the agent for the owners of the property, and collected the rents and paid the taxes. From 1880 to 1890 Hartnett & Co. were the agents for the owners, collected the rents, and paid the taxes. After that date the owners attended to renting the property themselves. In 1872 the Pacific Railroad Company, without color of title or authority of law, entered upon the property, and took possession of the 15-foot strip, constructed a track upon it, which was known as, and constituted a part of, the Kirkwood connection or branch of that road; and that company and its successor, the defendant, has ever since been in open, peaceable, continuous, and uninterrupted possession of said strip, claiming it as of right and adversely to the world, and has paid taxes on it as a part of its Kirkwood branch. Mary E. Boyce did not have actual knowledge of the defendant's possession and claim until October, 1890, and never saw the property until 1898, and John O'Fallon Delaney did not have such actual knowledge until 1895. This suit was begun on March 6, 1897. The defendant's right rests entirely upon a presumption of a grant based upon prescription. The plaintiff asserts three propositions, under all and each of which she claims that she is entitled to judgment, to wit: (1) That, under the constitution of Missouri, the defendant railroad company can only have an easement in the land covered by its right of way, the fee remaining in the owner, subject to the use, and that the statute of limitations does not run in favor of a party having only an easement in land; (2) that the land was continuously leased, and therefore the plaintiff could not lawfully enter into the possession, or challenge the right to possession claimed by the defendant, and hence the defendant's possession could only be adverse to the tenant's rights, and was not adverse to the plaintiff's rights; and (3) that under the constitution of Missouri a railroad company cannot acquire an easement for a right of way by prescription or limitation, but can only do so by paying just compensation therefor to the owner, or into court for the owner, in a suit for condemnation; and of these in their order.

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1. Section 21 of article 2 of the constitution provides "that private property shall not be taken or damaged for public use without just compensation. Such compensation shall be ascertained by a jury or board of commissioners of not less than three freeholders, in such manner as may be prescribed by law; and until the same shall be paid to the owner, or into court for the owner, the property shall not be disturbed or the proprietary rights of the owner therein divested. The fee of land taken for railroad tracks without the consent of the owner thereof shall remain in such owner, subject to the use for which it is taken." Even before the adoption of the present constitution, this court held that, in condemnation cases by a railroad for a right of way, the fee did not pass, but remained in the owner, subject to the use. It was also held that an easement passed to the railroad, "giving it perpetual and continuous title so long as it used the land for the purpose for which it was taken, but, when the use was abandoned, then it would revert back to the owner of the premises." *Kellogg v. Malin*, 50 Mo. 496, 11 Am. Rep. 426. And this, too, notwithstanding the statute then in force authorized the acquisition by the railroad, by condemnation, of an "absolute estate in fee simple"; for it was said that the words "fee simple," used in the statute, were not employed in their technical sense. Since the adoption of the section of the constitution of 1875, quoted, this court has likewise held that a railroad company has only an easement in the land for its right of way or tracks. *Union Depot Co. v. Frederick*, 117 Mo. 152, 21 S. W. 1118, 1130, 26 S. W. 350, 57 Am. & Eng. R. Cas. 656; *Railway Co. v. Clark*, 121 Mo. 169, 25 S. W. 192, 906, 26 L. R. A. 751. But while the railroad does not acquire the fee, it does acquire a perpetual and continuous easement as long as it uses it for such purpose; and the owner of the fee is not entitled to use the land at the same time with the railroad company, but the company is entitled to the exclusive use, limited only as it is or may be by statute in that regard. Therefore the term "easement," as employed in those cases, was not used in its strict, technical sense, but partakes, rather, of the meaning of an interest in the land, than of the original meaning given to the term "easement"; that is, a right in common with the owner or others. 10 Am. & Eng. Enc. Law (2d Ed.) p. 400, and cases cited in notes. It is with this in mind that the first contention of the plaintiff—that the statute of limitations does not apply to easements—must be considered.

Originally, in England, easements were said to lie wholly in grant. Easements are incorporeal hereditaments, and statutes of limitations were held to apply only to actions for the recovery of land. Afterwards the fiction of a "lost grant" was adopted by the courts; that is, the courts presumed from the long possession and exercise of right by the defendant with the acquiescence of the owner, that there must have been

originally a grant by the owner to the claimant, which had become lost. "It was called a 'lost grant,' not to indicate that the fact of the existence of the grant originally was of importance, but to avoid the rule of pleading requiring proffer." *Railroad Co. v. McFarlan*, 43 N. J. Law, 605. It was considered the duty of the court to enforce the fiction, "not, however, because either the court or the jury believe the presumed grant to have been actually made, but because public policy and convenience require that long-continued possession shall not be disturbed." *Jones, Easem.* § 161, p. 138. *Pollock, B.*, in the recent case of *Bass v. Gregory*, 25 Q. B. Div. 481, decided in 1890, said the fiction of lost grant "has been adopted by almost all civilized nations for the furtherance of justice and the sake of peace." Formerly it was held to apply only to cases where the defendant claimed a right to possession by prescription; that is, that his right began at a period beyond the "time whereof the memory of man runneth not to the contrary." Lately in England and in most of the United States the rule has been adopted that the period for acquiring an easement in lands corresponds to the local statute of limitations as to land. For it was said, "It would be irrational to hold that an easement may not be acquired by the same lapse of time required to confer title to the land by adverse possession." *Jones, Easem.* § 160, p. 134, and cases cited in notes. And this is the doctrine ably announced by *Ellison, J.*, speaking for the Kansas City court of appeals in *House v. Montgomery*, 19 Mo. App., loc. cit. 179, after an exhaustive review of the modern authorities. Hence while statutes of limitations do not directly apply to actions in which easements or other incorporeal hereditaments are involved, still by judicial construction an adverse user of an easement for the period specified in the statute, barring actions for the recovery of lands, is now by analogy held to be a conclusive judicial presumption of a prescriptive right by a lost grant. *Jones, Easem.* §§ 161, 162, and cases cited; 10 *Am. & Eng. Enc. Law* (2d Ed.) p. 426, and cases cited. It is the accepted rule, however, that "the user, to perfect title by prescription to an easement, must be exercised by the owner of the dominant tenement, and must be open, peaceable, continuous, and as of right." *Illinois Cent. R. Co. v. City of Bloomington*, 167 Ill. 9, 47 N. E. 318; *Conyers v. Scott*, 94 Ky. 123, 21 S. W. 530; *Swan v. Munch*, 65 Minn. 500, 67 N. W. 1022, 35 L. R. A. 743, 60 Am. St. Rep. 491; *Hoyt v. Carter*, 16 Barb. 212; *Bushey v. Santiff*, 86 Hun, 384, 33 N. Y. Supp. 473; *Costello v. Harris*, 162 Pa. 397, 29 Atl. 874. This doctrine was recognized by this court in *Pitzman v. Boyce*, 111 Mo. 387, 19 S. W. 1104, 33 Am. St. Rep. 536, and it was there said: "And such adverse user for the statutory period will give origin to the rebuttable legal presumption of a grant, even though the use, in its inception, was a trespass." But it was not meant by this that the legal presump-

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tion of a grant could be rebutted or overcome by proof that the owner of the fee—the servient estate—had no actual knowledge of the claim to an easement, and did not expressly acquiesce in the dominant use. It was only intended that the presumption could be rebutted by showing that the use was by express permission, or that the owner of the servient estate was under a legal disability, and could not, therefore, give consent or legal acquiescence, or, in other words, by the interposition of any of the excusatory pleas that are open to a plaintiff in ejectment against a plea by the defendant of the statute of limitations. So that although, technically, the statute of limitations does not apply to an easement, still by judicial interpretation the result is the same as if the statute did so apply. Under the first contention the plaintiff asserts the subcontention that the burden is upon the defendant to show that such exercise of such an easement was with the knowledge and acquiescence of the owner, and that in this case, so far from the defendant so proving, it appears that Mary E. Boyce did not know that the tracks were on the land until 1890, and John O'Fallon Delaney did not know that fact until 1895. Theoretically the use and easement are with the knowledge and acquiescence of the owner as much as is the adverse possession of a defendant in ejectment. For the law presumes that every man knows the condition and status of his land, and if any one ousts him, or trespasses upon his land, or enters into possession and sets up an adverse claim thereto, and the owner does not ask legal aid to dispossess him within the time limited for bringing such actions, the law assumes that the owner has acquiesced in the adverse claim. That is, the statute of limitations sets at rest all such questions unless they are properly presented for adjudication within the statutory period of limitation. In point of fact, the owner, like these owners, may have had no actual knowledge, and therefore did not expressly acquiesce; but the law implies knowledge, and therefore consent. This is as true of claims to easements as it is to claims to the land itself. 10 Am. & Eng. Enc. Law, p. 426. A like contention was made by the plaintiff in *Miller v. Rosenberger*, 144 Mo., loc. cit. 300, 46 S. W. 167, in an ejectment suit, where title by limitation was set up by the defendant; and this court, speaking through Burgess, J., held that an instruction embodying such an idea was erroneous, saying: "If defendant's possession was adverse, open, and notorious, under claim of title to the land, it makes no difference whether plaintiff in fact knew of such adverse holding or not. The law did not impose upon the defendant, under the circumstances disclosed by the record in this case, the duty of notifying plaintiff of the character of his possession, or of advertising it to the world. It was sufficient if his possession was adverse, open, notorious, under claim of ownership of the property for the period of ten consecutive years next preceding the institution of this

suit." And this has long been the rule in this state, whether the claim asserted be to an easement or to the whole fee simple, especially where the nature of the possession is necessarily notice of the claim. *Scruggs v. Scruggs*, 43 Mo. 142; *Fugate v. Pierce*, 49 Mo., loc. cit. 446, 447; *Key v. Jennings*, 66 Mo. 356; *Leeper v. Baker*, 68 Mo., loc. cit. 405; *Hargis v. Railway Co.*, 100 Mo. 210, 13 S. W. 680; *Turner v. Railroad Co.*, 112 Mo. 547, 20 S. W. 673; *Wilkerson v. Eilers*, 114 Mo., loc. cit. 254, 21 S. W. 514. The conclusion of Black, J., in *Turner v. Railroad Co.*, 112 Mo., loc. cit. 547, 20 S. W. 673, is peculiarly applicable to the question under consideration. That learned jurist said: "The proof is clear and undisputed that the company built its tracks across the strip of land in suit in 1868 or 1869. It has from that time to the commencement of this suit occupied and used the land for a right of way, and this use has been open, exclusive, and without interruption. The suit was commenced in 1883. No witness, it is true, testified in so many words that the defendant claimed to own the land occupied by its tracks; but there is no evidence showing or tending to show that the railroad company took or entered into possession by permission of or license from the plaintiffs, or under any contract with them. There is and can be no pretense of any contractual relations between the plaintiffs and defendant. This being so, the fact of actual, open, and continuous possession by defendant is of itself sufficient evidence that the possession was adverse to the plaintiffs. The defendant's case did not call for any other or further evidence." Likewise the rule stated by Burgess, J., in *Wilkerson v. Eilers*, 114 Mo., loc. cit. 254, 21 S. W. 514, is appropriate to the case at bar. He said: "It is well-settled law that in order to bar the true owner of his right to the possession of his land where the occupant holds without color of title, as in the case at bar, his possession must be open, notorious, continuous, and adverse for the period of ten years, claiming to be the owner thereof. *Bowman v. Lee*, 48 Mo. 335; *Fugate v. Pierce*, 49 Mo. 441; *Nelson v. Brodhack*, 44 Mo. 596, 100 Am. Dec. 328. If defendant's possession of the land had been adverse to plaintiff, open and notorious, and under claim of right thereto, for ten years prior to the time this suit was brought, plaintiff's right of action was barred, whether he knew the facts or not. *Scruggs v. Scruggs*, 43 Mo. 142. Actual, continued, visible, notorious, and hostile possession is tantamount to a claim of ownership. *Shearer v. Middleton*, 88 Mich. 621, 50 N. W. 737." The principles of these cases apply as well where only an easement is claimed as where the title to the land itself is in controversy. Some easements are of such nature and character that they may be enjoyed at the same time by several persons, and the owner may also use the surface of the land. In some cases the nature of the use does not necessarily disclose the identity of the person using the land, nor does it disclose or mean that

an exclusive use or easement is claimed. But in the case at bar no such uncertainties are present. The railroad track was permanently laid upon the land, thereby giving notice to the owner of the nature of the use and the exclusive character of the claims, and also affording easy means of identifying the occupant and claimant. It does not appear that the tracks were laid under a contract or license from the owner, the tenant, or any one else. They were laid as of right in 1872, and have been used as a part of the Kirkwood connection ever since, which was for a period of 25 years before this suit was brought. The possession was therefore open, actual, visible, notorious, continuous, hostile, adverse, and under claim of right, without color of title. If it had been an individual who was thus shown to have been in possession, there could, and probably would, have been no claim but that the original tortious and wrongful possession had ripened into a title by limitations, whether the true owner actually saw or knew of such possession or not. By analogy, upon the theory of an implied lost grant, the defendant has acquired by prescription an easement for a railroad right of way over the land, which entitles it to retain the exclusive possession as long as it continues to use the land for such purpose.

2. The second contention of the plaintiff is that the land was continuously leased, and therefore the plaintiff could not lawfully enter into the possession, or challenge the right to possession claimed by defendant; and hence the defendant's possession could only be adverse to the tenant's rights, and was not adverse to the plaintiff's rights. In an exceedingly interesting, able, and exhaustive brief, the plaintiff supports this contention by copious references to decisions as to the rights of tenants and subtenants as against the landlord and as against strangers to the title. But there is a link missing in the chain of connection between the principles established by the cases cited and the facts in evidence in this case; that is, it does not appear that the premises were continuously under lease, and therefore the plaintiff had a right of entry more than 10 years before the institution of this suit, which was therefore the date at which the cause of action accrued to the plaintiff, and from which date the limitation or prescription or presumption of a grant began to run. The facts are, briefly, that in 1862 Mrs. Boyce leased the property to James B. Eads for a term of 10 years, with a privilege of a renewal for 10 years more. No other lease was ever made, and no renewal was ever made before Mrs. Boyce's death, in 1876. In 1868 Eads sublet to the Missouri Zinc Company, which, of course, could only be for his unexpired term, and under his privilege for a renewal, which privilege, however, was never exercised. In 1872 the tracks were laid on the land. After the expiration in 1872 of the Eads lease, the zinc company continued to occupy the land until Mrs. Boyce's death, in 1876. That company, or Eads, under whom that company

claimed, was therefore a mere tenant from month to month, under the statute, from the expiration of the lease thenceforward, as long as Mrs. Boyce lived, and thereafter until after the partition of the land, in 1879, when the plaintiff and Delaney required a surrender and cancellation of the Eads lease, and of all rights of the zinc company as subtenant, and leased, each for themselves, their respective shares to the zinc company, for a new, different, and increased rental, for a new term, from May 1, 1880, to May 1, 1890. Hence a right of entry not only accrued to the plaintiff in April, 1880, but such entry actually occurred, the old lease and rights of the old tenant and subtenant were surrendered and canceled, and a new lease, right of possession, and rental were effected, with a new tenant. This was on April 18, 1880, which was 17 years before this suit was brought. If, therefore, the plaintiff's contention be conceded, that while property is leased the statute of limitations does not run in favor of a stranger who goes into the possession, as against the landlord, but such possession affects only the tenant's rights, still this plaintiff cannot effectively invoke such a rule, because this plaintiff was entitled to possession in 1880, the defendant was actually in possession at that time, this plaintiff waited 17 years thereafter before beginning this suit, and therefore a right has now accrued to the defendant to retain the possession, as against the owner, who failed to preserve and properly assert his rights within the statutory period prescribed. But this concession is made only for the purposes of argument in this case, and must not be taken as the assertion of such a principle by this court.

3. The last contention of the plaintiff is that under the constitution of Missouri (section 21, art. 2) a railroad company cannot acquire an easement for a right of way by prescription or limitation, but can only do so by paying just compensation therefor to the owner, or into court for the owner. The gist of this contention is that, because section 21 of article 2 of the constitution provides that private property shall not be taken for public use without just compensation, therefore a railroad company cannot acquire an easement by prescription or limitation. If this be the true construction to place upon the provision of the constitution quoted, then it logically follows that no individual can acquire title by limitation to the property of any other individual, for section 20 of article 2 of the constitution provides that private property shall not be taken for private use at all. Yet in spite of this constitutional provision, the Reports of the decisions of this court are full of cases where one individual has taken the property of another individual, and has acquired complete title thereto by limitation. So, too, cases have been decided by this court where railroad companies have taken private property for a right of way, and by adverse possession for the statutory period of limitation have acquired title or an easement (it is

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immaterial what it is termed) by limitation, or by means other than by direct purchase or condemnation. In *Doyle v. Railway Co.*, 113 Mo. 286, 20 S. W. 970, the trespass was waived, and the suit was for the value of the land taken; and it was held that when that sum was paid it would operate to vest an easement in the land in the defendant "as effectually, to all intents and purposes, as if condemnation proceedings had been conducted." In *Turner v. Railway Co.*, 112 Mo., loc. cit. 547, 20 S. W. 673, the defendant rested its claim entirely upon limitation and that claim was sustained by this court. So, too, the same right was conceded, on principle, to a railroad company, in *City of St. Louis v. Missouri Pac. Ry. Co.*, 114 Mo., loc. cit. 23, 21 S. W. 202, although it did not avail in that case, because the statute of limitations did not run against the city of St. Louis. In short, the theory of the statute of limitations is that it does not affect the right, but simply destroys the remedy for the assertion of the right in court, for the purpose of quieting titles, and preserving the peace of society. There is nothing inconsistent between such statutes and such decisions and the provisions of the constitution, for the constitution simply offers protection to private rights to all such as ask its aid, while the statute of limitation and the decisions simply require the aid of the law to be reasonably invoked, and refuse aid to those who have not tried to help themselves at a proper time.

This results in holding that the judgment of the circuit court is right, and hence it is affirmed. All concur.

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(*Supreme Court of Mississippi, Jan. 27, 1902.*)

[31 So. Rep. 212.]

Application of Employer's Liability Act.*

Acts 1898, c. 66, being a legislative enactment of Const. § 193, creating a right of action by an employee for injuries arising from negligence of fellow servants, and limiting the right to sue, when such injuries result in death, to the personal representatives of deceased, has no application to other classes of injuries than those therein named, and hence relates to a different subject, and does not impliedly repeal Acts 1898, c. 65, re-enacting Lord Campbell's act, and permitting actions for any class of injuries causing death by certain relatives of deceased.

Same.

Acts 1898, c. 65, by its express terms, applies to injuries to servants resulting from the negligence of the master alone.

Calhoon, J., dissenting.

Appeal from circuit court, Hinds county; Robt. Powell, Judge.

Action by C. M. Bussey and others against the Gulf & Ship

*See generally, 12 Am. & Eng. Enc. Law (2d Ed.) 976 et seq.; 5 Rap. & Mack's Dig. 709 et seq.

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Island Railroad Company. From a judgment in favor of defendant, plaintiffs appeal. Reversed.

Appellants, who were plaintiffs in the court below, brought this suit against the Gulf & Ship Island Railroad Company, the defendant below, under chapter 65, Acts 1898, to recover of it damages for the alleged wrongful death of Thos. B. Bussey, a young man alleged to be about 21 years of age. The declaration alleges that deceased was an employee of the appellee railroad company, and that he was thrown from an engine and killed because of a derailment resulting from a loose and sunken joint in the rails; that at the time of the death of deceased he was unmarried, and left surviving him no children; that the plaintiffs are his father and mother, brother and sister. To plaintiffs' declaration defendant filed its demurrer, setting up the grounds that under chapter 66 of the Acts of 1898 a cause of action is not given to the brother and sister of a decedent at all; that, while an action is given to a parent for the death of a child, yet an adult is not a child, and, if he be so held, the parent can, under said chapter, recover only such damages as he or she has personally sustained by reason of the death; and since, in this case, the decedent was an adult, his earnings did not belong to the parents, and consequently the parents, who had no claim to the young man's earnings, and were not dependent upon him, were not legally damaged. The demurrer was sustained by the court below, and plaintiffs appeal.

Alexander & Alexander, for appellants.

E. J. Bowers and McWillie & Thompson, for appellee.

WHITFIELD, C. J. The only true way to understand chapters 65 and 66 of the Acts of 1898 is to do as ought always to be done in getting at the meaning of statutes; that is to say, to look at them in the light of their history and purposes. The action here is to recover for the negligence of the company, not that of a fellow servant. Appellants claim the right to bring the action under chapter 65. The court below held that, as the deceased was an employee, the suit could only be brought under chapter 66. It also held that chapter 66 repealed chapter 65 as to all actions by employees, and that under chapter 66 appellants had no case. It is perfectly manifest that there was no express repeal. Repeals by implication are never favored.

Let us see, now, what the history and purposes of these two acts are. Prior to the constitution of 1890, actions for injuries causing death were governed by Lord Campbell's act, which for the first time appeared in our law as article 48, p. 486, Code 1857, from which is taken literally, leaving out the clause as to the recovery for the death of a slave, section 1510 of the Revised Code of 1880. This act did not define the negligence which would give rise to the action. It left the liability of defendant to be determined by the general law reg-

ulating the relation of master and servant. It did not in the remotest degree touch or qualify the stringent fellow-servant rule, illustrated in all its bald absurdity by the case of *McMaster v. Railroad Co.*, 65 Miss. 264, 4 South. 59, 7 Am. St. Rep. 653. It left the law as to negligence where it found it, and dealt merely with who should bring the suit, and the measure of damages. Who should sue, and what the measure of damages should be, were fully within legislative control. The constitution did not interfere with this power. The harshness of the fellow-servant rule had become intolerable. It shocked common sense and common justice, and received its apotheosis in *McMaster's Case*. The legislature had been appealed to in vain at successive sessions to modify this rule. It had the power to do it. But it declined to exercise it. It was left for the framers of the constitution of 1890 to accomplish this greatly-needed change; and section 193 of the constitution, which created for the first time in this state new—wholly new—rights and causes of action, never existing before, effected this change. It is indispensable to understand that section 193 did create the rights and causes of action it provided for. We expressly so held in *White's Case*, 72 Miss. 16, 16 South. 248. It provided that as to employees injured by the negligence of fellow servants, of the class described in section 193, there should exist thereafter, as there had never done before, these causes of action. It enlarged the rights of those authorized to sue, by adding new grounds of liability, theretofore unknown to our law. That conception is fundamental to any proper understanding of the scope and purposes of these two acts. This section took away no right existing under the general law, nor any remedy provided by section 1510, Rev. Code 1880. It was never dreamed of that there was any conflict between section 1510, Rev. Code 1880, and section 193, Const. 1890. On the contrary, section 1510 of the Revised Code of 1880 was brought forward as section 663 of the Code of 1892; and both this statute, with its scope, and section 193, with its scope, stood side by side for years without the thought ever entering anybody's mind that there was conflict between them. Why? Because they related to wholly different rights. Section 1510 and section 663 related to cases arising under the general law as it existed before the constitution of 1890. Section 193 of that instrument related exclusively to the new rights by it created,—of recovery where the negligence was that of certain named fellow servants. But section 1510 of the Revised Code of 1880 is brought forward as section 663 of the Code of 1892, and as chapter 86 of the Acts of 1896, and as chapter 65 of the Acts of 1898. In purpose they are all one. All relate to causes of action antedating the constitution, of liability under the general law of negligence, and in no way whatever to causes of action for injuries inflicted by certain fellow servants, first created by Const. § 193. Now, section 193 of the constitution is also

developed and brought forward as chapter 87 of the Acts of 1896 and chapter 66 of the Acts of 1898. It relates exclusively to actions brought by employees to recover for injuries due to the negligence of those fellow servants named in section 193 of the constitution. It repeats section 193, *ipsisssimis verbis*. It has no relation whatever to rights of action under the general law of negligence, antedating the constitution of 1890. Here is a statutory scheme, under said article 48, p. 486, Code 1857, and section 1510 of the Revised Code of 1880 (our form of Lord Campbell's act), developed in section 663 of the Code of 1892, and chapter 86 of the Acts of 1896, and chapter 65 of the Acts of 1898, wherein rights of action arising under the general law of negligence are provided for, and have been continuously maintained and improved, —a complete and perfect scheme relating wholly to causes of action antedating the constitution of 1890, and having nothing on earth to do with rights of action arising from the negligence of fellow servants. That is one scheme unrelated to, unaffected by, section 193 of the constitution. Here is another scheme, never existing before the constitution, created by section 193 of that instrument, relating not at all to causes of action provided for by the statutory scheme above, but exclusively to causes of action created by section 193, conferring the right to recover for injuries inflicted by the named fellow servants. They have stood side by side, never questioned, as both proper and not in conflict, before. It is perfectly manifest that if chapter 66 of the Acts of 1898 is in conflict with chapter 65 of the Acts of 1898, then section 193 of the constitution, which is chapter 66, was also in conflict with section 663 of the Code of 1892, and also that chapter 87 of the Acts of 1896 was in conflict with chapter 86 of said Acts. There is no conflict whatever between the two acts (chapter 65 and chapter 66), in their essential frame.

It is said that chapter 65 has no relation to suits by employees at all,—not even where the employee sues on the ground of negligence of the master alone; and the court below so held, notwithstanding section 2 of said chapter 65 plainly says: "This act shall apply to all personal injuries of servants or employees received in the service or business of the master, where such injuries result in death." This section cannot thus be read as blank paper. It expressly applies the principle of Lord Campbell's act—recovery for injuries resulting in death—to all employees, when the injuries were due to the negligence of the master. It was part of a statutory scheme that had never assumed to deal with injuries caused by the negligence of fellow servants in any way whatever, and it was not dealing with them.

It is said the measure of damages is different in the two acts, and there is difference as to who may sue. Certainly. Do they not relate, as shown, to wholly different subject-matters? The measure of damages and the parties to sue

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might well be different,—might be just what the legislature chose to make them. There is no conflict possible to be seen because of the different measures of damages, except where the two wholly different acts, with wholly different histories and purposes, are confused and blended, instead of being kept separate and distinct.

It is also to be specially noted that while section 193 left the remedies, measure of damages, and procedure under section 663 of the Code of 1892 unaffected, it also clearly intended the legislature to provide and regulate remedies for rights provided by itself. It is true, it provided that "legal or personal representatives" might assert the rights thereby provided, and that in the *Hunter Case*, 70 Miss. 471, 12 South. 482, which nullified the words "or legal representatives" in section 193, it was held the personal representative must sue, till legislation extended the remedy. The *Hunter Case* did not attempt to hold the legislature was not authorized to extend the remedy provided by section 193. That section expressly says, "The legal or personal representatives shall have the same rights and remedies as are allowed by law to such representatives of other persons." It was perfectly competent for the legislature to provide additional remedies, and it did do so in the acts we are considering, for the express purpose of abrogating the rule announced in the *Hunter Case*; and it also by the same legislation abrogated the rule announced in the *Pendegrass Case*, 69 Miss. 425, 12 South. 954. The purpose of the legislature was plain. It was to observe the mandate of this most wholesome provision of the constitution, and so make effective the remedies for the new rights by it created, and also to broaden and develop the remedies for the rights provided for by section 1510 of the Revised Code of 1880,—the initial form in which the Code of 1857 and that statute left them,—to the present completeness furnished by chapter 65, Acts 1898.

The construction adopted by the court below would, if followed here, overrule the *Woolley Case*, 28 South. 26. We expressly held there that the widow could sue under section 663, Code 1892; and *Woolley* was an employee, and the remedies for rights provided by section 193 had not then been enlarged by legislation. If the view we combat is correct, Mrs. *Woolley* would have had no right of action. Chapter 65, Acts 1898, extends the remedy to all relatives, giving only one suit, including damages of all kinds, as well to the relations as the decedent. It was perfectly competent for the legislature to do this. Another thing: If, as is suggested, the legislature did not have the power, under section 193, to extend the remedies as to who could sue for the assertion of the rights therein provided for, then, manifestly, the provisions of chapter 66 as to who may sue are simply void, and chapter 65 is left unaffected in that regard,—not repealed. How could an unconstitutional provision in chapter

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66 repeal a constitutional provision in chapter 65? The proposition is wholly untenable. But it is said chapter 66 was passed four days later than chapter 65, and is the last expression of the legislative will. Granted. But about a different subject-matter.

It is thoroughly settled canon of construction that the courts must never, if it can properly be avoided, so construe acts of the legislature as to impute folly to that body. To hold that chapter 66 repeals chapter 65 as to employees is not only to abrogate section 2 of chapter 65, but to charge the legislature with the absurdity of enacting two statutes, standing side by side, both in the Acts of 1896 and of 1898, when one destroys the other. This we must decline to do. The conflict all vanishes in the light of the history and purposes of the two acts, and they are perfectly harmonized by our construction. There are minor differences, it may be conceded, which were well calculated to mislead the accomplished trial judge. But he should not have sacrificed the wide scope and large substantial rights worked out on different lines to mere trivial inharmonies, correctible by legislative amendment.

Reversed and remanded.

VOELKER v. CHICAGO, M. & ST. P. RY. CO.

(*Circuit Court, N. D., Iowa, E. D., June 16, 1902.*)

[116 Fed. Rep. 867.]

Injury to Employee—Negligence—Pleading—Defective Car Coupler.

Two acts of negligence as causes of the accident, one being the use of a car on which the coupler was in such condition that it would not work properly and couple by impact, are charged by a petition which at length describes the faulty condition of the coupler, avers that its condition was due to defendant's negligence, and made it necessary for plaintiff's intestate to go between the cars, and that, while there, other cars were negligently kicked against the cars to be coupled, causing him to be crushed.

Same—Statutes—Pleading.

That the statute may avail plaintiff, it is not necessary or permissible that the petition in an action for injury from a defective car coupling cite or refer to Act Cong. March 2, 1893, relative to couplings on cars used by carriers in interstate commerce.

Same—Right to Benefits.

Though an employee, in an action for injury from defective car coupling, does not, by his argument or otherwise, indicate that he is relying on Act Cong. March 2, 1893, relative to couplings on cars of carriers engaged in interstate commerce, the court may and should instruct as to his rights thereunder.

New Trial—Surprise.

Though defendant was taken by surprise by the court's calling the attention of the jury to a statute, this is not ground for new trial, it having made no request when the court, at the end of the charge, inquired whether there was any point or matter as to which instruction was desired, and it not being shown or claimed that defendant has evidence which will change the facts on which the court held the statute was to be considered.

Same.

Defendant having known the condition of a car coupler was an issue

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of fact in the case; and the question of its actual condition having been thoroughly gone into, and evidence having been introduced by both parties, it cannot have a new trial on the theory that, if it had foreseen the court was going to cite a statute on the question of the legal obligation resting on it as to couplers, it might perhaps have had further evidence on the question of fact.

Instructions—Pleading and Evidence.

Though a petition in action for injury from a defective car coupling does not allege that the car was used in connection with interstate commerce, the fact appearing in the evidence, the court may instruct that Act Cong. March 2, 1893, is applicable.

Master and Servant—Car Couplers.

Act Cong. March 2, 1893, requiring cars used in moving interstate commerce to be equipped with couplers coupling automatically, applies to a car designed for interstate traffic, though at the time being hauled empty.

Same—Proximate Cause—Concurrent Causes.

Failure to equip a car with a coupler coupling automatically, by reason of which a car coupler was obliged to go between the cars, where he was crushed, is a proximate cause of the accident, though the cars were forced together by the negligent kicking of other cars against them.

Same—Car Couplers.

A carrier, by permitting couplers, originally sufficient, to become worn out and inoperative, is within the prohibition of Act Cong. March 2, 1893, against using cars in interstate commerce not equipped with couplers coupling automatically.

Same—Assumption of Risk—Instruction.

It must be shown that an employee, claimed to have assumed the risk of the manner in which work was done, knew, or had means of knowing, how it was done; and an instruction that, if it was the custom to do the work as it was done when he was injured, he assumed the risk, is properly refused, no reference being made to knowledge or means of knowledge.

Same—Custom—Applicability.

The question of the custom of kicking back cars, under ordinary circumstances, without notice, is immaterial, but that of ordinary care under an exceptional situation is presented where the first cars kicked down did not, by reason of a defective automatic coupler, couple to the standing car, but separated from it a few feet, and deceased went between them to manipulate the coupler, and other cars were kicked back, crushing him; and it was claimed that the circumstances were sufficient to show the other members of the switching-crew that the first coupling had not been made, and that he had gone between the cars.

Death—Excessive Damages.

Verdict for \$9,000 for death of a man 29 years old, with a life expectancy of 35 years, he being sober, industrious, and of good habits, and earning from \$75 to \$78 per month, is not so excessive as to justify reduction.

Pleadings—Amendment—Variance.

Under Code Iowa, § 3597, making variance immaterial where the adverse party was not actually misled to his prejudice, and providing for amendment only where such party was so misled, plaintiff need not file an amendment to petition, because of variance, where defendant is estopped to say that it was misled thereby.

Submitted on Motion for New Trial Filed on Behalf of the Defendant.

McCarthy, Kenline & Roedell, for plaintiff.

W. J. Knight, for defendant.

RAIFORD *v.* WILMINGTON & W. R. Co.*(Supreme Court of North Carolina, June 10, 1902.)*

[41 S. E. Rep. 806.]

Master and Servant—Negligence—Personal Injury—Safe Place to Work*—Accidental Injury.

Plaintiff was engaged in removing an engine apron from the bumper of a locomotive in a machine shop, and was some two feet from the track; the bumper extending that distance beyond it. A large piece of iron running crosswise and underneath the bumper was fastened to it by a bolt and nut. Before plaintiff began work, another workman had removed the nut, but had not taken off the piece of iron, which fell while plaintiff was working, and, rebounding from the track, struck plaintiff: *held*, that defendant was not negligent in the removal of the nut without also removing the piece of iron.

Appeal from superior court, Wayne county; Allen, Judge.

Action by B. B. Raiford against the Wilmington & Weldon Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed.

F. A. Daniels and W. C. Munroe, for appellant.
Allen & Dortch, for appellee.

MONTGOMERY, J. The plaintiff, when he was hurt, was in the employment of the defendant in its machine shops at Wilmington. He was at work in the act of dismantling an engine which had been injured in a collision. While he was engaged in removing an iron engine apron that covered the engine bumper, a piece of iron, 1 inch thick by 3 inches wide, and 12 or 14 inches in length, running crosswise the bumper, and underneath it, fell to the track below, and, in some unaccountable way, rebounding, struck the plaintiff, who was standing off the track, and at the end of the bumper; the bumper extending 2 feet beyond the rail. The piece of iron was kept in place underneath the bumper by an iron rod extending from the top of the bumper and through the bumper, the rod being fastened underneath the piece of iron by a nut. Just before the plaintiff commenced his work, another employee of the defendant had removed the nut. Upon the refusal of his honor, on the defendant's motion, to dismiss the action at the close of the evidence, the question as to whether there was any evidence of negligence on the part of the defendant is raised. When the nut was unscrewed from the bolt, and the bolt withdrawn, by the first workman, the piece of iron must have been held in place from the time of the withdrawal of the bolt until it fell from some cause produced by the enforced pressure of wood against iron,—probably rust of the iron and indentations of the wood. The negligence alleged by the plaintiff is that the first workman left the piece of iron in the condition it was in after he unscrewed

*See note, 12 Am. & Eng. R. Cas., N. S., 537; 12 Am. & Eng. R. Cas., N. S., 668; Norfolk & W. R. Co. *v.* Cromer (Va.), 23 Am. & Eng. R. Cas., N. S., 720.

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the nut and withdrew the bolt. With that exception, the defendant was not alleged to be at fault. Work on the engine was not attended with risk or danger, and the place where the engine was standing was free from obstructions of any sort; the floor being laid in concrete, and the rails in good condition. The piece of iron, falling perpendicularly, struck the ground four inches within the rail; and the plaintiff was standing on the ground, two feet from the rail, and at the end of the bumper. He said that he had no occasion to work under the bumper, and in fact had not looked under it. Was his hurt an accident, or was it produced by the negligence of the defendant? An accident is "an event from an unknown cause," or "an unusual and unexpected event from a known cause"; "chance, casualty." *Crutchfield v. Railroad Co.*, 76 N. C. 320. We are of the opinion, under that definition of the word "accident," that the plaintiff's hurt was accidental. The cause of the injury is known, but the event was most unusual and unexpected. It was almost miraculous that that piece of iron should have been held underneath that bumper, after the support had been withdrawn, by any power of adhesion known to us. But the jury so found, and that matter was with them. It seems to us that no human forethought could have anticipated such a result from such a cause. In describing the manner of the accident, the plaintiff himself testified that the piece of iron "struck me in some sort of fashion. I do not know how. The plate struck something else, and then struck me almost instantly. It was like lightning." We repeat what we said in *Carter v. Lumber Co.*, 129 N. C. 203, 39 S. E. 828: "No act or omission, though resulting in damage, can be deemed actionable negligence unless the one responsible could, by the exercise of ordinary care under all the circumstances, have foreseen that it might result in damage to some one." 16 Am. & Eng. Enc. Law, p. 439; Pol. Torts, 36, 37; Shear. & R. Neg. 10. There must be, before a recovery can be had in actions for negligence, a breach of duty on the part of the defendant; and the act or omission producing the breach of duty, culpable in itself, must be such as a reasonably careful man would foresee might be productive of injury; and one is not liable for an injury which he could not foresee. *Smith*, Neg. 24; *Blyth v. Waterworks Co.*, 11 Exch. 781. There is not a scintilla of evidence in this case tending to show that the defendant was negligent, or failed to exercise ordinary or reasonable care. We quoted in *Carter v. Lumber Co.*, *supra*, from 16 Am. & Eng. Enc. Law, p. 402, a good definition of the test of ordinary care, which we reproduce: "When a person in the observance or performance of a duty to another has neither done nor omitted to do anything which an ordinarily careful and prudent person, in the same relation and under the same conditions and circumstances, would not have done or omitted to do, he has not failed to use ordinary care, and

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is therefore not guilty of negligence, even though damage may have resulted from his action or want of action. And conversely, there has been a want of ordinary care where a person in the observance or performance of a legal duty to another has done or omitted to do something which an ordinarily careful and prudent person, in the same relation, and under similar circumstances and conditions, would not have done or omitted; such act or omission being the proximate cause of injury to the other party to the relation."

The defendant's motion to dismiss the action should have been allowed. Error.

LOUISVILLE & N. R. CO. v. SHUMAKER'S ADM'R.

(*Court of Appeals of Kentucky, April 23, 1902.*)

[67 S. W. Rep. 829.]

Injury to Brakeman—Care Required of Employee for Self-Protection.*

In an action against a railroad company to recover damages for the death of a brakeman who was struck and killed by a section of a train which he had been sent to flag, the court properly refused to instruct the jury that it was the duty of the brakeman, under the circumstances, "to have exercised the highest degree of care for his own safety"; it being sufficient to instruct them, as was done, that "it was his duty to exercise for his own safety such care and prudence as men of ordinary prudence would exercise for their own safety under like circumstances."

Appeal from circuit court, Boyle county.

"Not to be officially reported."

Action by the administratrix of John Shumaker against the Louisville & Nashville Railroad Company to recover damages for the death of plaintiff's intestate. Judgment for plaintiff, and defendant appeals. Affirmed.

C. R. McDowell, R. P. Jacobs, and E. W. Hines, for appellant.

Robt. Harding and John W. Rawlings, for appellee.

BURNAM, J. This was an action for negligence resulting in the death of plaintiff's intestate, John Shumaker, a brakeman in the defendant's employment. The case has been tried three times in the circuit court. The first trial resulted in a verdict for \$15,000, which was set aside by the lower court as excessive. The second trial resulted in a verdict for \$10,000, which was reversed upon appeal by this court for error in the instruction defining the measure of damages. In the opinion rendered upon the former appeal, which is reported in 53 S. W. 13, the court said: "As this case will go back for a new trial, we deem it unnecessary to enter into a discussion of the facts, and give the reasons for reaching the conclusion that the case was one which the court properly

*See generally, *Leak v. Carolina Cent. R. Co.* (N. Car.), 14 Am. & Eng. R. Cas., N. S., 739, and note, 742.

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submitted to the jury. Were we in doubt on this question, then the fact that two verdicts have been returned for the administratrix would make us hesitate to say that the facts were not such that the jury should be permitted to judge as to their sufficiency to warrant them in finding a verdict for the plaintiff. Except one, the instructions are faultless, and that one is on the measure of damages." Upon the last trial this instruction was corrected as directed. The testimony on each of the three trials was substantially the same, and three juries have reached the same conclusion as to appellant's liability, though differing as to the amount of compensation. And the rule is well established that after three verdicts for the same party, although this court may be of the opinion that the weight of evidence is against them, the verdict and judgment will not be disturbed. This question was carefully considered in *Railroad Co. v. Graves' Assignee*, 78 Ky. 74, in which this court said: "Questions of fact belong primarily to the jury, and the court only interferes to prevent injustice from haste, inadvertence, or prejudice; and as the court has no authority to decide questions of facts in a case properly triable by the jury, if there be any evidence proper to be considered by the jury, if the jury will not give way, the court must, that there may be an end of litigation. The refusal of the court to yield after such a number of trials, all resulting in the same verdict, as give reasonable assurance that the verdict is the result of an honest conviction produced in the minds of the jury, and not from inadvertence, passion, or prejudice, would be a virtual abolition of the right of trial by jury."

The only alleged error relied on for reversal which is open for our consideration is that the trial court refused to give to the jury the following instruction, marked "No. 5," at the instance of the defendant, in explanation and qualification of instruction No. 4. Instruction No. 5 is as follows: "You are instructed that it was the duty of John Shumaker, under the circumstances of this case, to have exercised the highest degree of care for his own safety, and if he failed to do so, and that by reason thereof the accident happened to him that resulted in his death, then you will find for the defendant." Instruction No. 4, which was actually given, is as follows: "If you believe from the evidence that the deceased had taken his station on the railway track for the purpose of signaling the returning section, it was his duty to exercise for his own safety such care and prudence as men of ordinary prudence would exercise for their own safety under like circumstances. If you further believe from the evidence that deceased, while occupying this place on the track, failed in any respect to exercise that degree of care and prudence, and that the killing would not have occurred if he had done so, then you will find for the defendant." The annotator of the

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American Decisions, in his notes to *Freer v. Cameron*, 55 Am. Dec. 666, says: "Scarcely any theme in the whole range of legal science has been more fruitful in adjudications than the subject of contributory negligence, but the multiplicity of decisions on this point has not by any means cleared it of difficulties. On the contrary, it has in some respects seemed rather to 'darken counsel' by the introduction of a great variety of metaphysical refinements and subtle distinctions. Mr. Thompson declares himself convinced, 'after a study of the adjudications of both the English and American courts, that the whole subject of contributory negligence remains in a state of great confusion and uncertainty.'" Mr. Thompson, in his recent *Commentaries on the Law of Negligence* (volume 1, § 23), says: "In most situations and employments the standard of care which the law imposes upon persons, to the end of avoiding injury to themselves or others, is designated by the descriptive words 'ordinary care,' or sometimes by the words 'ordinary or reasonable care.' Ordinary care and 'reasonable care' have been regarded as meaning substantially the same thing. Sometimes, again, we meet with such expressions as 'due care,' though it has been held that this expression, in a request for an instruction, is properly changed to 'ordinary care' or 'reasonable care.' Moreover, it is to be kept in mind that the standard of ordinary care is not the standard of the law under all circumstances, but that where human life is the subject of a bailment, so to speak, as in the case of carriers of passengers, the law, at least for the purposes of instructing a jury, lays down a more exact standard. But as we shall see further on, ordinary care is a care proportioned to the risks of the business or of the particular situation. It is such care as prudent men are accustomed to use under the same circumstances, and, if the danger is great, it may rise to the grade of a very exact and unremitting attention. With the exceptions elsewhere noted, the standard of care by which to determine whether actionable negligence has been committed is the standard which ordinarily prudent men are accustomed to exercise under the same circumstances." What a reasonably prudent man would ordinarily do under a given state of fact is as near an approximate to the true standard as can be well expressed in words. It places both parties on an equal footing as to the rule to be applied in ascertaining whether there has been negligence. The instruction given by the court presents fully this view of the law, and the court did not err in refusing the instruction asked by appellant, as it sets up a different standard, and would have resulted in confusing the jury.

Judgment affirmed.

CORLETTI v. SOUTHERN PAC. CO.

(Supreme Court of California, June 20, 1902.)

[69 Pac. Rep. 422.]

Injury to Employee—Defective Appliance—Evidence.

For the purpose of hauling and dumping dirt on a railroad track a box was placed on rollers on a push car. Plaintiff was injured by being thrown from the car by the tilting thereof. The car and one similar to it had been in use for some time before the accident, and was used for a long time after without change, and never tilted before or after the injury to plaintiff. Plaintiff had assisted in the construction of the apparatus, was experienced in such work, and the contrivance was in perfect order at the time he was injured: *held*, that as a matter of law the apparatus was not inadequate or unsafe.

Assumption of Risk.

Plaintiff assumed the risk as a matter of law.

Department 2. Appeal from superior court, city and county of San Francisco; Geo. H. Bahrs, Judge.

Action by Peter Corletti against the Southern Pacific Company. From a judgment for plaintiff, defendant appeals. Reversed.

C. W. Cross, for appellant.

A. Morgenthal and Wm. H. Stackpole, for respondent.

HENSHAW, J. Plaintiff sued to recover damages for personal injuries to himself, alleged to have been occasioned through the negligence of defendant. Plaintiff was employed as a laborer to assist in repairing the railway track of defendant in Placer county. While engaged in emptying a dumping car upon which he was standing, it tilted, throwing him with great violence to the ground, fracturing his leg and necessitating amputation. It is alleged that the injury was occasioned because defendant had knowingly furnished a defective, inadequate and unsafe dumping car; that these defects were unknown to plaintiff, and could not have been discovered by him with the use of ordinary care. The proposition argued upon this appeal is that the appliance furnished was not defective, inadequate, or unsafe, and that plaintiff had equal means with the defendant of knowing its condition, and a full understanding of any possible risk which he might run in the use of it. The push car itself, it is not disputed, was one of safe construction, and one with the use of which plaintiff had been familiar for years. Upon this car was placed a simple box, sliding upon gas-pipe rollers, with strips across the bottom of the car to prevent them from rolling too far, and with handles at the end of the box by which it could be lifted up, thrust forward, and its contents dumped. This appliance was new to plaintiff, the cars having formerly been provided with boxes having removable sideboards. When these were removed, the dirt slid and was shoveled off. Upon the day preceding the accident the box had been used upon a smaller and lighter car, and plaintiff was engaged in this employment. It was

noticed, however, that the light car tipped when the box was lifted, and the larger push car was substituted for it. Plaintiff proved himself to be a man of excellent understanding. He produced in court a model of the apparatus, made by himself. His testimony shows that he clearly understood in every detail the nature of the simple appliance about which he was engaged. Moreover, he was a participant in its construction. "The next day (the day of the accident) we took this larger dump car, and put a box onto it, and nailed a strip on the bottom of the push car, on top of the center of the bottom or platform of the car," he testifies. He then describes the accident, and the measurements and construction of the car and dump box, and proceeds: "When we went to dump the car, after we got to the place where we wanted to unload the dirt, then we would roll the dump box forward on the rollers until it got to the hooks. Then the hooks would catch the front roller. The hooks would catch in the front roller, and then the men standing on the back end of the car would take hold of the handles at the back end of the dump box, and lift the back end of the dump box up, and let the dirt slide out in front. At the time of the accident I was standing on the back end of the car, and the car tilted up, and I fell off to one side,—on the left side. The car had not tilted up at all before that day. I had worked on the same kind of car four years and a half, but I never used that kind of a box on it,—no roller. I had unloaded seven or eight loads when I got hurt." Another witness for plaintiff (Avancino) testifies that he had been helping to lift the box before Corletti lifted it. "I stopped lifting the box, and Mr. Corletti commenced to lift it, because he understood it much better than myself. I had been there such a short time, and he was an old hand there, and he understood it better than me." The same witness—and he is the only witness for plaintiff whose testimony bears upon the matter—further testifies that he "worked on the car in the same condition continuously after the accident. No change was made in the car. They always put the same load on it. That he worked a week and a half after Corletti got hurt, and the car never tipped any more. That that was the only time. That the car was in perfect order, so far as he knew, at the time it tipped. The load was handled in the same way as they handled every other load." It appears, therefore, from the testimony of the plaintiff himself, that the appliance was a simple one; its construction, its use, and the possible risks attending such use thoroughly appreciated by him. Neither as matter of law nor as matter of fact can it be said that there was the slightest evidence tending to show that the appliance furnished was unsafe or inadequate, or that its use and the possible dangers attending it were not thoroughly understood by the plaintiff. It is clear that plaintiff was not injured because of any structural defect or inadequacy in the appliance. He was engaged in work with which he was

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thoroughly familiar. He had aided in the construction of the appliance. He had assisted, standing upon the car, in dumping seven or eight loads, before the car tilted with him. Even so, the man by his side, engaged in the same occupation, was not injured. It must be concluded, therefore, from the evidence, that the appliance was not inadequate or unsafe; that full knowledge of it was possessed by plaintiff; that, if there was any liability of tilting, he had been forewarned of that by his actual personal experience with the smaller car upon the day preceding. While it is the duty of the employer to furnish reasonably safe appliances, yet when he has furnished such appliances as may, by ordinary care, be used without danger, or with no more danger than is necessarily incident to the character of the work, he has discharged his duty.

The judgment and order denying a new trial are reversed, and the cause remanded.

We concur: McFARLAND, J.; TEMPLE, J.

MISSOURI, K. & T. RY. CO. OF TEXAS *v.* BAILEY.

(*Court of Civil Appeals of Texas, March 22, 1902.*)

[68 S. W. Rep. 803.]

Injury to Brakeman—Assumption of Risk—Mere Knowledge as to How Insecure Stirrup Is Fastened.*

A brakeman, though knowing that a stirrup used in getting on and off a car was secured by a bolt with but a single nut, would not assume the risk ordinarily attendant on so securing the stirrup if he did not know that the usual and customary precautions had not been taken to prevent the nut from coming off.

Same—Negligence—Instructions.

Refusal to charge that the mere absence of a nut from a bolt used in fastening a stirrup to a car, and a mere giving way of the stirrup on a brakeman's attempting to mount the car, would not establish negligence, was not error where there was sufficient evidence to show a failure to use proper precautions to prevent the nut from coming off, and where the court charged that the burden was on plaintiff to show that he was injured through defendant's negligence.

Same—Evidence.

In an action by a brakeman for personal injuries, testimony that within a week after the injury plaintiff was consulting with attorneys about bringing suit, and that about a week after the accident he refused to talk with defendant's claim agent relative to a settlement, was properly excluded as immaterial.

Same—Same.

Testimony that at the time plaintiff employed counsel they gave him certain money, and entered into a contract that, as long as the suit was pending, they would advance him \$40 monthly, was properly excluded as immaterial.

Same—Same.

Testimony that plaintiff was indebted to a third party, who had threatened to report the indebtedness to the company, was properly excluded.

*See notes, 11 Am. & Eng. R. Cas., N. S., 485; 20 Am. & Eng. R. Cas., N. S., 304.

Missouri, K. & T. Ry. Co. of Texas *v.* Williams

Appeal from district court, Grayson county; Rice Maxey, Judge.

Action by L. E. Bailey against the Missouri, Kansas & Texas Railway Company of Texas. Judgment for plaintiff, and defendant appeals. Affirmed.

T. S. Miller and Head & Dillard, for appellant.
Wolfe, Hare & Semple, for appellee.

MISSOURI, K. & T. RY. CO. OF TEXAS *v.* WILLIAMS.

(*Court of Civil Appeals of Texas, March, 19, 1902.*)

[68 S. W. Rep. 805.]

Injury to Fireman—Assumption of Risks—Knowledge of Violation of Rules by Engineer Acquired on Last Trip.*

A fireman of a railroad company, ordered to make a certain trip with an engineer for whom he had never fired before, but who, presumably with the company's knowledge, habitually violated its rules in regard to having his train under control on approaching stations and switches, was not estopped to complain of the engineer's negligence on the return trip, or from suing for resulting injuries, merely because on the trip down he had ascertained this habit of the engineer.

Same—Duty to Report Violation of Rules.

A fireman of a railroad company did not violate a rule requiring him to report to his immediate superior any infringement of the company's rules, though he failed to report his engineer for running by switches without having his train under control at the down terminus of the particular run, where it did not appear that his immediate superior officer was stationed at that point; and was not thereby precluded from recovery for injuries due to the same carelessness on the engineer's part on the return trip.

Same—Duty to Look Out for Other Trains—Instructions.

The duty of a railroad fireman to keep a lookout for other trains on approaching a station was sufficiently presented to the jury in a charge that, if he failed to keep such a lookout as an ordinarily prudent man would have done under the same circumstances, and such failure contributed to his injury, he could not recover, and by a further charge that in determining the question of negligence on his part the rules and orders under which and the manner in which the train was operated should be considered, etc.

Appeal from district court, Grayson county; Rice Maxey, Judge.

Action by A. C. Williams against the Missouri, Kansas & Texas Railway Company of Texas. Judgment for plaintiff, and defendant appeals. Affirmed.

T. S. Miller and Head & Dillard, for appellant.
Wolfe, Hare & Semple, for appellee.

*See note, 20 Am. & Eng. R. Cas., N. S., 279; 20 Am. & Eng. R. Cas., N. S., 299. See also, *Wright v. Sou. Pac. R. Co.* (Utah), 5 Am. & Eng. R. Cas., N. S., 559; *Chicago & A. Ry. Co. v. Eaton* (Ill.), 1 R. R. R. 353, 24 Am. & Eng. R. Cas., N. S., 353.

KING *v.* INTERSTATE CONSOL. ST. RY. CO.MORRISON *v.* SAME.*(Supreme Court of Rhode Island, Feb. 12, 1902.)*

[51 Atl. Rep. 301.]

Injury to Employee—Duty to Furnish Food, Shelter, and Transportation—Pleading—Legal Conclusions.

Plaintiff alleged that while engaged, for a railroad company, in removing ice and snow from its track at a distance from any shelter, he became exhausted, and, before he could reach his home, was so frozen that both his feet had to be amputated, and that it was the duty of the company to furnish him food and shelter, and to provide for his safety and carry him to his home, all of which, though informed of his condition, it neglected to perform, and that such negligence was the cause of such injury, without fault on his part: *held*, that in the absence of a statement of facts showing it to be the duty of the company to furnish food, shelter, and transportation, the allegations of such duty were mere matter of law and useless.

Duty to Furnish Employee Food, Shelter, and Transportation.

In the absence of a contract or established custom, it is not a duty of a railroad company to furnish the employees on its road with food, shelter, or transportation between their homes and places of work.

Actions by Thomas King and by John Morrison against the Interstate Consolidated Street Railway Company. Demurrers to the declaration in each case sustained.

J. M. Gillrain and T. P. Corcoran, for plaintiff.

W. B. Vincent, for defendant.

TILLINGHAST, J. These cases, which are substantially alike, are before us on demurrers to the declarations. We will consider the first-named case. It is trespass on the case for negligence, and sets out, in substance, in the first count thereof, that the plaintiff was employed by the defendant corporation to help remove snow from its tracks between Pawtucket, R. I., and Attleboro, Mass., in very cold weather in the month of February, 1899; that the work had to be done over a wide tract of open country, remote from dwelling houses and other habitations; that the defendant knew that the work of removing said snow and ice from its tracks and roadbed in said open country, in view of the cold and stormy weather, was very trying, exhausting, and dangerous to the laborers engaged therein, and that it was the duty of the defendant corporation to furnish sufficient food and shelter to the plaintiff during the continuance of said work, and to provide for the safety of the plaintiff while so employed, and to carry him to his home in Pawtucket when returning from said work; that he was ignorant of the danger attending said work in the open country in cold and stormy weather, and that while engaged for 24 hours therein, and while in the exercise of due care, and in ignorance of the peril to which he was exposed, both of his feet were frozen, of which fact he informed the defendant's agents and servants, and requested them to

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carry him to his home, in Pawtucket, but that the defendant, its agents and servants, well knowing the premises, carelessly and negligently failed to provide food and shelter for the plaintiff; and that the freezing of his feet was due to the failure of the defendant corporation, its agents and servants, to supply him with food and shelter while so engaged. It is further alleged that, in consequence of the freezing of plaintiff's feet, they had to be amputated, whereby he was disabled, etc. The second count differs from the first in that it alleges that, without fault on his part, both of his feet were frozen, of which fact he informed the defendant, its agents and servants, and requested them to carry him to his home, in Pawtucket, which they carelessly and negligently refused to do, and, being unable to procure passage to his home, he was obliged to make his way there on his hands and knees, and was engaged in making said journey from 7 o'clock in the evening until 8 o'clock the next morning. And he avers that in consequence thereof, and without fault on his part, his feet were so badly frozen that they afterwards had to be amputated, and that it was the duty of the defendant, under the circumstances set forth, to provide him with food and shelter and transportation as aforesaid. To this declaration the defendant demurs on the grounds (1) that the defendant owed no legal duty to the plaintiff in the premises; (2) that the alleged negligence was not the proximate cause of the accident; (3) that the danger complained of was obvious to the plaintiff, and that he assumed it as one of the risks of his employment; (4) that the plaintiff was not in the exercise of due care; and (5) that it does not appear from the declaration that the defendant was guilty of negligence.

That, as a general proposition, a railroad company is under no legal obligation to provide food and shelter for its servants, may be regarded as not open to question. No such duty arises from the ordinary relation of master and servant, and hence the mere fact that the plaintiff alleges the existence of such a duty does not sustain or aid the pleading; it being well settled that such allegation, being one of mere matter of law, is useless where the declaration is insufficient, and superfluous when sufficient without it. *Brown v. Mallett*, 5 C. B. 599; *Safe Co. v. Ward*, 46 N. J. Law, 19. In other words, there must be an allegation of facts sufficient to create the duty or obligation, or else the declaration will be fatally defective. *Nickerson v. Hydraulic Co.*, 46 Conn. 24, 33 Am. Rep. 1. No such duty as that alleged, then, being ordinarily devolved upon the master, we need only inquire whether the facts set out in the declaration bring the case within any exception to the general rule. We do not think they do. The case is not different upon principle from one where a farmer employs a wood chopper to go with him in very cold weather into the woods to chop down trees, haul logs or timber, or do other outdoor work at quite a distance from the home of the serv-

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ant. In connection with such employment the employee is supposed to look out for himself in so far as the provisions for his physical wants are concerned, and to protect himself from the cold and inclement weather, which is a danger inherent to the work, as best he may; and it is well settled that no legal duty devolves upon the employer in regard to such matters. It is, of course, competent for the person seeking employment to accept or reject that which is offered; but, if he accepts it, it is the almost universal rule that he assumes the ordinary risks incident thereto. That one of the risks incident to long-continued outdoor employment in the winter time in this climate is that one's feet or hands may be injured by freezing is so clearly within the rule of assumed risks on the part of the servant as to require no argument. Take the case of a teamster whose route, as is frequently the case, passes through a large tract of uninhabited country. He starts out in cold and stormy weather, and during his journey his feet become frozen, or he is blockaded by a snowstorm, on account of which he suffers from hunger, fatigue, and cold to the extent of causing him serious physical injury. Could it be claimed for a moment that his employer could be called upon to compensate him for the damages thus sustained? Clearly not. The danger or risk involved in such case would clearly be incidental to the employment, and by accepting the employment he assumes the risk. Again, take the case of an ice dealer, who employs men to go with him into the open country, several miles from their homes, it may be, in very cold weather, to engage in cutting and storing ice. Not having taken proper precautions to protect themselves from the cold, or not being vigorous to endure the strain which is put upon them by the severity of the weather and the character of the work, they suffer from freezing or from exhaustion, and are thereby made sick and caused to suffer damage. Could it be claimed that their employer would be liable for the damages thus sustained? That this question must be answered in the negative would seem to be apparent to any one who is familiar with the elementary principles of the law of master and servant. The furnishing of food and clothing, the proper care of oneself in the doing of his work, the recognition of the existence of well-known physical laws,—these duties, in the absence of some custom, rule, or understanding to the contrary, are clearly devolved upon the servant; and for any failure to observe them he alone must suffer the consequences. As said by the court in *Transportation Co. v. Smith* (Miss.) 28 South. 807: "The laborer must be presumed to have knowledge equal, if not superior, to his employer's, of the effect of cold upon his feelings and person. His own temperament is better known to him than to any one else, and his own sensations sound the alarm to himself. Men are presumed to have ordinary common sense, until the contrary is shown, and the law does not speculate on degrees of knowl-

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edge about weather." See, also, *Kelley v. Dyeing Co.*, 12 R. I. 112, 34 Am. Rep. 615; *Gaffney v. Railroad Co.*, 15 R. I. 456, 7 Atl. 284; *Baumler v. Brewing Co.*, 23 R. I. —, 50 Atl. 841.

Of course, it is competent for a servant to stipulate as to duties which the master shall perform in addition to those which the mere contract relation imposes upon him, and in such case the terms of the contract would govern as to such additional duties. But in the absence of such stipulation, or of some conduct on the part of the master from which the additional duty may be impliedly assumed, his common-law obligations only are binding upon him. In order, therefore, to cast such a duty upon the defendant in this case as that which is here relied upon, it must appear from the facts and circumstances set forth in the declaration that the plaintiff was led to neglect or omit to provide for himself by reason of the fact that the defendant had assumed the duty of providing for him. But no promise of this sort on the part of defendant is set out in the declaration, nor is it alleged that the defendant in any way assumed upon itself the duty of providing the plaintiff with food and shelter. It necessarily follows, therefore, that the only legal duties which devolved upon the defendant were those which grew out of the contract relation, as aforesaid. Had the plaintiff alleged in his declaration that in view of the facts and circumstances set out as to the weather, the danger, etc., the defendant assumed upon itself the duty of feeding the plaintiff, of protecting him from injury on account of the cold, and conveying him to his home in case of his becoming exhausted, or when his work was done, the case might come within that of *Bresnahan v. Lonsdale Co.*, (decided Jan. 17, 1900) 51 Atl. 624, where it was held that the declaration stated a cause of action, in that it alleged that the defendant undertook to convey the testator's intestate, after his injury, to his home, and neglected to take proper precautions to cover and protect him while so doing, in consequence of which exposure complications ensued, causing his death. The court said that, "If the taking home of the plaintiff's intestate after his injury was a duty assumed by the defendant corporation, the fellow servant doctrine contended for by the defendant does not apply." *Hyatt v. Railroad Co.*, 19 Mo. App. 287, is to the same effect. In that case the plaintiff and others were hired to shovel snow from the defendant's tracks. The weather became intensely cold, and it began to snow. Under these circumstances, plaintiff hesitated about going forward; but defendant's superintendent promised him that if he would continue he would keep cars near the gang, in which they might warm themselves. Relying on this inducement, the plaintiff proceeded with the work. An engine was left, but the engineer refused to let the plaintiff get in to warm himself, and his foot became frozen from the

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exposure. The court said: "What difference can there be in an assurance against danger from defects in machinery against danger from being extraordinarily exposed to the rigor of extraordinary weather? If, as was said, the master cannot prevent the severity of the weather, he can very well provide against it. Neither can the master prevent the breaking of the machinery or apprehend accidents in many cases, but he may well provide against injury therefrom, even though the machinery does break or the accident happen. He may provide means of escape or otherwise protect his servants. Notwithstanding the defendant might not have been liable in this case if he had not promised to provide protection from the extraordinary weather; notwithstanding that from the simple employment of plaintiff, without more, it might have been the duty of the defendant to provide fires,—when the assurances were given, and the plaintiff was induced thereby to undertake the extraordinary work, it became the duty of the defendant to protect him in the manner assured. In *Clifford v. Railroad Co.*, 9 Colo. 333, 12 Pac. 219, plaintiff was hired as a day laborer in connection with the construction of the defendant's road. His contract provided that the defendant should furnish him with "good and suitable board and lodging." At first the plaintiff worked in a high altitude. When he reached the camp high up in the mountains, and found he must sleep on damp spruce boughs, with insufficient covering, he protested, and with his fellow laborers threatened to quit work unless they were immediately furnished with comfortable lodgings and protection from the weather, and proper beds and bedding to keep them warm at night. Thereupon the defendant agreed with the plaintiff and his coemployees that if they would not leave the work, they would remain at the same, the defendant, through its officers and managers, would provide them with suitable and comfortable bedding, etc. These promises were several times repeated, and the plaintiff, relying upon their being fulfilled, remained in the employ of the defendant, and shortly afterwards, by reason of being compelled to sleep on the cold, wet and frozen ground, and without sufficient blankets to cover him and protect him from the cold, was taken dangerously ill, and his health was permanently ruined and destroyed. It was held by the court that the plaintiff could recover. So long as, therefore, as said first count fails to allege that the defendant corporation either expressly or impliedly assumed the duty of furnishing the plaintiff with food or protection from the cold, we think the demurrer thereto must be sustained.

We think the second count is also demurrable. It is alleged that the defendant corporation conveyed the plaintiff to his place of work, or that it promised, either expressly or impliedly, to carry him back to his home; and it is not, and could not successfully be, contended that it is any part of

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duty of an employer to carry his employees to or from their place of work, in the absence, at any rate, of some custom, understanding, or agreement to that effect. In *Ionnone v. Railroad Co.*, 21 R. I. 452, 44 Atl. 592, 46 L. R. A. 730, 79 Am. St. Rep. 812, Matteson, C. J., in delivering the opinion of the court, said: "The carrying of the deceased after his day's work was done to a point near his home is, we think, to be regarded not as creating the relation of a passenger, but, rather, as a privilege incidental to his contract of service, granted him by the defendant, of which he availed himself to facilitate his return to his home, and that it was a privilege accorded to him merely by reason of his contract of service." *Schumaker v. Railroad Co.*, 46 Minn. 39, 48 N. W. 559, 12 L. R. A. 257, cited by plaintiff's counsel in support of this count, while at first blush it would seem to sustain the same, yet, upon more careful study, we think it is distinguishable from the case at bar. There the plaintiff was sent to repair a wrecked caboose on the line of the defendant's road. It was extremely cold, and a village nine miles away was the nearest point at which he could get food and shelter. He was not provided with food or sufficient clothing for exposure to such weather. The company knew this, and knew that he relied upon its sending for him in the evening. It did not do so, and he was obliged to walk back to the village, and by reason of his exposure to the extreme cold he contracted rheumatism and was permanently injured. The court held that he was entitled to recover. The case was different from the one now before us, in this: That it was evidently alleged in the declaration (although the declaration is not set out in the case) that the defendant knew of the plaintiff's unprepared condition as to clothing, etc., and also knew that he relied on the defendant's furnishing him with transportation when the work was completed. Whether, in case the declaration now before us showed such a state of facts, we should follow that case and sustain it, we are not now called upon to decide. That the defendant's conduct towards the plaintiff in refusing to carry him home after his feet were frozen was highly reprehensible, morally speaking, no one will question. Indeed, it is well-nigh inconceivable that the agents and servants of the defendant corporation could have been guilty of so gross an act of inhumanity. But courts of law can only take notice of legal rights, duties, and obligations, and must decide cases in accordance therewith, regardless of inhumanitarian questions. The demurrer to the second count is sustained.

As the declaration in the second-named case, namely, *John Morrison v. Interstate Consolidated St. Ry. Co.*, is the same as the one we have already considered, the demurrer thereto is also sustained, and the cases are remanded to the common pleas division for further proceedings.

PEPLINSKI v. PENNSYLVANIA R. CO.

(Supreme Court of Pennsylvania, May 19, 1902.)

[52 Atl. Rep. 32.]

Railroads—Injury to Person Unloading Car—Fellow Servant.*

Plaintiff was employed by a coal company in unloading cars of coal. The cars stood on a track in the company's yard. The track was owned and maintained by the defendant railroad company, and the cars were moved by it and moved by its employees to such points as the coal company directed. While plaintiff was on a car of coal to unload it, other cars were negligently shunted against it with such force as to throw him off and injure him. The act of April 4, 1868, provides that when any person not an employee of the railroad company shall sustain personal injury while lawfully employed on or about any of its trains or cars, the action of recovery against such company shall be only such as would exist if such person were an employee: *held*, that plaintiff was a fellow servant of the trainmen under the act of 1868, and could not recover.

Appeal from court of common pleas, Erie county.

Action by August Peplinski against the Pennsylvania Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed.

J. Ross Thompson & Son, for appellant.
Benson & Brooks, for appellee.

DEAN, J. The plaintiff, Peplinski, was an employee of W. L. Scott & Co., large coal dealers at Erie, Pa. On the 19th of June, 1901, he was on top of a car of coal, then standing on the railroad trestle, about to be unloaded, when it was struck or bumped by other cars of defendant pushed or shunted by its locomotive. The effect was to tumble plaintiff off the car into the coal chute below, and very seriously injure him. He brought suit against the defendant for damages, averring negligence in pushing the cars without warning against the one he was on, and thereby causing his injury. The defendant denied the alleged negligence, and further averred that under the act of April 4, 1868, plaintiff was a fellow servant and co-employee of the trainmen who shunted the cars negligently, and therefore could not recover. The court submitted the question of negligence to the jury, but declined to hold that, under the evidence, the plaintiff was a fellow servant of the trainmen. The jury found for the plaintiff, and therefore, necessarily, that the defendant was negligent. Although the evidence of negligence was very meager, still it rose above a scintilla, and was properly submitted to the jury. The remaining assignments of error, in substance, raise a single question whether, on the undisputed facts, the injury comes within the act of 1868. It enacts: "That when any person shall sustain personal injury or loss of life while lawfully employed on or about the roads, and

*See article "Fellow Servants," 12 Am. & Eng. Enc. Law 893.

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depots, and premises of a railroad company, or in or about any train or car therein or thereon, of which company such person is not an employee, the right of action and recovery in all such cases against the company shall be such only as would exist if such person were an employee: provided, that this section shall not apply to passengers." The railroad company laid the ties and rails on a trestle constructed by Scott & Co. on the land of the Philadelphia & Erie Railroad, lessor of the defendant, for the purpose of moving W. L. Scott & Co.'s coal to the Lake Shore Railroad Company. The trestle was for the use of the coal company, and was built to promote its business, as well as that of the railroad company. The railroad company maintains the structure at its own cost; owns and operates the locomotives and cars that run upon it. The trestle is not level, but is an upgrade to a summit, to which they are pushed by a locomotive four cars at a time. There they are detached, and, under the control of a brakeman, are dropped, by gravity, to pockets or coal chutes which discharge their coal into cars on the Lake Shore Railroad under the trestle. The cars to be moved to and put on the trestle are selected by Scott & Co., and by them marked. The railroad company then moves them to the chutes designated by Scott & Co., where the employees of the latter company, either by hopper bottoms or by hand, unloaded them. On the day of the accident four loaded cars had been placed at the chute. Peplinski, as was his duty, had got on top of one of these coal cars preparatory to unloading it. Four other cars were then pushed over the summit of the knuckle. These last stopped 10 feet short of their place. The engineer attempted to move them to their proper place. When he did so they bumped heavily against the four already placed, knocking Peplinski over into the coal chute, as already noticed. Clearly, Peplinski at the time of his injury was employed in and about the premises and the car of the railroad company, although employed by another than the railroad company. If he was injured by the negligence of the servants of the railroad company, as the jury has found, then on the undisputed facts he was injured by his fellow servants under the act of 1868, and cannot recover. It is a waste of time to again cite the authorities from *Cummings v. Railway Co.*, 92 Pa. 82, down to *Weaver v. Railway Co.* (opinion handed down at this term), 52 Atl. 30. We are not here to review criticisms on the wisdom or policy of the statute, but to enforce it according to its plain meaning.

The judgment of the court below is reversed.

ATCHISON, T. & S. F. RY. CO. v. KINGSCOTT.*(Supreme Court of Kansas, Division No. 1, June 7, 1902.)*

[64 Pac. Rep. 184.]

Injury to Employee—Care Required of Master in Furnishing Appliances*—Inspection.*

It is the duty of a railway company to its employees engaged in emptying oil from barrels by the use of compressed air to provide barrels that are reasonably sound and in a safe condition for such use, and also to use due care in inspecting the condition of the barrels before they are filled with oil.

Same—Same—Same.

Evidence that the care used in inspection is that usually exercised by a railway company is not conclusive upon the proposition that due care has been used by the company.

Same—Nonassignable Duties.†

The duties of inspection and of furnishing its employees safe instrumentalities to carry on its operations devolves upon the company itself, and those who perform these duties for the company represent it, and for their negligence the company is responsible under the rule of the common law.

(Syllabus by the Court.)

Error from court of common pleas, Wyandotte county; Wm. G. Holt, Judge.

Action by John C. Kingscott against the Atchison, Topeka & Santa Fe Railway Company. Judgment for plaintiff. Defendant brings error. Affirmed.

Argued before DOSTER C. J., and JOHNSTON, CUNNINGHAM, and ELLIS, JJ.

A. A. Hurd and O. J. Wood, for plaintiff in error.

L. F. Bird and H. G. Pope, for defendant in error.

JOHNSTON, J. This was an action by John C. Kingscott against the Atchison, Topeka & Santa Fe Railway Company to recover damages for personal injuries resulting from the explosion of an oil barrel. Kingscott was employed by the railway company in an oil house at Argentine, and while

*See notes, 12 Am. & Eng. R. Cas., N. S., 744; 19 Am. & Eng. R. Cas., N. S., 434; 19 Am. & Eng. R. Cas., N. S., 427; 12 Am. & Eng. R. Cas., N. S., 652; 12 Am. & Eng. R. Cas., N. S., 668. See also, Choctaw, O. & G. R. Co. v. McDade (C. C. A.), 1 R. R. R. 413, 24 Am. & Eng. R. Cas., N. S., 413; Louisville & N. R. Co. v. Richardson (Ky.), 1 R. R. R. 360, 24 Am. & Eng. R. Cas., N. S., 360; Gauden v. Kansas City S. Ry. Co. (La.), 23 Am. & Eng. R. Cas., N. S., 909; Kent v. Yazoo & M. V. R. Co. (Miss.), 21 Am. & Eng. R. Cas., N. S., 332; Benson v. New York, N. H. & H. R. Co. (R. I.), 22 Am. & Eng. R. Cas., N. S., 299.

†See notes, 16 Am. & Eng. R. Cas., N. S., 570; 11 Am. & Eng. R. Cas., N. S., 15; 19 Am. & Eng. R. Cas., N. S., 430; 20 Am. & Eng. R. Cas., N. S., 107; 12 Am. & Eng. R. Cas., N. S., 537; 12 Am. & Eng. R. Cas., N. S., 668. See also, Chicago & A. Ry. Co. v. Eaton (Ill.), 1 R. R. R. 353, 24 Am. & Eng. R. Cas., N. S., 353; Norfolk & W. R. Co. v. Cromer (Va.), 23 Am. & Eng. R. Cas., N. S., 720; Doyle v. Toledo, S. & M. Ry. Co. (Mich.), 22 Am. & Eng. R. Cas., N. S., 294; Kent v. Yazoo & M. V. R. Co. (Miss.), 21 Am. & Eng. R. Cas., N. S., 332; Wallin v. Eastern Ry. Co. (Minn.), 21 Am. & Eng. R. Cas., N. S., 611.

emptying coal oil from a barrel into a tank by means of compressed air pressure the barrel burst, and portions of it struck him upon the face and body, destroyed an eye and inflicted other severe injuries. In his petition he alleged that the railway company was negligent in furnishing an old and defective barrel, in failing to properly inspect the barrel before it was filled with oil, in not warning him of the danger of emptying barrels by the dangerous agency of air pressure, and in failing to furnish him with a safe appliance for emptying the barrels. The railway company answered by alleging that the injuries sustained by Kingscott were the result of his own want of care in emptying the barrels, and were not caused by the negligence of the company. In submitting the case to the jury the court eliminated the question of the negligence of the company in furnishing an unsafe appliance for emptying oil barrels, and for failing to warn Kingscott of the danger of using compressed air. The questions submitted to the jury were, did the company provide a defective barrel, and did it properly inspect the barrel so as to ascertain its fitness for the use to which it was put, was the flow of oil obstructed by burlap or other foreign substance in the barrel, and was Kingscott himself negligent in failing to properly regulate the flow of oil from the barrel? It appears that oil was emptied from barrels into the tank by means of air pressure, the maximum being 80 pounds to the square inch. On the pipes by which the reservoir was attached to the barrel were valves to regulate the pressure, and on the wall near by was a gauge which registered the amount of pressure being used. The process is to bore a hole in the side of a barrel and connect it with the tank by means of a rubber tube. Another hole is bored into the head of the barrel, which is connected with an air reservoir by a pipe, and the pressure of the air forces the oil out of the barrel and into the tank. In this instance the plaintiff had made the connections, and the greater part of the oil had been emptied out of the barrel by this method, when Kingscott tipped the barrel up so all the oil might flow out, and immediately the explosion occurred from which the injuries resulted. One of the contentions of the plaintiff was that there was burlap and other foreign substances in the barrel which obstructed the flow of the oil, and when the air pressure was applied the barrel necessarily burst. The jury found that the explosion was not caused by the negligence of Kingscott by turning too much air into the barrel, or in failing to properly regulate the air pressure, but that it was caused by the stoppage of the outlet for the oil and the defective head of the barrel. Among other matters, the jury found that Kingscott was only applying from 5 to 20 pounds of pressure just prior to the explosion, and that that was sufficient to accomplish the purpose. It was also found that the barrel appeared to be sound and in good order before the explosion occurred, and that its unsoundness could have been discovered

by a pressure test. The jury further answered that they could not definitely determine what the obstruction to the outlet was which caused the explosion.

The main contention of the railway company is that the charge of negligence was not sustained by the testimony. It is argued that Kingscott understood the use of compressed air, and had large experience in its application; that a gauge was furnished which indicated the amount of pressure, and, as he had control of the valves, he could regulate the air pressure, and was therefore responsible for the excess of pressure which caused the explosion. The trial court having taken from the jury the question of the condition of the compressed air appliances, the verdict rests only on the negligence of the company in providing a defective and insufficient barrel, and one which contained something which clogged the outlet for oil, and thus caused the explosion and the injury. We think the testimony tends to show negligence of the railway company, and that it is sufficient to sustain the verdict. It was an old secondhand barrel which was provided, but the fact that it had been previously used does not necessarily show that it was unfit for further use. There is proof tending to show that the barrel was unsound,—that is, that its head was somewhat decayed and defective,—and some of the testimony tends to show that the outlet was obstructed by some foreign substances. As compressed air is a dangerous agency to use in emptying barrels, it was highly important that barrels should be provided to withstand the pressure, and which contained nothing that would obstruct the outflow. According to some of the testimony, an obstruction to the outflow renders the process dangerous where only a few pounds of pressure are used. The maximum pressure in the reservoir was 80 pounds, and, though regulated to some extent by the valve, a witness stated that the air quickly equalized when the outflow was clogged, and that soon the pressure in the barrel would be increased until it would be equal to the pressure in the reservoir. Whether the company exercised care suitable to the exigencies of the situation in testing the sufficiency of the barrels was a proper question for the determination of the jury. In view of the danger arising from a stoppage of the outflow, it would seem to have been the duty of the company in using old wooden barrels to examine the inside of them, and see whether they contained anything that would obstruct the flow of oil or air. Testimony was offered by Kingscott, but refused by the court, to the effect that it is practicable to inspect the inside of barrels, and that brewers do so by putting a light in the barrels, and are thus able to discover whether any foreign substance is in them, and to remove it when found. This would seem to be a proper precaution to take where so dangerous an agency as compressed air is used in emptying barrels. The fact that such an inspection may not have been employed by the com-

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pany, or that it may not be used among railroad companies, does not prove that the failure to make it is not negligence. As was said by Justice Brewer in *Railway Co. v. Haley*, 25 Kan. 64: "It may often be the duty of the courts to pronounce conduct negligent, and grossly so, although sanctioned by the custom of the roads and the rules of the company, and forbidden by no statute." See, also, *Railway Co. v. Holley*, 30 Kan. 474, 1 Pac. 130, 554; *Dougherty v. Railway Co.*, 128 Mo. 38, 30 S. W. 317, 149 Am. St. Rep. 536, 2 Am. & Eng. R. Cas., N. S., 281; *Railway Co. v. McDaniels*, 107 U. S. 454, 2 Sup. Ct. 932, 27 L. Ed. 605; *Carlson v. Coke Co.*, 19 Wash. 473, 53 Pac. 725; *Railway Co. v. Weems (Ala.)* 12 South. 186; *Martin v. Railway Co.*, 94 Cal. 326, 29 Pac. 645; *Railway Co. v. Warner (Tex. Civ. App.)* 36 S. W. 118.

No error was committed by the court in declining to instruct the jury as to whether the handling of oil was to be regarded as within the hazards peculiar to the operations of a railroad, and as to whether the company was responsible to Kingscott for the negligence of a co-employee. The plaintiff below was not asking for the protection of the fellow servant act. The duty of inspection and of furnishing safe instrumentalities for its employees devolved upon the company itself, and those who performed those duties represented the company, and for their negligence the company is liable under the rule of the common law. *Railroad Co. v. Seeley*, 54 Kan. 21, 37 Pac. 104; *Walker v. Gillett*, 59 Kan. 214, 52 Pac. 442. The railway company asked for the submission of a number of special questions, which were refused. An examination of the questions submitted and refused showed that the trial court fairly exercised its discretion in this respect, and submitted questions on the material and controlling issues of the case. Most of the questions refused were not material, and while some of them could have been given without error they were not so material as to make their refusal a ground of reversal. The findings made are supported by sufficient testimony, and appear to sustain the general verdict.

The judgment will be affirmed. All the justices concurring.

KERRIGAN v. CHICAGO, M. & ST. P. RY. CO.

(*Supreme Court of Minnesota, June 13, 1902.*)

[90 N. W. Rep. 976.]

Injury to Employee—Defective Engine Step*—Knowledge of Company—Contributory Negligence—Assumption of Risk.

Plaintiff was in defendant's employ as a fireman, engaged as such on

*See note, 11 Am. & Eng. R. Cas., N. S., 484; 12 Am. & Eng. R. Cas., N. S., 744; 14 Am. & Eng. R. Cas., N. S., 830; 11 Am. & Eng. R. Cas., N. S., 412; 11 Am. & Eng. R. Cas., N. S., 866. See *Mexican Cent. R. Co. v. Jones (C. C. A.)*, 21 Am. & Eng. R. Cas., N. S., 200; *Southern Ry. Co. v. Cooper (Ky.)*, 21 Am. & Eng. R. Cas., N. S., 231.

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an engine equipped with a certain step,—an appliance placed on the pilot to be used by employees in lighting or adjusting the headlight. The step became out of repair, and plaintiff was injured while using it in the discharge of his duties: *held*, that the evidence is insufficient to sustain the verdict of the jury to the effect (1) that defendant had notice that the step was defective and unfit for use in ample time to have enabled it to repair the same before the accident to plaintiff; (2) that it was guilty of negligence in failing to do so; and (3) that plaintiff was not guilty of contributory negligence, nor did he assume the risks incident to the use of the step.

Res Judicata.

Gen. St. 1898, § 3072, of the state of Wisconsin, provides, among other things, that when an action is removed from the circuit to the supreme court of that state by defendant, and the order or judgment appealed from is reversed, and a new trial granted, the plaintiff shall pay the taxable costs, and proceed with such new trial within one year, in default of which the action may be dismissed: *held*, that a dismissal of an action under said statute for failure of plaintiff to comply therewith is not a judgment on the merits, and is not a bar to another action in this state based upon the same cause of action.

(Syllabus by the Court.)

Appeal from district court, Winona county; Arthur H. Snow, Judge.

Action by John E. Kerrigan against the Chicago, Milwaukee & St. Paul Railway Company. Verdict for plaintiff. From an order denying a new trial, defendant appeals. Affirmed.

Webber & Lees and H. H. Field, for appellant.

Higbee & Bunge and Tawney, Smith & Tawney, for respondent.

FROHRIEP v. LAKE SHORE & M. S. RY. CO.

(*Supreme Court of Michigan, Sept. 30, 1902.*)

[91 N. W. Rep. 748.]

*Railroads—Injuries to Passengers—Evidence of Mismanagement—Sufficiency.**

Evidence in an action for injuries received by being thrown out of a bunk in a freight caboose examined, and *held* insufficient to show any mismanagement of the train.

Error to circuit court, St. Joseph county; George L. Yapple, Judge.

Action by John Frohriep against the Lake Shore & Michigan Southern Railway Company. From a judgment for plaintiff, defendant appeals. Reversed.

Dallas Boudeman, for appellant.

Howard, Roos & Howard and Charles A. Sturges, for appellee.

MONTGOMERY, J. This is an action in which the plaintiff recovered for personal injuries received while riding in a caboose attached to a freight train of the defendant. The plaintiff shipped over defendant's road a car load of stock, and,

*See notes at end of case.

as is customary, accompanied the freight train to look after the stock. The injury which the plaintiff suffered occurred at the city of Hillsdale, while the trainmen were coupling cars in the yard. There is no evidence, aside from the plaintiff's, which tends in any way to show that what occurred in the way of coupling cars was in any way unusual, or that any unusual jar or jolt was occasioned by coupling. The plaintiff's testimony upon this subject we quote at considerable length: "I got on board the train—took the caboose—between four and five o'clock in the afternoon. Reached Hillsdale about midnight. There were no passengers in the caboose at that time besides myself. Hillsdale is a great business point, with different branches running in there,—junction point. There are a great many side tracks. When we reached Hillsdale, I laid down on what we called the 'bunk' in the caboose. Those bunks are lengthwise in the caboose. It is a bench on each side of the car, about eighteen or twenty inches wide. I was on the north side in the east part of the car. When I reached Hillsdale, I was lying down on this bunk, and I was partly asleep when I came into Hillsdale. The first thing I knew there came a crash that threw me endways of the car, and I bounded back, and I fell with the left knee on the floor, and also the left edge of my hip on a bunkboard. I don't know whether I got up right away, but I got up, and I was there alone on the seat again. Shortly after I was on the seat, I heard another rattle of the train taking up the slack, and when I heard the clatter I braced myself to protect myself, and didn't fall the second time." On cross-examination: "I laid down when we left Coldwater, and I was asleep when we reached Hillsdale. I wasn't awake just before that, and had any conversation with the men in the car. At Coldwater I got a cigar, came back, and smoked it, and took a little lunch, and then laid down. After leaving Coldwater, I waked up in Hillsdale yard, when this accident occurred. Q. You mean when this bumping of the cars, as you suppose, took place? A. Yes, sir. Q. You didn't wake up before that? A. I don't remember that I was awake. I wasn't sound asleep at all. I laid on the north side of the car, toward the east end. At Hillsdale the train faces east. I should think I was about five or six feet from the end of the car. I laid far enough toward the end of the car so that the door swung clear. The bunk extended all the way to the end of the car. The stove wasn't in that end, but about the middle of the car. I didn't see any table in that end of the car. My feet rested toward the west as I lay there, and my head toward the east of the car,—the way the train was moving. Don't know how long we were at Hillsdale. I didn't get out while there. It was quite a while after I heard this bumping against the car while I was there before the train started on. They had to do some more switching and work, and I heard some more clattering and coupling of

cars. Q. As the car was pushed back, as you supposed it was, against the caboose, you say that you were thrown on the floor? A. I was thrown endways, and came back when the shock came to me. Q. You were thrown endways? A. Yes, sir. Q. Then you mean you were thrown under the seat? A. I was thrown endwise, and bounded back and came on the floor. Q. If you were lying on the east side, you would be pushed toward the end of the car? A. Yes, sir. Q. Is that the way it was? A. I couldn't tell exactly. I was partly asleep. I fell with great force on the floor. I was not awake nor sound asleep. I was in between. Q. The first you knew about it, you were on the floor? A. Yes, sir. Q. So that what occurred before that you don't know? A. No, sir. Q. And whether you were shoved along on the seat or not, or anything of that character, you cannot tell? A. I couldn't say exactly. Q. The first you knew, then, you were on the floor? A. Yes, sir. Q. Of course, that being so, the car had already struck before you knew of it? A. It did. Q. You didn't hear it strike, did you? A. When I fell I heard the clatter and the rumpus. Q. You didn't hear the car strike against the caboose until after you were on the floor? A. Why, no. Q. So far as the car that struck your caboose was concerned, you didn't hear it? A. Yes, sir. I wasn't sound asleep when I was on the floor. It took quite a little time before the sound of the racket got away. Q. Let me get this clear. The first, or, as I understand you to say, the first you knew anything about the accident, you found yourself on the floor? A. Yes, sir. Q. Then you hadn't heard anything before that, had you? A. No, sir. Q. And you couldn't hear the car strike the caboose after the time that you were on the floor? A. No, sir; I don't claim I did. Q. And just how the accident occurred, or how the bumping occurred, you don't know anything about it, of your own knowledge? A. I know the crash came in making up the train. Q. I am asking you about the shock of the car against the caboose. You don't know anything about that, because you were asleep? A. I was partly asleep; yes, sir. Q. And you didn't hear the car when it struck the caboose? A. No, sir.

* * * The seat I was on was on the north side of the car, and I was five or six feet from the end of the car. I don't know whether the seat ran clear to the end of the car or not. Don't know whether I was right at the end of the seat or not. When I found myself on the floor, I was right opposite where I had been lying down on the side, and right close to the seat. The seat was about ten inches from the floor, I should judge. When I first woke, I was lying on my left side. I was lying on my left side when I was on the seat. Q. And when you were shoved or slipped off of the seat you lay on your left side? A. I came down on my left side. I should think the fall was about eighteen inches, but I couldn't state how far I had been lifted off of the seat. That I couldn't state. Q. You

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can't swear that you were thrown at all? A. I couldn't swear; I couldn't state one way or the other. Q. All you can say is, whatever the bumping was, you rolled off the seat on the floor? A. I don't know whether I rolled off. I came with force down on the floor. Q. And you don't know what caused you to roll off or slip off? A. It was because of the crash of the car that threw me. Q. I understand you to say that when the car bumped against the caboose you rolled off or slipped off of that seat? A. I did not slip off of my own accord. Q. You don't know whether you rolled off or slipped off of that seat on the floor? A. I know I went on the floor somehow. Q. You don't know how it came about that you slipped off or rolled off of that seat on the floor? A. I went off when the crash came, and I heard the clatter of the cars. The car wasn't standing still when I laid on the floor. Q. You didn't hear anything until you found yourself on the floor, or until after you struck the floor? A. I didn't hear the first strike of it, because it takes a little time; but the car was in motion when I picked myself up. * * * Q. Do you mean to swear that you heard the first shock? A. I don't want to say that I heard the first car that was moved. Q. That is what I am asking you,—the first car that struck the caboose you didn't hear? A. I don't claim that I did. Q. Did you? A. I heard the clatter from the collision from this crash. Q. Will you confine yourself to this one question? I understood you to testify that you did not hear the car that first struck the caboose which you were in. Am I right about that? A. You are trying to make me say that I didn't hear the clattering at all. Q. No, I am not. A. I told you I did not hear the first clatter. I heard the clatter when I laid on the floor. Q. What clatter did you hear when you laid on the floor? A. I heard the clatter from the drawbars. Q. You have often heard freight trains bumping together? A. Yes, sir; sure. Q. What you heard was this: You didn't hear the first car when it struck your caboose, but after it struck your car, as is very often the case, as they were bumping against the other? A. Yes, sir; I heard such a motion. Q. The clatter you heard on the floor was the bumping of the other cars in the train, and not the bumping of the car against your particular car? A. I said I didn't hear the first bumping." The question presented is whether it is open to any just inference to be drawn by the jury that there was any mismanagement of defendant's train. We think not. It is very manifest from this testimony that the plaintiff was lying on this bunk, consisting of a narrow seat at the side of the caboose, with nothing whatever to prevent his falling off or being jolted off by any slight jar, and that the first warning he had was when he found himself on the floor of the caboose, having been jolted or shaken from his precarious position. To say that this is evidence of any fault on the part of defendant railway in the management of its train would be to per-

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mit the verdict to rest upon mere surmise. In saying this we consider the rule that those who take passage on freight trains are held in law to assume the risk of ordinary jarring, jolting, and jerking incident to the making up and distributing of such trains. This we held in *Moore v. Railroad Co.*, 115 Mich. 103, 72 N. W. 1112. See, also, 3 *Thomp. Comm. Law Negl.* § 2903. We should add that the medical testimony introduced by the plaintiff himself shows that the injuries which he suffered might have been occasioned by his rolling off this narrow seat onto the floor of the car. The request that a verdict be directed for defendant should have been granted.

The judgment will be reversed, and a new trial ordered.

LONG, J., did not sit. HOOKER, C. J., and MOORE, J., concurred.

GRANT, J. I concur in the above, but think no new trial should be granted.

NOTES.

CARRIERS OF PASSENGERS—MANAGEMENT OF CONVEYANCE.

- I. General Rule.
- II. Crowded Trains or Cars.
- III. Running Trains or Cars in a Manner Calculated to Alarm Passengers.
- IV. Avoiding Dangers Encountered during the Journey.
- V. In Passing through Tunnels.
- VI. In Running Trains or Cars on Wrong Track.
- VII. In Approaching Switch Apparently Mislabeled.
- VIII. Omission of Signals Required by Statute.
- IX. Moving Disabled Trolley Car.
- X. Absence of Driver or Motorman from Post of Duty.
- XI. Speed of Trains or Cars.
- XII. Jerks and Jolts of Trains or Cars.
- XIII. Collisions.

I. GENERAL RULE.

A carrier of passengers is bound to exercise care to operate and manage its conveyance in such a manner as to prevent injury to passengers, and for a failure to exercise the proper degree of care in the discharge of this duty the carrier will be liable in damages. *Lake Shore, etc., R. Co. v. Brown*, 123 Ill. 162, 14 N. E. 197, 31 Am. & Eng. R. Cas. 61, 5 Am. St. Rep. 510, digested in subdivision B. of section IV of note to *Chicago, etc., R. Co. v. Morse*, 4 R. R. R. 215, 27 Am. & Eng. R. Cas., N. S., 215; *Kentucky Hotel Co. v. Camp*, 97 Ky. 424, 30 S. W. 1010; *Costigand v. Warren, etc., R. Co.*, 174 Mass. 553, 55 N. E. 317.

II. CROWDED TRAINS OR CARS.

A railroad company has a right to refuse to allow a greater number of passengers than can be safely carried to get upon one of its trains, and, if it is unable to prevent the overcrowding, it may refuse to move the train until the condition can be remedied. But if the carrier, instead of pursuing that course, undertakes to transport all the passengers that are on board, whether in the cars or on the platforms, it is bound to take the condition of things into account in the management of the train, and exercise additional care commensurate with the perils and dangers surrounding the passengers by reason of the overcrowded condition of the cars. *Lynn v. Southern Pac. Co.*, 103 Cal. 7, 36 Pac. 1018, 24 L. R. A. 710. See *Olivier v. Louisville, etc., R. Co.*, 43 La. Ann. 804, 9 So. 431, 47 Am. & Eng. R. Cas. 576.

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It has been held that when a street car company stops its cars when they are so crowded with passengers that seats are not obtainable, and permits passengers to get on and to ride on the platforms and footboards of the cars, it is guilty of gross negligence in running the cars, when in that condition, so close to the intersection of a switch with the main track that the cars on each track cannot pass without injury to the passengers. *Topeka, etc., R. Co. v. Higgs*, 38 Kan. 375, 16 Pac. 667, 34 Am. & Eng. R. Cas. 529, 5 Am. St. Rep. 754.

III. RUNNING TRAINS OR CARS IN A MANNER CALCULATED TO ALARM PASSENGERS.

A railroad or street railway company may be chargeable with negligence in managing its trains or cars in a manner which is calculated to cause reasonable apprehension of danger on the part of the passengers. Thus a passenger on a street car has been allowed to recover damages for physical injury resulting from fright which was caused by negligently running the car across the track of an intersecting cable road, in front of a near and rapidly approaching train. *Purcell v. St. Paul, etc., R. Co.*, 48 Minn. 134, 50 N. W. 1034, 52 Am. & Eng. R. Cas. 611, 16 L. R. A. 203. But when a passenger, while in a state of panic or fear, jumps from a train or street car and is injured, the company is liable only if the panic or fear was caused or inspired by some word or act of an employee of the company. *Kleiber v. People's R. Co.*, 107 Mo. 240, 17 S. W. 946, 52 Am. & Eng. R. Cas. 531, 14 L. R. A. 613. See *Reary v. Louisville, etc., R. Co.*, 40 La. Ann. 32, 3 So. 390, 34 Am. & Eng. R. Cas. 277, 8 Am. St. Rep. 497. A train upon which plaintiff's intestate was a passenger had been stopped by a snow bank at a point where there was a curve in the track. It was night and snow was falling. Not long after the train had been stopped the passengers saw the head light of an engine attached to a snow plow, which was rapidly approaching from the rear, really on a parallel track, but apparently on the same track as that on which the train was standing. At the same time the engine in front of the passenger train gave several sharp, quick whistles, which the passengers understood to be signals of alarm. Plaintiff's intestate, along with another passenger, jumped from the train and was run into by the advancing snow plow, receiving injuries from which he subsequently died. There was no evidence showing the purpose of the whistles or explaining their meaning, and it was not shown that they were intended for the passengers. It was held that the evidence was insufficient to establish negligence on the part of defendant. *Chicago, etc., R. Co. v. Felton*, 125 Ill. 458, 17 N. E. 765, 33 Am. & Eng. R. Cas. 533, reversing 24 Ill. App. 376.

IV. AVOIDING DANGERS ENCOUNTERED DURING THE JOURNEY.

While passenger carriers are not responsible for accidents resulting from the act of God or the public enemy (see note to *West Chicago, etc., R. Co. v. Tuerk*, 1 R. R. R. 1, 24 Am. & Eng. R. Cas., N. S., 1), a railroad company may, nevertheless, be liable for the negligence of its servants having charge of a train in failing to anticipate dangers from these causes, and in not managing the train accordingly. *Sawyer v. Hannibal, etc., R. Co.*, 37 Mo. 240, 90 Am. Dec. 382; *Andrews v. Chicago, etc., R. Co.*, 86 Iowa 677, 53 N. W. 399, 52 Am. & Eng. R. Cas. 252. Thus when the servants of a railroad company in charge of a train have notice that there has been an unusual and extraordinary storm at a particular point along the road, it is their duty to inform themselves as to whether it is safe to complete the trip, and to exercise care in passing the point of probable danger. *Ellet v. St. Louis, etc., R. Co.*, 76 Mo. 518, 12 Am. & Eng. R. Cas. 183; *Louisville, etc., R. Co. v. Thompson*, 107 Ind. 442, 8 N. E. 18, 9 N. E. 357, 27 Am. & Eng. R. Cas. 88, 57 Am. Rep. 120. A rail-

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road company has been held liable to a passenger for injuries sustained in consequence of the negligence of its servants in running a train dangerously close to a washout, and failing to use due diligence to remove the passengers from the vicinity of the danger. *Southern Pac. R. Co. v. Tarin*, 108 Fed. 734. But an elevated railway company cannot be charged with negligence in continuing to run its trains during a blizzard, unless it is shown that the situation is such that the running of trains is inconsistent with the exercise of the high degree of care which carriers owe their passengers. *Connelly v. Manhattan R. Co.*, 142 N. Y. 377, 37 N. E. 462, reversing 68 Hun (N. Y.) 456, 23 N. Y. Supp. 88, digested in section II of note to *Chicago, etc., R. Co. v. Durand*, 3 R. R. R. 519, 26 Am. & Eng. R. Cas., N. S., 519. And it has been held that where there is merely a scintilla of evidence that a defendant railroad was guilty of negligence in running a train through a wind storm, and the presumption of negligence arising from the derailment is overcome by proof, a judgment of nonsuit is proper. *Pierce v. Great Falls, etc., R. Co.* (Mont. 1899), 56 Pac. 867. In an action to recover for injuries sustained by plaintiff in consequence of the derailment of the car in which he was riding, the testimony showed that about three or four hours before the accident happened, an unprecedentedly heavy fall of rain occurred in the immediate locality of the accident, but that it had not been sufficient, even on that part of the road, to stop or impede the regular running of the trains. The evidence did not show that the agents and employees in charge of this particular train, either from information or their personal observation, had notice of the character of the rain fall in that locality, or of the damage to the roadbed. On the contrary it appeared that to all external appearance the roadbed and track were sound and in good order, and that the train at the time was running at but little over half-speed, not by reason of any apprehended danger, but to prevent passing a place at which it was intended to take on wood. A verdict for plaintiff was set aside on the ground that it was contrary to the evidence. *International, etc., R. Co. v. Halloren*, 53 Tex. 46, 3 Am. & Eng. R. Cas. 343, 37 Am. Rep. 744.

V. IN PASSING THROUGH TUNNELS.

In passing through tunnels of any considerable length a train should ordinarily be lighted, and the windows, doors, and even the ventilators should be closed to prevent the otherwise inevitable discomfort from smoke, cinders, and gas. In a case in which it appeared that when defendant's train, upon which plaintiff was a passenger, passed through a long tunnel, the coaches were rendered very uncomfortable in consequence of the doors being left open, and plaintiff, who was sitting near the front door of one of the coaches, was injured while attempting to close the door, it was held that defendant was liable. *Western, etc., R. Co. v. Stanley*, 61 Md. 266, 18 Am. & Eng. R. Cas. 206, 48 Am. Rep. 96.

VI. IN RUNNING TRAINS OR CARS ON WRONG TRACK.

A street railway company which operates its cars on double tracks between which are erected trolley poles, and which has equipped its cars with guards on the side next to the poles, may at times find it necessary to run a car on the wrong track so that passengers are deprived of the protection of the guards, and it cannot be said as a matter of law that it is negligence to do so; the question of the carrier's negligence must be determined by the jury from all the facts and circumstances existing at the time. *Citizens' etc., R. Co. v. Hoffbauer* (Ind. App. 1900), 56 N. E. 54. But it has been held that a belt line, with north and south-bound tracks, that backs a train north over the south-bound track without a headlight on the caboose, and without the usual signals for preventing danger, is guilty of gross negligence. *Fleming v. Kansas City, etc., R. Co.*, 89 Mo. App. 129.

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VII. IN APPROACHING SWITCH APPARENTLY MISPLACED.

If, when a train approaches a switch, the engineer discovers that the switch is apparently misplaced, he should at once make every effort to stop the train as soon as possible. *New York, etc., R. Co. v. Daugherty*, 11 Wkly. Notes Cas. (Pa.) 437, 6 Am. & Eng. R. Cas. 139.

VIII. OMISSION OF SIGNALS REQUIRED BY STATUTE.

Statutes which require a whistle to be blown, or a bell to be rung, when a train approaches stations or stopping places, crossings, etc., so far as they apply to persons, are intended primarily for the benefit of the traveling public, passengers at stations (*Somer v. Boston, etc., R. Co.*, 141 Mass. 10, 6 N. E. 84), and others who have a right to be warned of approaching trains, for their personal protection against injury. The observance of the statutory precautions may, of course, sometimes be of advantage to passengers on the trains in preventing such accidents as collisions and derailments, but, ordinarily, such passengers are not included in the letter or spirit of these statutes; they do not need signals of warning for their protection, and, therefore, the statutes cannot be construed as intended for their benefit. Accordingly, although the servants in charge of a train fail to ring the bell, or blow the whistle at intervals, when approaching a station, as required by statute, a passenger on the train who is not injured in an accident, such as a collision, to which the omission of the statutory duties contributes, but in an accident to which the omission does not contribute, cannot urge the failure to discharge the duty to establish the carrier's negligence. *Alabama, etc., R. Co. v. Hawk*, 72 Ala. 112, 18 Am. & Eng. R. Cas. 194, 47 Am. Rep. 403.

IX. MOVING DISABLED TROLLEY CAR.

While a disabled car was being pushed by another car behind it, the trolley pole of the disabled car, at a point where defendant's track was crossed at right angles by that of another company, jumped its own wire, struck and broke the wire of the cross line, and thus caused the accident by which plaintiff was injured. There was testimony that the proper course, under such circumstances, was to tie down the trolley pole of the disabled car, and that in this case the conductor was told by the conductor of the rear and operating car to do so, but he refused or neglected. A judgment for plaintiff was sustained, the reviewing court holding that the trial court was right in refusing a peremptory instruction for defendant and leaving the case to the jury. *Schenkel v. Pittsburg, etc., Traction Co.*, 194 Pa. St. 182, 44 Atl. 1072.

X. ABSENCE OF DRIVER OR MOTORMAN FROM POST OF DUTY.

The act of a driver or motorman in charge of a street car in leaving his post of duty where his presence is necessary for the safety of the passengers, may amount to negligence for the consequences of which the carrier is liable. A motorman who was in sole charge of an electric car, in passing a switch, alighted without shutting off the power and went back to readjust the trolley, which had to be done from the rear of the car. After having readjusted the trolley with some difficulty he started on a run for the front end of the car, but stumbled and fell and was unable to regain his place on the car, which ran down a hill and was derailed. Plaintiff's intestate, who was a passenger on the car received injuries from which she died. It was held that even though it was not negligence to have only one man in charge of the car, if the man in charge could have stopped the car by shutting off the power, and changed the trolley to the proper wire, it was negligence for him to leave the motor with the power on, and the car in motion, to go to the other end of the car to adjust the trolley. "The fall of the motorman while attempting to return to the front platform was accidental, but it was not accidental

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that but one man was put in charge of the car when two were required, or that the one man did not stop the car to adjust the trolley, if the adjustment could be made in that way." *Redfield v. Oakland, etc., R. Co.*, 110 Cal. 277, 42 Pac. 822. In an action to recover for injuries sustained by a child nine years of age who fell from the front platform of a street car, or was thrown therefrom by another boy, while the driver had gone inside of the car to eat his breakfast, it was held that it was negligence for the driver needlessly to withdraw from the front platform, leaving the plaintiff and another boy thereon, and it was negligence not to be there ready to stop the team when the plaintiff fell, or was thrown by the other boy off the platform upon the track in front of the car, the two boys engaging in a scramble to drive the horse, the reins having been left within their reach. *Metropolitan, etc., R. Co. v. Moore*, 83 Ga. 453, 10 S. E. 730, 41 Am. & Eng. R. Cas. 240. In an action to recover damages for injuries to a child ten years old, who had been invited to ride on one of defendant's cars by the driver, the complaint alleged, in substance, that the driver, after changing the team from one end of the car to the other, upon reaching the end of the line, left the team standing alone and went to the then rear end of the car, and that, while the driver was at the rear platform, the team suddenly started forward, throwing plaintiff from the car, and injuring her. It was held that the complaint stated a cause of action. *Evansville, etc., R. Co. v. Meadows*, 13 Ind. App. 155, 41 N. E. 398.

XI. SPEED OF TRAINS OR CARS.

As to the liability of carriers for injuries to passengers in consequence of running trains or cars at an excessive rate of speed, see the note appended to *Northern, etc., R. Co. v. Adams*, 3 R. R. R. 734, 26 Am. & Eng. R. Cas., N. S., 734.

XII. JERKS AND JOLTS OF TRAINS OR CARS.

As to when jerks and jolts of trains or cars amount to mismanagement, see the note appended to *Freeman v. Metropolitan, etc., R. Co.*, 3 R. R. R. 584, 26 Am. & Eng. R. Cas., N. S., 584.

XIII. COLLISIONS.

As to the duty of passenger carriers to manage their conveyances so as to avoid injury to passengers in consequence of collisions, see the note appended to *Chicago, etc., R. Co. v. Durand*, 3 R. R. R. 519, 26 Am. & Eng. R. Cas., N. S., 519.

THEODOR MEGAARDEN.

HICKS v. SOUTHERN RY. CO.

(*Supreme Court of South Carolina, April 18, 1902.*)

[41 S. E. Rep. 753.]

Appeal—Review.

Questions not raised in the trial court on motion for nonsuit will not be considered on appeal.

Harmless Error.

Where refusal of a nonsuit was erroneous, but evidence offered by defendant entitled plaintiff to have the jury pass on the case, the refusal will not be set aside.

Objections to Evidence.

A general objection to evidence on the trial will not be sustained on appeal on grounds not presented to the trial court.

Pleading—Evidence.

Where certain allegations are improperly allowed to remain in a pleading without objection, evidence responsive thereto is properly admitted.

Hicks v. Southern Ry. Co**Evidence—Information to Servant.**

Where information is given to a servant, and is communicated by him to his master, it is binding on the master, though not within the scope of his duties.

Same—Harmless Error.

Admission of irrelevant testimony is harmless, where it is not shown to have been material.

Competency of Engineer—Opinion Evidence.

The competency of an engineer cannot be shown by the opinion of a nonexpert witness, without the statement of the facts on which his opinion is based.

Evidence.

The book of entries of a car inspector is not evidence, and can be used only to refresh the memory of the inspector.

Assumption of Risk.

Employment by a master of an incompetent servant is negligence, the danger of which is not assumed by a fellow servant.

Fellow Servants.

A conductor on a train is a fellow servant of a flagman on another train, but not of a flagman on his own train.

Instructions.

A request not applicable to the evidence is properly refused.

On rehearing. Affirmed.

For former opinions, see 38 S. E. 725, 866.

GARY, A. J. This is an action to recover damages for personal injury sustained by the plaintiff on the 5th of November, 1895, by reason of alleged negligence on the part of the defendant while in its employment as brakeman, and doing duty as flagman. The complaint alleges that the plaintiff, after flagging the train, boarded it, and, just as he did so, a sudden jerk was made, which snatched his foot off the step, and caused it to be run over by the wheels of the car. He alleges negligence on the part of the defendant in the following particulars: (1) In suddenly jerking the train, when the plaintiff had just boarded it, and when it was aware of his position; (2) in its failure to provide medical attention at Batesburg, and requiring him to wait till he was carried to Columbia before he was treated; (3) in employing an incompetent engineer and conductor for the duties each was to perform on that occasion; and (4) in the use of defective machinery.

After denying the material allegations of the complaint, the defendant set up the following defense: "Defendant further says it was not the duty of the plaintiff to board, or attempt to board, passenger train No. 37, on the 5th of November, 1895, in the way and at the time he attempted to do so, and that the injury he complains of was caused by his failing to remain on the ground and perform his duty in flagging a train which was following passenger train No. 37, and by his carelessness in attempting to get on board of a moving train at a time when it was not necessary to do so, under circumstances that rendered it dangerous, or else by the act of a fellow servant, for which defendant is not responsible."

The appellant's attorney states that the following facts are not in dispute: "The plaintiff, Coleman Hicks, was a flagman on a freight train en route from Augusta to Columbia on November 5, 1895. The train was a long one,—some thirty-five cars, besides engine and caboose. One Blanton was conductor. When the train reached Batesburg it was found that the side track was too short to contain the whole train, and it was headed in on a side track; the engine and a number of cars resting on a side track, and a number of cars and the caboose resting on the main line. Being very nearly on the time of the west-bound passenger train No. 37, and, in the manner described, obstructing the passage of the passenger train, the conductor sent the plaintiff forward almost half a mile to flag the passenger train, and inform the engineer and conductor of that train that the freight train was 'swinging' at Batesburg. This term, in railroad parlance, expresses the position at the time occupied by the freight train. The purpose was to allow the passenger train to pull down on the main line near the west switch, stop and allow the freight train to proceed out of the east switch, then shift the switch at the west end, and allow the passenger train to proceed. The plaintiff obeyed his instructions. He ran down to the blow post, about half a mile, signaled the engineer that the freight train was 'swinging,' and as the passenger train slowed up in obedience to the signal, and was passing the plaintiff, he ran alongside of it for a short distance, and made an effort to board it for the purpose of riding back to Batesburg. According to his statement, the passenger train was then going at the rate of about six or eight miles an hour,—the rate at which the employees were in the habit of boarding trains. Plaintiff had his flag in his right hand, and was much exhausted by his run. He was on the right side of the train approaching Batesburg. He caught the hand railing at the front platform of the Pullman car with his right hand, and, in the effort to board it, in some way slipped, and his left foot, resting on the rail, was crushed by the wheels. He threw himself away from the train, and fell into the ditch, where he stayed for half an hour, until an extra freight train came along and carried him to Batesburg, where his foot received some attention, and thence he was carried to the hospital in Columbia. There his foot was amputated." The jury rendered a verdict in favor of the plaintiff for \$2,350.

The defendant appealed upon exceptions, the first of which is as follows:

"(1) The Motion for Nonsuit. The presiding judge erred in not granting defendant's motion for nonsuit upon the ground that there was no evidence of negligence on the part of the defendant, as charged in the complaint. (a) The alleged negligence in suddenly jerking the train, when defendant was aware of plaintiff's position, was, if any, the negligence either of the conductor or the engineer of the passenger

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train, both of whom were fellow servants of the plaintiff, for which the defendant was not liable. (b) There is no evidence that the servants of the defendants were aware of the dangerous position of the plaintiff, or of his intended effort to board the passenger train. (c) There is no evidence that the jerk in the train was an act of negligence, or anything more than the ordinary and incidental movement of the train. (d) There is no evidence that the engineer of the passenger train was an incompetent officer, or that the injury to plaintiff was the result of such incompetency, or that the company was negligent either in employing him, or retaining him after it knew, or had reason to know, of his incompetency. (e) There is no evidence that the conductor of the passenger train was an incompetent officer, or that the injury to plaintiff was the result of such incompetency, or that the company was negligent either in employing him or retaining him after it knew, or had reason to know, of his incompetency. (f) There is no evidence that any of the appliances, attachments, and running gear of the passenger train were unsafe, unsound, and unreliable, or that the plaintiff's injury was caused thereby, or that the defendant knew, or had reason to know, of such condition. (g) There is no evidence that the defendant failed in its duty to furnish medical attention to the plaintiff, or that his injury was either caused or increased thereby. Section 1690, Rev. St., requiring notice to be given to a physician, has no application to an action for damages resulting from a personal injury such as this is."

The grounds upon which the defendant made a motion for a nonsuit are thus stated in the record, together with the reasons for refusing it: "Mr. Sanders: We move for a nonsuit on the ground that there is not sufficient evidence of the allegations in the complaint to go to the jury. The allegations are, briefly, that the engineer and conductor were careless and incompetent, that the machinery and appliances were out of order, and that the railroad company was negligent in that respect, and that by reason of the negligence of the railroad company in having an incompetent engineer and conductor there, or by having this machinery out of order, this man, when he undertook to board the train, the train gave a sudden jerk, and his foot slipped and was crushed. Taking the first proposition in this case, the plaintiff and employees of the train were fellow servants, and the plaintiff must show that the master was negligent in the employment of the conductor and engineer at first, or negligent in retaining such in the service. By the Court: I cannot say there is no scintilla of evidence here. There is testimony as to an instance of alleged incompetency before the accident occurred, which, if believed, may be some evidence of negligence or carelessness, and there are one or two instances after it occurred from which the jury might presume that the servant was the same kind of man that he was before. Isn't that a presumption for

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the jury? I don't think I ought to take the case from the jury." The exception presents some questions upon which the circuit judge was not requested to rule, and these cannot be considered. One of the provisions of rule 18 is that "a motion for a nonsuit must be reduced to writing by the moving counsel or by the stenographer under the direction of the court, stating the grounds of the motion." His honor the circuit judge understood the defendant's motion to be made on the ground that there was no testimony tending to show that the defendant was negligent in the selection of the conductor and engineer, or in retaining them in its service; the defendant contending that they were fellow servants with the plaintiff. Even if there was no testimony whatever to sustain the allegation of negligence in this particular, it does not follow that the defendant was entitled to an order of nonsuit. There were four specific acts of negligence set forth in the complaint, and, as there was testimony in support of each of them, a nonsuit would not have been proper, even if it should be held that the grounds of the motion were applicable to each specification of negligence. But if there was a failure of evidence to sustain the allegations of negligence at the time the motion for a nonsuit was made, and afterwards, when other testimony was introduced, it made a case proper for the consideration of the jury, the supreme court would not set aside an order refusing a motion for nonsuit, although erroneous when made. *Scates v. Henderson*, 44 S. C. 554, 22 S. E. 724. In the case of *Martin v. Ranlett*, 5 Rich. Law, 546, 57 Am. Dec. 770, the court uses this language: "It was said in the case of *Thomas v. Jeter*, 1 Hill, 382, as follows: 'Even if the presiding judge had erroneously refused the nonsuit, and the defendants in their defense had supplied the proof necessary to make out the plaintiffs' case, a nonsuit could not be directed here; * * * and when, upon the whole proof, it appears that the plaintiffs are entitled to recover' (and, we may add, when the jury have ratified it), 'it would be sporting with justice to say they should be turned out of court on account of such an order of the judge.'" We are satisfied that in view of all the testimony such a case was made out as entitled the plaintiff to the right to have the jury pass upon it. This exception is overruled.

"(2) Questions of Admissibility of Evidence. The presiding judge erred in allowing and rejecting testimony in the several particulars hereinafter specified. (a) In allowing the witness Coleman Hicks to testify that, after the accident happened, Conductor Blanton said that the crew of the passenger train did not tell him anything about it. The error consisting in this: A part of the plaintiff's action for damages is injury by neglect after the servants of the company became aware of the accident. This they sought to establish by the declarations of the agent, Blanton, not a part of the *res gestæ*, nor made within the course or scope of his

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agency. (b) In allowing the witness Coleman Hicks to testify as follows: 'Dr. Fox told me that, if I would let him operate on my foot, he could save my great toe and the toe next to it; that is, with trimming the foot (he pointed),—trimming the right foot across this way, leaving out behind the little toe. He first told me, before I got an answer, that, if I didn't let him do it, that my foot would have to be unjointed in here, with what they call a "—— operation," if I didn't let him do it.' The error consisting in this: Such testimony was hearsay, the expression of opinion by one not an agent of the company, and not a part of *res gestæ*. (c) In allowing the witness Coleman Hicks to testify that he had repeated to Conductor Blanton what Dr. Fox had said in reference to saving a part of his foot. The error consisting in this: It was a conversation between the witness and an officer of the company whose duties did not require any report or action based upon such information. It was not a part of the *res gestæ*. (f) In allowing the witness J. H. Green to answer upon cross-examination the question, 'Did you ever know, in a law-suit,—a suit for damages,—a railroad admit that it had incompetent employees in its employment?' Said testimony being irrelevant, incompetent, and calculated to prejudice the minds of the jury against the defendant. (g) In refusing to allow the witness William Maxwell to answer the question: 'Do you know whether or not he [McAllister] was a careful engineer?' and in holding, 'I think he is confined, not to the conclusion, but to the evidences of the care, or of the reverse,—any dereliction in his duty.' The error consisted in this: The complaint alleged that the engineer was incompetent, and known by the company to be so. This was denied by the answer, and therefore became an issue in the case, upon which the testimony should have been allowed, without requiring proofs of specific acts of care. And for the same reason, in striking out the answer of the witness, as follows: 'Well, as far as his handling of an engine in the yard, I would say he was a very careful,' and 'all of his handling around indicated a careful engineer;' and in holding: 'You are confined to acts,—acts showing that he was careful.' It is submitted that if a witness is qualified to judge of the competency of an engineer, and was in a position to so judge, it is proper for him to state, from his standpoint, whether the engineer is competent or not, without being confined to specific acts of care or want of care. (h) In refusing to allow in evidence the book of the car inspector, showing original entries made by him as to the condition of the cars examined, and in holding that such book could not be introduced as original evidence, and in striking out such evidence."

"a" Assignment of Error. This question arose out of the testimony of the plaintiff, as follows: "They picked me up and put me on a flat car. The conductor, engineer, fireman, and train hand picked me up and put me on a flat car and

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carried me into Batesburg. When I got in there I hopped down off the flat car, with the aid of the train hand, and went across, and jumped up on the platform. Mr. Blanton came around and says: 'Hicks, do you work?' I says, 'I am not able to do any work. Them fellows run over me up yonder.' He says: 'Run over you?' I says, 'Yes.' He says: 'They didn't tell me anything—' (Objection to conversation by Mr. Schumpert.) That was Mr. Blanton, you own conductor? Yes, sir. By the Court: I rather think that ought to be omitted. Go ahead. Mr. Blanton says: 'They didn't tell me anything about it.' It will be observed that the defendant's attorney interposed a general objection to the "conversation," but did not specify the grounds of objection. The grounds of objection stated in the exception were not ruled upon by the presiding judge, and are therefore not properly before this court for consideration. *Norris v. Clinkscales*, 59 S. C. 243, 37 S. E. 821.

"b" Assignment of Error. The record contains the following statement: "The case was first tried before Judge Gage. At that trial, after the complaint was read, Mr. Sanders, for defendant, in pursuance of written notice, moved to strike out the following allegation in paragraph 7 of the complaint: 'Although the plaintiff clearly remembers, and he so alleges, that a doctor was at hand, who said that he could save plaintiff's great toe.' By Mr. Johnstone: 'The motion comes too late, after the framing of the issues and the impaneling of the jurors.' By the Court: 'I think the motion ought to have been made beforehand.' This motion was not renewed or called up at the second trial." The object of the pleadings is to frame issues so that the parties to the action may know how to shape their testimony. The testimony mentioned in this assignment of error was responsive to an allegation which the defendant had allowed to remain in the complaint by its nonaction. It therefore had no right to object to such testimony. Furthermore, the grounds of objection set forth are not those urged before the presiding judge.

"c" Assignment of Error. This question arose as follows, during the examination of the plaintiff: "Q. Were the officers of the company around there? A. No, sir; there wasn't no one of the company, not as I know of. There were none of them there, as I know of, at that time. Q. Did you tell them of it when you saw them? A. I told Mr. Blanton about it when he came back there,—my conductor. Q. What did you tell him? Mr. Sanders: It is a conversation between him and Mr. Blanton, who is a conductor, and not an officer of the company, an hour afterwards. It is not competent. The principal is not bound by what the agent says, but by what he does. By the Court: I think he may show what he did, or what he omitted to do. The allegation in the seventh paragraph of the complaint speaks of his wounded condition, and says a doctor was at hand, and said he could save plain-

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tiff's great toe. He may show the omission as well as what was done. Q. Was the agent, Mr. Blanton, of this company, informed of what the doctor said? A. He was. Mr. Schumpert: Your honor rules that he can say that the agent was informed? By the Court: With reference to what the doctor said, as alleged here in the complaint, in the seventh paragraph, as to the saving of his great toe. Q. What was done after Mr. Blanton received this information of what Dr. Fox had told you? Mr. Schumpert: He is going on and speaking about some information. What information? Q. What did he say when he was so informed? A. He had the operator wire Mr. Wells, and ask him if these doctors could operate on me. (Objection by Mr. Schumpert.) By the Court: No; the conductor is an agent, with certain duties, and all his admissions go upon the ground of the scope of his employment." This testimony was not objected to on the ground that it was not a part of the *res gestæ*, but on the ground that the conductor was not the proper person to whom the information should have been given. As the testimony shows that the conductor communicated with the superintendent after receiving the information, we fail to see wherein the testimony was prejudicial to the defendant.

"d" and "e" assignments of error, were abandoned.

"f" Assignment of Error. The record shows this question arose as follows: "Cross-examination by Mr. Johnstone: Q. Did you ever know, in a lawsuit,—a suit for damages,—a railroad admit that it had incompetent employees in its employment? Mr. Schumpert: I object. It is irrelevant, incompetent. By the Court: Oh, yes; he might answer that. Q. The Southern Railway Company,—did you ever know the Southern Railway Company to admit in any law case where it was sued for the negligence of its agents that it had incompetent employees or negligent employees in its service? A. No, I don't think I have." Even if the testimony was irrelevant, we fail to see wherein it was material, which fact would have to appear before this court would sustain the exception. We cannot believe that a juror possessed of ordinary reason would be influenced in his finding of a verdict by the fact that the witness knew or did not know that the defendant had ever admitted, in any law case where it was sued for negligence, its employees were incompetent or negligent. Furthermore, the exact question propounded to the witness was not answered.

"g" Assignment of Error. At the time the presiding judge made his rulings, there was no testimony showing that the witness was an expert, nor the facts upon which he based his opinion. The testimony was therefore inadmissible. *Price v. Railroad Co.*, 38 S. C. 212, 213, 17 S. E. 732; *State v. Lee*, 58 S. C. 350, 36 S. E. 706. But even if there had been such testimony, he could not have testified as to the competency of the engineer, because this was an issue raised by

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the pleadings, in which case the witness could only give his opinion upon a state of facts hypothetically stated. The rules as to opinion evidence are stated in the case of *Easler v. Railway Co.* (recently filed) 60 S. C. 117, 38 S. E. 258.

"h" Assignment of Error. The witness was allowed to refresh his memory by reference to the entries made in the book by him, and he testified that there were no defects in any of the coaches attached to the train that injured the plaintiff on the day the accident happened. The presiding judge very properly drew the distinction between such evidence simply for the purpose of refreshing the memory, and when introduced as evidence in itself of the facts therein appearing. The book was not admissible as independent evidence, and this was the only testimony which the presiding judge excluded relative to the book. The presiding judge is sustained in his ruling by the cases of *State v. Collins*, 15 S. C. 373, 40 Am. Rep. 697, and *Fritz v. Burriss*, 41 S. C. 149, 19 S. E. 304. This exception is overruled.

The third exception is as follows: "(3) Exceptions to the judge's charge. (a) The presiding judge erred in charging the jury as follows: 'Well, the law of fellow servants is this: That in the same department of work where yourself and another are engaged in service,—same department of work,—he does not occupy to you the relation of master, * * * there, where you are injured as the result of negligence or lack of care of a fellow servant, then you cannot recover, if it is done in the ordinary employment, and acting as such fellow servant.' The error consisting in limiting the doctrine of fellow servants to servants engaged in the same department of work. (b) The presiding judge erred in charging the jury as follows: 'An employer undertakes and contracts that his men are men of ordinary care and prudence.' There is no such contract on the employer's part. His duty is to exercise ordinary care in the selection of his employees, and not to retain them after he knows, or has reason to know, of their incompetency. (c) The presiding judge erred in charging the jury as follows: 'If it be proved that one is incompetent, you may infer that he is incompetent to the knowledge of the person who employed him, unless, when that condition of affairs was established, he comes forward and shows that he did not have that knowledge. * * * If you have once established the fact that a person is incompetent, then, that being a prima facie case, you may stop there. Then the defendant putting up his defense would have to say that, "while that may be so, yet I did not know it," but he takes upon himself the burden of proving that lack of knowledge. * * * When it is once established that a man is incompetent,—a servant is incompetent in the service of the master,—you have a right to infer, you have a right to presume, and it is presumed, that he is incompetent to the knowledge of the master. * * *

The presumption is that he is incompetent to the

knowledge of the person who employed him.' The error consisting in holding that there was a presumption, upon the proof of incompetency of a servant, that the master knew of it. (e) The presiding judge erred in qualifying defendant's first request to charge. The request was as follows: 'A conductor upon one train, while engaged in his ordinary duties, is a fellow servant of a flagman upon another train.' The modification was as follows: 'I so charge you that. That means to say, while engaged in the relationship or duties of conductor and flagman, respectively; but, as I have charged you heretofore, if one is placed above the other, so as to occupy towards the other the relationship of master and servant, beneath him for the moment, and for the time throwing aside the relationship that the conductor ordinarily bore towards the flagman, or that the flagman bears towards the conductor, for the man so placed above another so as to act for the principal and as principal,—as master,—then the master would be responsible.' The error consisting in this: The defendant was entitled to the charge as presented. There was not a particle of testimony which made the modification applicable. It was therefore misleading and prejudicial to the defendant. (f) The presiding judge erred in refusing the defendant's fifteenth request to charge, which was as follows: Even if the defendant was, under the law, obliged to call a doctor to attend the plaintiff, if, as a fact, they did call a doctor, then the company did its duty in this respect, and cannot be held liable for the mistake of the doctor.' The request contained a correct principle of law applicable to the case, and the defendant had the right to have it charged to the jury."

"d" was abandoned.

"a" Assignment of Error. The meaning of the presiding judge is more apparent when his words are quoted more fully, which were: "Well, the law of fellow servant is this: That in the same department of work, where yourself and another are engaged in service,—same department of work,—he does not occupy towards you the relation of master or superior officer, representing a principal, and you do not represent towards him that you will contract with reference to each other's skill and care, there, where you are injured as the result of negligence or lack of care of a fellow servant, then you cannot recover, if it is done in the ordinary employment, and acting as such fellow servant." We do not see how this charge was prejudicial to the appellant, as the presiding judge stated that the plaintiff could not recover under the circumstances therein mentioned.

"b" Assignment of Error. The entire sentence in which the words in this assignment of error were used is as follows: "An employer undertakes and contracts that his men are men of ordinary care and prudence; that men are competent, etc.,—not the highest degree of competency, not the lowest degree of competency, but are men of ordinary competency

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and of ordinary care, as are engaged in that particular calling, and have the amount of that care that a man of ordinary prudence would exercise; they are responsible, provided they knew of such lack of competency." As the defendant's liability was made to depend upon its knowledge of the fellow servant's incompetency, the error was not prejudicial.

"c" Assignment of Error. It is the duty of the master to furnish his servants with safe and suitable machinery and appliances to enable them to perform the work for which they are employed, and to keep the same in repair. It is likewise the duty of the master to select competent servants to do the work for which they are employed. It is true, a servant assumes the risk ordinarily incident to his employment, such as arise either from the handling and use of the machinery, or from the negligence of a co-servant; but he does not assume risks arising from defective machinery, or from the selection of incompetent servants. The case of *Branch v. Railway Co.*, 35 S. C. 405, 14 S. E. 808, states the principles governing cases in which an injury is sustained through defective machinery, and decides that the omission of duty to provide suitable machinery affords at least prima facie evidence of negligence, and that want of knowledge on the part of the master of the defect of the machinery is a matter of defense. In *Bodie v. Railway Co.*, 61 S. C. 468, 39 S. E. 715, recently decided by this court, it is held that the circuit judge did not err in charging the jury that "the word 'appliances' includes not only inanimate machinery and tools and apparatus, but also the living men or persons needed to operate the machinery." We see no reason why it should not be prima facie evidence of negligence to employ an incompetent servant, as well as to furnish defective machinery. Nor do we see why a servant should be held to assume the risk of negligence on the part of an incompetent fellow servant, when he does not assume the risk arising from defective machinery, especially since it has been decided that the word "appliances" includes the persons necessary to operate the machinery.

"e" Assignment of Error. The modification states what is known as the "superior servant limitations." 12 Am. & Eng. Enc. Law (1st Ed.) 922 et seq. There are cases recognizing this doctrine, among which may be mentioned *Boatwright v. Railroad Co.*, 25 S. C. 133, in which the court uses this language: "It seems to us clear that unless the conductor of a train is, while in charge of a train, the representative of the company, then the train is being run without any representative. He has entire charge of the train, and every employee on it is subject to his orders. This view is sustained by the supreme court of the United States in the case of *Railway Co. v. Ross*, 112 U. S. 377, 5 Sup. Ct. 184, 28 L. Ed. 787, where, after reviewing the cases on the subject, Mr. Justice Field uses this language: 'We agree with them in holding (and the present case requires no further decision) that the

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conductor of a railway train, who commands its movements, directs when it shall start, at what station it shall stop, at what speed it shall run, and has the general management of it, and control of the persons employed upon it, represents the company, and therefore that for injuries resulting from his negligent acts the company is responsible. If such a conductor does not represent the company, then the train is operated without any representative of its owner.''' This is not the rule now recognized by the United States supreme court (*Railroad Co. v. Conroy*, 20 Sup. Ct. 85, 44 L. Ed. 181), and, in the opinion of the writer of this opinion, should no longer be recognized in this state; but the majority of the court think otherwise, and, until the rule is abrogated in this state, it is incumbent on him to follow the authorities sustaining it. The modification was a correct statement of the law, under the authorities now in force, and this assignment of error is overruled.

“f” Assignment of Error. As there was no testimony tending to show a mistake on the part of the doctor, there was no error in refusing the request.

It is the judgment of this court that the judgment of the circuit court be affirmed.

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(*Supreme Court of Ohio, June 24, 1902.*)

[64 N. E. Rep. 582.]

Employee Using Hand Car as Licensee—Duty of Company.*

An employee of a railroad company, whose duties in the performance of his employment do not require him to be on the main track of the railroad with a three-wheel hand-car called a “speeder,” but who so goes upon the main track without any invitation or inducement therefor by the company, but with no objection on the part of the company, is, at most, a mere licensee: and his use of the track in such manner is subject to all the risks incident to the use of the track by the company in the same manner it was used at the time the license was granted, and the company does not owe him the duty to especially look out for and protect him when running its trains, except to use reasonable care to avoid injuring him after discovering him upon the track.

Statutory Signals—Accident Not at Crossing.†

Rev. St. §§ 3336, 3337, are intended for the protection of such persons

*As to the care due licensees on the track, see *Morgan v. Wabash R. Co.* (Mo.), 20 Am. & Eng. R. Cas., N. S., 372, and extensive note, 394; foot-note appended to *Law v. Missouri, K. & T. Ry. Co. of Texas* (Tex.), 2 R. R. R. 582, 25 Am. & Eng. R. Cas., N. S., 582; *Tully v. Philadelphia, etc., R. Co.* (Del.), 23 Am. & Eng. R. Cas., N. S., 209.

†As to the effect of failure to give statutory crossing signals where accident was not at crossing, see *Philadelphia & B. C. R. Co. v. Holden* (Md.), 22 Am. & Eng. R. Cas., N. S., 192, and extensive note, 199 et seq.; *Sims v. Southern Ry. Co.* (S. Car.), 20 Am. & Eng. R. Cas., N. S., 76; *Southern Ry. Co. v. New* (Ga.), 14 Am. & Eng. R. Cas., N. S., 19; *San Antonio & A. P. Ry. Co. v. Gray* (Tex.), 2 R. R. R. 828, 25 Am. & Eng. R. Cas., N. S., 828; *Mason v. Southern Ry. Co.* (S. Car.), 19 Am. & Eng. R. Cas., N. S., 83; *McArver v. Southern Ry. Co.* (N. Car.), 23 Am. & Eng. R. Cas., N. S., 772.

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only as are crossing the track, or are about to do so; and they do not inure to the benefit of persons who are on the track, and not at a crossing. *Railroad Co. v. Depew*, 40 Ohio St. 121, approved and followed.

Same—Same—Contributory Negligence.

Where the evidence shows that the deceased was struck by a train and killed at a point about 600 feet from the crossing, it is error to charge the jury that it is for them to determine from the evidence whether the statutory signals were given or not, and that their conclusion on that subject would be one of the elements which they should consider in determining whether the defendant was guilty of negligence that produced, in whole or in part, the death of the deceased; and in such case it is also error to charge the jury that the deceased was bound to use reasonable precautions to detect the approach of trains, and to know that the defendant might run a train over the road at that point at any time, "unless lulled into a feeling of security by a failure of the defendant's employees in charge of its train to observe the statutory regulations and rules of the company in the manner of running and management of the train at the time and place of the accident, and under the circumstances shown by the evidence."

Contributory Negligence.

Where it is an admitted fact that at the time of the accident it was so foggy that it was difficult, if not impossible, to see objects on the railroad more than a few rods distant, and there is evidence tending to show that the deceased took the "speeder" upon the main track for no reason connected with his employment, other than his convenience; that after lighting one switch light he rode down the main track towards another switch light on the speeder, with a companion, in violation of the orders of his superior, the station agent; that there was a side track or "passing track" from a point near the station to where the other switch light was to be placed; that the deceased could have easily placed the speeder upon said side track, and reached his destination easily and with safety; and that, instead of doing so, he went down the main track, without keeping any lookout behind him,—it is error to refuse to charge the jury that, if they find such facts, the deceased was guilty of such negligence as would prevent the plaintiff from recovering in the case, unless the defendant could have avoided the injury after discovering the deceased upon the track.

Contributory Negligence of Father—Action for Death of Son.

Where there is evidence tending to show that the father of the deceased was guilty of negligence directly contributing to the death of his son, and the court charged the jury that, in arriving at the amount of damages, they should consider the pecuniary injury to each separate beneficiary, first determining the value of the life of the deceased to his father, etc., but that the verdict should be for a gross sum, not exceeding \$10,000, it is error to refuse to charge the jury, as requested, that, if they should find that the father of the deceased was guilty of negligence directly contributing to the death of his son, the plaintiff could not recover for any pecuniary loss suffered by the father for the death of his son. *Wolf v. Railway Co.*, 45 N. E. 708, 55 Ohio St. 517, 36 L. R. A. 812, approved and followed.

Ordinances—Passage—Evidence.

An issue in the pleadings being whether an ordinance existed or not, it was error to permit parol proof of the passage of the ordinance; and the error was not cured by the court saying to the jury that the ordinance was a circumstance to be taken into consideration, in connection with the other facts and circumstances, in determining whether the defendant was guilty of negligence or whether the deceased was guilty of negligence which contributed to cause his death.

(Syllabus by the Court.)

Error to circuit court, Knox county.

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Action by one Workman, administrator of Arleigh J. Mead, deceased, against the Cleveland, Akron & Columbus Railway Company. Judgment for plaintiff. Defendant brings error. Reversed.

The defendant in error, as the administrator of Arleigh L. Mead, deceased, sued in the court of common pleas of Knox county to recover damages from the plaintiff in error for the death of his intestate, caused, as alleged, by the negligence of the plaintiff in error. The negligence charged was that the conductor and engineer of the train were negligent in running the train without a headlight, and in violation of the village ordinance, at a high and dangerous rate of speed; that the bell was not rung, or any notice or warning given of its approach in any way whatever; that the train was not run on schedule time, but was an extra. It is alleged that the said afternoon was very foggy, making it very dark, so that it was "very difficult, if not impossible, to see objects on the said railroad more than a few rods in front of the engine." The answer denied the allegations of negligence, and denied specifically the passage or existence of the alleged ordinance, and charged the deceased with contributory negligence. A verdict and judgment were rendered for the administrator, which was affirmed in the circuit court, and the cause comes into this court for review.

The facts are substantially as follows: The railway of the plaintiff in error passes through the northern part of the corporate limits of Buckeye City in an almost east and west direction, crossing the highway at right angles; the general direction of the road, however, being north and south. At the southeast corner of the crossing is Danville station. The railroad is perfectly straight east and west of the crossing for more than a mile each way. There is a descending grade from a point something over a mile east of the station. A switch extends along the south side of the main track, starting at the station and running east a distance of 1,020 to 1,040 feet; and a passing track, starting at the west side of the highway, 100 to 150 feet north of the station, and running west about 2,050 feet. This passing track was entirely clear on the day of the accident. The whistling post for the crossing is about a quarter of a mile east of the station. The west corporation line of Buckeye City was 582 feet from the west end of the platform, and 603 feet from the station. The accident happened about 683 feet from the station. It happened on the 13th day of January, 1899. For many years the father of the decedent, J. H. Mead, had been station agent for the defendant company at this place. It was a part of his duty to light the switch lamps in the evening, and bring them in in the morning. He was partially crippled, and, to assist him in the performance of his duties, he purchased, for his own convenience, and used, a "speeder," or three-wheeled vehicle, which could be run on the track, propelled by hands

and feet. He did this without objection on the part of the company. The speeder at the time of the accident had a brake, but the brake had been lost or broken off, so that there was no way of stopping it except by the hands. The deceased at the time of the accident was about 16 years old, and was in the employ of the company, at \$5 per month, as his father's assistant and night man. His duties were to light the switch lamps in the evening and bring them in in the morning, attend to the two night trains at the station, and, when not in school, carry the mail. Mr. Mead, the father, permitted his son, the deceased, to use the speeder in doing his work, but cautioned him to be careful and to look out for trains when on the track. He had forbidden him to allow anyone else on it with him, but had seen him once or twice take another boy with him. It appeared in evidence that every two or three days, and sometimes oftener, extra trains ran through Danville without stopping and that one of the rules of the road provided: "Extra trains may pass over the road at any time without previous notice, and foremen must always be prepared for it. Anything that interferes with the safe passage of trains at full speed is an obstruction." At the time of the accident, one J. P. McCaskey, a telegrapher out of employment, was temporarily helping Mr. Mead in the office. While Mr. Mead and Mr. McCaskey were in the office together during the afternoon, McCaskey, who was sitting at the instrument table, heard orders going over the wires, and turned to Mead and told him that an extra would meet No. 23 at a station east of Danville,—either Brinkhaven or Braddaw Pass. No. 23 passed Danville going north at 2:52. The extra coming south (west) actually passed at Brinkhaven. Mead, who was busy at the time, paid little attention to the matter, and it passed out of his mind. Neither he nor McCaskey communicated the fact of the extra being on the road to Arleigh, the deceased. Mr. Mead, the station agent, left the station about 3 o'clock, and went home; but, before he left, the deceased came in. Shortly after his father had left, the deceased took the speeder and a boy companion (one Herbert Parrish), and started out to light the switch lamps. It does not appear that Mr. Mead, the father, knew that the deceased was going on the speeder that day; nor did he or McCaskey, nor any one, so far as the evidence discloses, inform the deceased that an extra was on the road. The boys backed up the main track to the north switchlight, and, having lighted it, they turned toward the station, where they stopped for a moment to "hello" to Mr. Burrows' horse to get off the track, and then went on their way down the main track, toward the south switch light. They sat side by side, with their faces toward the south, talking together, and did not at any time, until just before the accident occurred, so far as known, look behind them. They both worked the handle bars, and made the speeder go as fast as they could. The extra had no orders to stop at Danville,

nor any reason to expect any. The rule of the company required each train, when running after sunset or obscured by fog, to display a headlight. But there was no headlight burning. The engineer testifies that a headlight would not have thrown a glare through the fog to enable parties to see that there was something coming, but there is other testimony on the subject. The train was going at full speed. There is some conflict in the testimony as to the rate of speed. The trainmen put it at 25 to 30 miles an hour, and plaintiff's witnesses about double that. The engine whistled, but whether it whistled for the crossing or not, or whether it gave an alarm whistle before the accident occurred, is a matter of some dispute. It does not appear that the boys heard the whistle. McCaskey, being in the station, heard the whistle, and running out, called to the boys as loud as he could. They were then some 50 feet beyond the west side of the crossing. Failing to attract their attention, he stood upon the corner of the platform, and tried to give the engineer a signal to make him stop the train or whistle. The engine was then right up to him. The target was white, which indicated there were no orders there for the train, and no occasion to stop, and the road was clear. As the engineer passed, he saw McCaskey give a signal. He did not understand it, and turned for an instant to look again at the target, and then at once turned his face down the track; and at the same instant the fireman saw the boys at the distance of one and one-half telegraph poles ahead of the train. The boys were facing south then, with their backs to the train. The engineer claims to have given the alarm whistle at this time, applied the air brakes to the engine, gave a signal for the brakes, reversed his engine, and did everything in his power to stop the train. The conductor and the two brakemen were in the caboose, and, at the whistle for brakes, they ran out and set them as fast as they could. Parrish, the boy who accompanied the deceased, says that the first he knew of the danger was the rumbling of the train. They both looked back, but the train was close upon them. The trainmen say that immediately upon blowing the alarm whistle the boys turned and looked back. Parrish, sitting on the left side, succeeded in getting off, but the deceased fell back upon the track and was instantly killed. A witness who was at the station had seen the boys come down the track on the speeder. He heard the whistle for the station as he was setting on his wagon, and drove across the track, and called to the boys as loud as he could, and failed to get their attention. They were then a telegraph pole and a half from the crossing.

The existence of the alleged ordinance of Buckeye City prohibiting the running of cars through its corporate limits at a speed exceeding eight miles an hour was distinctly put in issue by the pleadings. On the trial the plaintiff called as a witness the mayor of Buckeye City to prove that he had given

some notice to the company as to the speed of trains through the corporation. The defendant objected, and the court ruled that the plaintiff should first prove the ordinance, if there was one. Thereupon the witness produced the ordinance book containing the record of the supposed ordinance. Objection was made for the reason that the book was not the minutes of the proceedings of the council, nor did the record show that the supposed ordinance had ever been signed by the mayor. Thereupon the former mayor was called, and a piece of paper handed to him, signed by himself, and, as he says, by the city clerk, both in the presence of the council. He says it was passed one evening, and posted the next day. The paper was not at that time offered in evidence, but thereupon the plaintiff again offered the book of ordinances, and was permitted to read therefrom the ordinance as it appeared therein, to which ruling the defendant excepted. The record did not show that the ordinance had ever been signed by the mayor, nor that it had been published. Thereupon counsel for the defendant moved that it be stricken from the record for those reasons, and because the ordinance was not evidence of the passage of an ordinance, which could only be proved by the minutes of the proceedings of council. The motion was overruled, and the defendant excepted. Later in the trial the plaintiff offered the original piece of paper on which the ordinance was written, signed by the mayor and the clerk, which had been identified by the witness. Thereupon the paper was admitted in evidence, to which the defendant excepted. The minutes of the council were not produced or offered.

The defendant asked the court to charge the jury as follows: "That there having been testimony adduced tending to show that the defendant's station agent at Danville station, James Mead, was guilty of negligence that contributed to the death of his son, Arleigh J. Mead, the court charges you that the plaintiff cannot recover in this case on account or by reason of any negligence on the part of the said James Mead,"—which the court refused to give, and the defendant excepted. But the court upon that subject charged the jury as follows at the request of the plaintiff: "If the jury find negligence of the defendant, its agents and servants, and also that there was negligence of the said J. H. Mead as agent and servant of the defendant, the fact of such negligence of said J. H. Mead, which, combined with the negligence of other agents and servants of the company, caused the injury, would not prevent recovery if such negligence of the defendant, its agents and servants, was the proximate cause of said injury, and said Arleigh J. Mead was not guilty of negligence contributing directly to his injury." And the court also said to the jury upon that subject: "In actions of this kind, gentlemen of the jury, the administrator is a mere nominal party, having no interest in the case for himself or his estate he represents, as such actions are for the exclusive benefit of the beneficiaries named in the

section of the statute that I referred to at the beginning of this charge. In arriving at the total amount of damages in the case, the jury should consider the pecuniary injury to each separate beneficiary, but the verdict should be for a gross sum, not exceeding ten thousand dollars. * * * What has each separate beneficiary lost in money in the death of Arleigh J. Mead? will be your inquiry. First, determine the value of his life to the father; next, the value of his life to his mother, and then to each of the seven sisters; and, after you have found the value of his life to them all, you will return your verdict for the aggregate sum. In considering what each beneficiary is entitled to recover, you are to consider the age, the health, and the ability of the deceased to perform labor and earn money; * * * the health and circumstances of the parents, and the disposition and good will of the deceased to the beneficiaries, as likely to result in gifts or inheritances. * * *

The defendant also asked the court to charge the jury in that connection as follows: "The plaintiff is not entitled to recover in this action for any pecuniary loss suffered by James H. Mead, the father of Arleigh J. Mead, on account of the death of the said son, if the jury shall find that the said James H. Mead was guilty of negligence directly contributing to the death of his son." This was refused, and the defendant excepted. The defendant also asked the court to charge the jury as follows: "(1) That the character of Arleigh J. Mead's employment considered, and the means which he used at the time of the accident to reach the point at which he intended placing the switch light, and the other facts and circumstances surrounding the transaction, considered, that the employees of the defendant upon and in charge of and in the management of the train which caused his death were not obliged to regulate the speed of said train with reference to the possibility of injury to said Arleigh J. Mead, provided said employees, in the exercise of proper care and caution in the management and running of said train to accomplish the purpose of their employment, used all proper care and diligence to avoid said accident after they became aware of the presence of said Arleigh J. Mead upon said railroad track." "(4) It is alleged in the amended petition that the afternoon or evening upon which the accident occurred was very foggy, making it very dark, so that it was very difficult, if not impossible, to see objects on the railroad more than a few rods in front of the engine. If you find such to be the fact, and that the deceased, Arleigh J. Mead, took the speeder out upon the main track, and chose that means of travel for no reason connected with his employment, other than his own convenience, and, after lighting the north switch light, returned to the station and passed with the speeder down the main track to light the south switch light, taking with him a companion, in violation of the order of his superior, the station agent, said James Mead; and if you shall find that

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from the street crossing adjoining the station there was a side track connected at that point with said main track, which led directly to the south switch where the second light was to be placed, and that the said Arleigh J. Mead could have easily used the said side track with the speeder for reaching the point where the light was to be placed; and if you shall find that by so doing he would have been in a position of safety from passing trains, and that, instead of so doing, he chose to so go down the main track without keeping any lookout behind him, or using other precautions to insure his own safety from passing trains,—then I charge you that such conduct was negligence upon the part of said Arleigh J. Mead, and such negligence, the court charges you, as will prevent the plaintiff from recovering in this case unless they, the jury, shall further find that the defendant's agents and employees upon and in the management of the said train that caused the accident could have avoided said accident after they became aware of the presence of the said Arleigh J. Mead upon said track." These requests were refused, and the defendant excepted.

The court charged the jury as follows: "Evidence has been offered in this case on the part of the plaintiff tending to show that the defendant neglected and failed to sound the whistle of the locomotive for the public crossing, and failed to ring the bell, as provided by law, on approaching and passing the public crossing, a short distance from the point where the deceased met his death. Whether the bell was rung or the whistle sounded, or both, is a question for you to determine from a consideration of all the evidence offered; and your conclusions on this subject would be one of the elements that you are to consider in determining whether the defendant was guilty of negligence that produced, in whole or in part, the death of the deceased. In this connection I will only add that it was the duty of the company to make and enforce reasonable rules and regulations to guard against danger at public road or street crossings and in dangerous places, and that the deceased, while in the employment of the company, and when at or near a public street crossing, had a right to expect the performance of that duty." And also as follows: "A railroad track is commonly a place of danger. Whoever undertakes to walk along a railroad track or to travel thereon with a speeder, or other means of locomotion, must take such precautions as to ascertain the presence of danger as the ordinarily prudent person would take under like circumstances. The deceased, Arleigh J. Mead, on going on the defendant's track, was bound to use all reasonable precautions to detect the presence or approach of danger from passing trains. He was bound to know that the defendant might run a train over its road at that point at any time; and ordinary care would require him to look and listen for the approach of trains, and to continuously keep alive to the approach and presence of danger from passing trains, while on the defendant's track,

unless lulled into a feeling of security by the failure of the defendant's employees in charge of its train to observe the statutory regulations and rules of the company in the matter of the running and management of the train at the time and place of the accident, and under the circumstances shown by the evidence." The court also charged the jury as follows with respect to the ordinance: "Evidence has been offered tending to show that some time prior to the accident the village of Buckeye City had passed an ordinance limiting the speed of trains through the corporate limits, which it had a right to do, under the statutes. The issue is made in the pleadings that this ordinance is not a valid ordinance, but the court is of the opinion that the issue is not material in the case. It does not depend on the fact whether the ordinance is valid or not. If the village council have passed an ordinance, or attempted to pass an ordinance, which they supposed was valid, and notice of its passage had been communicated to the railroad authorities, and they had acted upon the assumption that the ordinance was valid, and had regulated the speed of their trains accordingly, and also if knowledge of the passage of the ordinance had come to the deceased, it would be, for the purposes of this case, equivalent to a valid ordinance; and the deceased would have a right to presume that the company would conform to such regulation; and if he acted in accordance with such presumption, in the absence of knowledge of the fact that the railroad company had exceeded such limit in running its trains, it would not, of itself, be an act of negligence on the part of the deceased. But if, on the other hand, the village had passed a valid ordinance, or had attempted to pass an ordinance, without conforming to the requirements of the statute, and the provisions of the ordinance had been ignored by the company, and they had exceeded the limits prescribed by the ordinance in running trains through the village, and this fact had come to the knowledge of the deceased, the mere fact that the ordinance had been passed would not give the deceased a right to assume that the company at the time of the accident would regulate the speed of its train in conformity to the ordinance. Running a train in violation of an ordinance limiting the speed of trains is not of itself negligence on the part of the railroad company. After all, gentlemen of the jury, it is a mere circumstance for the jury to take into consideration, in connection with all the other facts and circumstances, in determining whether the defendant was negligent in the running of its train in the manner in which you find the evidence shows it was run at the time and place of the accident, and also in determining whether the deceased was guilty of negligence that contributed to cause his death."

Upon the trial several of the rules of the company were given in evidence. After the parties had rested, and after the jury had risen to their feet, and some of them had left the

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jury box, but before any of them had retired to their room, counsel for the plaintiff requested that the book of rules of the defendant, which had been referred to, and offered during the progress of the trial, be sent to the jury, to be used by them during their deliberations. This was objected to for the reason that only a small portion of the book had been offered in evidence, the plaintiff claiming that the whole book had been offered. The court said that only certain rules or parts of the book had been offered in evidence, and instructed the jury as follows: "Of course, the jury will understand that only such rules as have been offered in evidence and read to the jury during the trial will be considered by them." Thereupon the jury retired to their room. The book of rules was subsequently sent to them, and was in their possession during the time of their deliberations.

Cooper & Moore and Watson, Burr & Livesay, for plaintiff in error.

W. Stilwell and D. F. & J. D. Ewing, for defendant in error.

DAVIS, J. (after stating the facts). In the theory of this case which seems to have been entertained by the trial court, there are several radical errors. Nearly all of them result from a misconception of the relation of the deceased to the plaintiff in error. That he was an employee of the railway company is not disputed, but at the time of the accident his position and his conduct were not within the scope of his duty. He was on the main track with the speeder for his own convenience, and under circumstances which made his presence there uncalled for and dangerous in the extreme. Such acquiescence in the occasional use of the speeder by the deceased and his father as may be implied in this case, at best, amounts to no more than a permission for that purpose, and constituted the deceased a bare licensee. The company did not object to the use of the speeder, if it knew of it, nor did it offer any inducement or invitation therefor. 2 Thomp. Neg. (2d Ed.) §§ 1722, 1723. The deceased took the license with its concomitant perils. The acquiescence in the use of the track with a speeder did not involve an undertaking on the part of the company to modify its rights as to the user of its own property, nor could it change its obligations to the public as a common carrier of passengers and freight. The trial court in this case, not without some warrant of authority, it must be admitted, took the view, and so instructed the jury, that it was the duty of the railway company to exercise reasonable care not only to avoid injury to the deceased after it discovered him upon the track, but that it was its duty to keep a careful lookout to discover and avoid injury to any person who might happen to be on its track at that place and at that time, and that this duty was implied in the license to the deceased and his father. It was in this view, apparently, that

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the court refused to give to the jury the defendant's first request to charge, and instructed the jury, instead, that the defendant "had a right to run its cars at the time and place of the accident at any speed and in any manner consistent with safety which was necessary in the conduct of its business in the usual and ordinary manner, taking into consideration, however, all circumstances surrounding the locality, and having a due regard to the safety of persons who might be upon its tracks. It was required to use ordinary care in running its train, having due regard to the rights of others." Such a conception of the law is opposed to reason, because a bare licensee must know that his license is subject to all the risks incident to the use of the track by the company in the same manner in which it was used at the time the license was granted, and that the company assumes no new obligation or duty toward him. Therefore the company owed him no duty of active vigilance to especially look out for and protect him. *Railway Co. v. Aller*, 64 Ohio St. 192, 60 N. E. 205; 3 Elliott, R. R. § 1250. It is believed that it is also contrary to the weight of authority. 3 Elliott, R. R. §§ 1250, 1251; 2 Thomp. Neg. (2d Ed.) §§ 1709, 1711, 1712, 1723, 1724; *Railway Co. v. Vittitoe's Adm'r* (Ky.) 41 S. W. 269. It may be added here that the rule is substantially the same as to trespassers and mere licensees; that is, licensees without invitation or inducement. An employee who goes upon the track or elsewhere upon the company's premises, not in the line or discharge of his duty, and without any invitation, express or implied, is at most a mere licensee, to whom the company owes no duty to keep such place safe. 3 Elliott, R. R. § 1251, and cases cited; *Id.* § 1303, and cases cited; *Railway Co. v. Marsh*, 63 Ohio St. 236, 58 N. E. 821, 52 L. R. A. 142; *Baker v. Railway Co.*, 95 Iowa, 163, 63 N. W. 667; *Railroad Co. v. McKnight*, 16 Ill. App. 596; 1 Thomp. Neg. (2d Ed.) §§ 945, 946. The doctrine of *Harriman v. Railway Co.*, 45 Ohio St. 11, 12 N. E. 451, 4 Am. St. Rep. 507, does not apply here, because there was in this case no pretense of acquiescence in the public use of the railway track in the way in which it was used by the deceased, nor was there any invitation or inducement held out to the deceased to so use it. There was at most only a failure to object to such user. We cannot think, therefore, that the trial court was right in instructing the jury as it did in this regard, and in refusing to instruct as requested in the defendant's first request.

In this connection we will consider the instructions of the court to the jury in regard to signals. Seemingly having in mind the erroneous theory criticised above, the trial court called the attention of the jury to the fact that evidence had been introduced by the plaintiff tending to show that the defendant had neglected and failed to give the statutory signals required on approaching and passing a public crossing; and the jury were instructed that it was for them to determine

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from the evidence whether such signals were given or not, and that their conclusion on that subject would be one of the elements which they should consider in determining whether the defendant was guilty of negligence that produced, in whole or in part, the death of the deceased, and, further, that the deceased was bound to use reasonable precautions to detect the approach of trains, and was bound to know that the defendant might run a train over the road at that point at any time, "unless lulled into a feeling of security by the failure of the defendant's employees in charge of its train to observe the statutory regulations and rules of the company in the matter of running and management of the train at the time and place of the accident, and under the circumstances shown by the evidence." It was also charged that the deceased, while in the employment of the company, and when at or near a public street crossing, had a right to expect the performance of that duty. The accident did not happen at or near the crossing, but more than 600 feet west of it, and not while the deceased was crossing the track, but while he was traveling longitudinally upon it. Independently of the theory of liability to a bare licensee, which we have already discussed, this raises the question whether the statutory duty to give signals when approaching a crossing inures to the benefit of persons on the track and not at a crossing. The statute obviously is not for the protection of persons who are not crossing the track, or about to do so; for not only is the whistle to be sounded before reaching the crossing, but the bell is to be continuously rung until the crossing is passed. The signals are not required at any other time. This is the construction which has been adopted in almost, if not quite, every jurisdiction where the question has arisen. It was fully considered and distinctly decided in *Railroad Co. v. Depew*, 40 Ohio St. 121, 127-129; also in the following cases: *O'Donnell v. Railroad Co.*, 6 R. I. 211; *Harty v. Railroad Co.*, 42 N. Y. 468; *Williams v. Railroad Co.*, 135 Ill. 491, 26 N. E. 661, 11 L. R. A. 352, 25 Am. St. Rep. 397; *Railroad Co. v. McKnight*, 16 Ill. App. 596; *Rohback v. Railroad*, 43 Mo. 187; *Toomey v. Railroad Co.*, 86 Cal. 374, 24 Pac. 1074, 10 L. R. A. 139; *Hale v. Railroad Co.*, 34 S. C. 292, 13 S. E. 537; *Railroad Co. v. Gravitt*, 93 Ga. 369, 20 S. E. 550; 2 *Thomp. Neg.* (2d Ed.) § 1707. There being no legal duty in that regard due from the defendant to the deceased, this instruction to the jury was erroneous.

Up to this point we have endeavored to consider the questions of law which were under review without complicating them with the subject of contributory negligence. It becomes necessary now to look at that phase of the case. The court refused to instruct the jury as requested in the defendant's fourth request. This instruction was sound, and ought to have been given. If it were found to be true that the deceased chose to travel with the speeder upon the main track

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for no reason connected with his employment, other than his convenience; that he rode down the main track with a companion on the speeder in violation of the order of his superior, the station agent; that from the station to the south switch light there was a "passing track," on which he could have placed the speeder, and easily and with absolute safety have reached his destination; and that instead of doing so he chose to go down the main track, without keeping any lookout behind him,—there can be no doubt that he was guilty of negligence which proximately contributed to his own injury, unless the defendant could have avoided the injury after discovering the deceased upon the track. The authorities sustaining this proposition are so numerous that it would be practically impossible to cite them all here. We content ourselves with citing a few pertinent cases and leading text-writers, with the cases collected and cited by them: 3 Elliott, R. R. § 1303, and cases cited in notes thereto; 2 Thomp. Neg. (2d Ed.) §§ 1734, 1738, 1747, 1748, 1774, and cases cited in notes thereto; Ream v. Railroad Co., 49 Ind. 93; Railroad Co. v. Depew, 40 Ohio St. 121; Burling v. Railroad Co., 85 Ill. 18. It will be seen from these authorities that the instruction, as requested, states the law more strongly against the company than was necessary. It makes the qualification that "unless the jury shall further find that the defendant's agents and employees * * * could have avoided said accident after they became aware of the presence of the said Arleigh J. Mead upon said track." Strictly speaking, the law would require the defendant, after discovering the deceased to be upon the track, to use reasonable care under the circumstances to avoid the accident, not absolutely to avoid it; but, this being an error against the party asking the instruction, it should not have been refused for that reason. Besides, the instruction which was asked specifically challenged the attention of the jury to some very important circumstances affecting the claim of contributory negligence, and the error of refusing this is nowhere cured in the charge as given.

Again, the defendant asked the court to charge the jury that the plaintiff could not recover on account of or by reason of any negligence on the part of James H. Mead, the father of the deceased, at that time the agent of the defendant, and also that plaintiff could not recover for any pecuniary loss suffered by the father of deceased on account of the death of his son, if the jury should find that the father was guilty of negligence directly contributing to the death of his son. These requests were refused. There was, it is true, no issue in the pleadings upon this subject; but the court did charge the jury that, "in arriving at the total amount of damages in the case, the jury should consider the pecuniary injury to each separate beneficiary, but the verdict should be for a gross sum, not exceeding ten thousand dollars," and that, "what has each separate beneficiary lost in money in the death of

Arleigh J. Mead? will be your inquiry. First determine the value of his life to the father; next, the value of his life to his mother," etc. Having done this, and having given the jury the plaintiff's requests numbered 13 and 19, the defendant's request that the jury should also be instructed that the plaintiff would not be entitled to recover for any pecuniary loss of the father, if the jury should find that the father was guilty of negligence directly contributing to the death of the son, could not properly be refused. *Wolf v. Railway Co.*, 55 Ohio St. 517, 45 N. E. 708, 36 L. R. A. 812.

The trial court and the counsel for the defendant in error seem to have entertained the view that the question raised concerning the ordinance of Buckeye City related to the validity and effect of the ordinance, but the issue in the pleadings was as to the legal passage and existence of the ordinance. The evidence to show the existence of the ordinance was clearly incompetent and insufficient, and the charge of the court did not cure the error of admitting it. It left the ordinance with the jury, as if it were a proven fact, instructing them that it was a circumstance to be taken into consideration, "in connection with all other facts and circumstances, in determining whether the defendant was negligent in the running of the train in the manner in which you find the evidence shows it was run at the time and place of the accident, and also in determining whether the deceased was guilty of negligence that contributed to cause his death." Nothing more needs to be said on that subject.

Another manifest error was the sending of the book of rules to the jury, to be used by them in their deliberations; only a few of the rules having been offered in evidence. Upon this record we would not reverse for that error, because it does not clearly appear that the company was prejudiced thereby; but we mention it in order that we may not seem to have approved it, and for the guidance of the trial court hereafter.

The judgments of the circuit court and the court of common pleas are reversed.

BURKET, SPEAR, SHAUCK, and PRICE, JJ., concur.

GALVESTON, H. & S. A. RY. CO. v. SHERWOOD.

(*Court of Civil Appeals of Texas, March 19, 1902.*)

[67 S. W. Rep. 776.]

Personal Injuries—Physical Examination of Plaintiff's Person.*

The court has no power, in a personal injury case, to appoint surgical experts, and order an examination by them of plaintiff, for the purpose of obtaining the evidence of such experts as to the nature and extent of plaintiff's injuries.

*See *Aske v. Duluth & I. R. R. Co. (Minn.)*, 21 Am. & Eng. R. Cas., N. S., 819, and foot-note.

Galveston, H. & S. A. Ry. Co. v. Sherwood**Same—Same—Harmless Error in Denying Motion.**

Where no affidavits are filed in a personal injury case in support of a motion by defendant for the appointment of surgeons to examine plaintiff, which show the necessity therefor or any belief as to what such examination will develop, and defendant's physicians have freely examined plaintiff before the trial and testify as to his condition, the denial of such motion, even if erroneous, is harmless, though the testimony of defendant's physicians is contradicted.

Injury to Employee—Incompetency of Fellow Servant.

Where a vice principal is negligent in ordering a fellow servant of plaintiff to do certain work for which he is physically incapacitated, and such incapacity is known, or in the exercise of due care should be known, to the vice principal, and plaintiff is injured as a result thereof, he may recover from the master, though the negligence of the fellow servant contributes to the injury.

On Rehearing.**Injury to Employee—Contributory Negligence—Instruction.**

There was no evidence in an action by a servant against his master for injuries received while carrying one end of a log, by the act of his fellow servant, who was of insufficient strength, in allowing the other end to fall, that the log was too heavy to be carried, or that plaintiff knew of the inability of the fellow servant, or that it could have been carried on a truck, which was the only means provided to carry heavy objects. The negligence of plaintiff in failing to use appliances furnished by the master was not pleaded as a defense, but the pleadings and evidence showed that the servants were directed to carry the log: *held*, that it was not error to refuse to instruct that plaintiff was negligent in attempting to carry the log if there were appliances which he could have used, as such instruction authorizes a verdict for defendant, even though plaintiff had no knowledge of the existence of such appliances, and takes the question of negligence in attempting to carry the log from the jury.

Assumption of Risk—Incompetency of Fellow Servant.*

The duty of furnishing fellow servants capable of doing the work being on a master, his failure so to do, which results in the injury of another servant having no knowledge that his fellow servant is incompetent, is negligence authorizing a recovery by the injured servant, though his means of knowledge of the incompetency of the fellow servant was equal to the master's, as he had a right to presume that the fellow servant was competent.

Appeal from district court, Medina county; I. L. Martin, Judge.

Action by H. Sherwood against the Galveston, Harrisburg, & San Antonio Railway Company for injuries received while in defendant's employ. From a judgment for plaintiff, the defendant appeals. Affirmed.

Baker, Botts, Baker & Lovett and Ellis, Garner & Love, for appellant.

Ed De Montel, S. B. Easley, Perry J. Lewis, and H. C. Carter, for appellee.

*See note, 10 Am. & Eng. R. Cas., N. S., 617. See also, Parker v. New York Cent. & H. R. Co. (N. Y.), 10 Am. & Eng. R. Cas., N. S., 614; Texas & P. R. Co. v. Johnson (Tenn.), 4 Am. & Eng. R. Cas., N. S., 441.

ELMORE v. SEABOARD AIR LINE RY. CO.*(Supreme Court of North Carolina, June 13, 1902.)*

[41 S. E. Rep. 786.]

Injury to Employee—Failure to Discover Defect in Automatic Coupler.*

Where the automatic coupler on a car has been out of repair for such a length of time that it might have been repaired, and a brakeman coupling cars in the discharge of his duty is injured, which he would not have been had the coupler been in order, the railroad is guilty of negligence. Per Clark and Douglas, JJ.

Same—Same—Effect of Continuing Negligence.

The negligence is continuing, and cuts off the defense of contributory negligence. Per Clark and Douglas, JJ.

Cook and Montgomery, JJ., dissenting.

Appeal from superior court, Wayne county; Allen, Judge.

Action by Henry J. Elmore against the Seaboard Air Line Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Day & Bell, J. B. Batchelor, and T. B. Womack, for appellant.

Allen & Dortch and I. F. Dortch, for appellee.

CLARK, J. This case is simply a repetition of *Greenlee v. Railway Co.*, 122 N. C. 977, 30 S. E. 115, 41 L. R. A. 399, 65 Am. St. Rep. 734, 11 Am. & Eng. R. Cas., N. S., 45, *Troxler v. Same*, 124 N. C. 191, 32 S. E. 550, 44 L. R. A. 313, 70 Am. St. Rep. 580, 14 Am. & Eng. R. Cas., N. S., 711, and the several cases affirming the doctrine therein laid down. It was in evidence that the defendant's cars were equipped with automatic couplers, but where the plaintiff was injured in making a coupling there was evidence that the automatic couplers had been out of repair five months or more, to the knowledge of defendant. The plaintiff testified that he was ordered to make a coupling, and was injured in so doing. He testified: "If the coupler had been in perfect condition, I would have been able to couple without putting my foot between there" (the cars); "if the link had been in perfect condition, I would not have had to kick it"; and much other evidence to the same purport, that he used his foot instead of his hand, because, the coupler being out of order, and no stick being furnished him, he could only make the coupling which the conductor ordered him to make by using his foot or hand, and he had more power in his foot; that he had seen his conductor use his foot to couple in that way, and the conductor had seen him and others do so. The judge charged the jury substantially that, if the coupler was in repair, the defendant was not guilty of negligence; or, if the lack of repair of the coupler did not necessitate the plaintiff going between the cars to couple, there was no negligence on the part of defendant;

*See *Norfolk & W. R. Co. v. Ampey (Va.)*, 5 Am. & Eng. R. Cas., N. S., 707. See also, note, 12 Am. & Eng. R. Cas., N. S., 609.

but that, if the coupler was out of condition for such length of time that defendant could have had it repaired, but failed to do so, and that plaintiff would not have been injured but for the condition of the couplers, and that in the condition in which the coupler was it was necessary in order to couple, to use the hand or foot, and that the plaintiff was under the orders of the conductor, who directed him to couple the cars, and in so doing plaintiff was injured; and if the jury further find that he would not have been injured but for the condition of the couplers,—then the jury should find the first issue "Yes." On the second issue the court instructed the jury that if the coupler was out of repair, and had been for such length of time that the defendant knew or should have known it, and with the exercise of reasonable diligence could have had it repaired, and the plaintiff coupled the cars under the direction of the conductor, and that it was plaintiff's duty to obey the conductor, and he would not have been injured but for the condition of the coupler, to answer the second issue (contributory negligence) "No." The charge was much fuller, and put every phase of the evidence which was favorable to the defendant, but the above presents the real point involved in the numerous exceptions. This proposition is settled in the cases above cited, to wit, it is the duty of the defendant to use automatic couplers, and if, on failure so to do, injury occurs to an employee, which would not have happened if there had been a coupler, this is a continuing negligence on the part of the employer, which cuts off the defense of contributory negligence; such failure being the *causa causans*. If the automatic coupler was out of repair for a length of time reasonably sufficient to have it repaired, and this was not done, it was the same thing as the failure to have the automatic coupler on that car. Without reiterating the reasoning which has induced the court to make and abide by this ruling, and applying it to the case in hand, the judgment below must be affirmed.

DOUGLAS, J., concurs in result.

COOK, J. (dissenting). I do not concur with the opinion of the court. Plaintiff was instructed by the conductor to go back and couple the cars while he went to the office to get orders. The caboose was standing upon the main track. The box cars to be coupled to the caboose were upon the side track. Afterwards the box cars were put in motion by being "kicked," and had rolled from the side track upon the main track, and approaching the caboose to which they were to be coupled. The couplings upon these cars were "automatic." Upon the caboose car the link which connected the drawer pin to the lever had been taken out, so that, if the lip were shut, it had to be opened with the hand. Plaintiff as well as defendant knew that this link was out. As the box cars approached the caboose, plaintiff saw that the lip was closed, and knew that the coupling could not be made until the lip

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was opened, and to do this he would have to raise the drawer pin with one hand, and then open the lip. "I [he] looked at the other cars [the ones approaching], and saw that the bumper on them [it] was not open, but was closed. * * * I did not know these cars were coming so fast. I put my foot down there, and as the cars came up with such rapidity they caught my foot. * * * It was caught on the rebound." It is not contended that it was negligence in giving the plaintiff the order to couple the cars. At the time the order was given, the cars had not been "kicked" or put in motion. The conductor did not know, nor did the plaintiff at that time, that the lip was closed; so plaintiff was not ordered to do a dangerous act, or to assume the risk of any danger. When plaintiff discovered that the coupling could not be made because the lip was closed, the box cars were approaching very near to the caboose. It was not his duty then to go in between the moving cars. It was against the rules. Upon a failure to make the coupling, the cars would have been stopped, and then the couplers could have been properly adjusted, and the coupling made with safety. The conductor's order to go back and couple the cars did not impose upon plaintiff an obligation to do so at a hazard, or to take any risk. Had the lip been open,—its usual condition,—the coupling would have been made; but, being closed, and discovered so to be just as the cars were coming together, plaintiff should have waited until the cars stopped, and then adjusted the couplers. But he chose to do the foolish, rather than the prudent, thing, which could not have been anticipated or prevented by defendant. Therefore I think the court erred in not instructing the jury that upon the whole evidence they should answer the second issue, to wit, "Did the plaintiff by his own negligence contribute thereto" (to his injury)? "Yes." Had the conductor been present, seeing the conditions that existed, and then ordered the plaintiff to make the coupling, then and in that event I would concur in the opinion; but such was not the case. It was the duty of plaintiff to look and see the conditions that existed, and from his own testimony it appears that he would not have taken the risk if he had looked and seen, for he says he "did not know these cars were coming so fast." Then, can defendant be responsible for such negligence?

MONTGOMERY, J., concurs in the dissenting opinion.

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(*Court of Civil Appeals of Texas, May 10, 1902.*)

[68 S. W. Rep. 528.]

Fellow Servants*—Guard of Express Car and Express Messenger.

A guard employed to ride on an express car and protect it from

*See note, 20 Am. & Eng. R. Cas., N. S., 213; 12 Am. & Eng. Ency. Law (2d Ed.) 893; *Hallett v. New York Cent., etc., R. Co.* (N. Y.), 22 Am. & Eng. R. Cas., N. S., 446.

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robbers is a fellow servant of the express messenger, not entitled to recover for injuries inflicted by his negligence.

Negligent Loading of Car—Safe Place to Work.

The duty to furnish a safe place to work, which an express company owes to a servant employed to ride in one of its cars, extends only to the construction and equipment of the car, and loading express matter by another servant in a dangerous manner is not a breach of this duty.

Scope of Work.

In loading and arranging express matter in the car, an express messenger is acting within the scope of his ordinary duties as servant, and a fellow servant cannot recover because of the negligent manner in which the arranging is done.

Assumption of Risk—Negligence of Fellow Servant.*

A guard employed to ride on an express car and protect it from robbers, by accepting employment, assumes the risk of injury resulting from the negligence of fellow servants in the usual course of the company's business.

Appeal from district court, Ellis county; J. E. Dillard, Judge.

Action by A. C. Page against Wells, Fargo & Co. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Alexander & Thompson, for appellant.

T. H. Collier, for appellee.

ST. LOUIS, I. M. & S. RY. CO. *v.* PICKETT.

(*Supreme Court of Arkansas, Feb. 22, 1902.*)

[67 S. W. Rep. 870.]

Statute Imposing Penalty for Failure to Pay Wages—Damages Recoverable.

The penalty authorized by Acts 1889, p. 76, making masters who fail to pay employees on the day of their discharge liable for the regular wages, as a penalty, until payment is in fact made, though in the nature of damages, rather than a penalty, is not exclusively exemplary damages, but also includes actual damages; and therefore a servant may maintain an action for such penalty, though he has received his wages before suit is commenced, the action not being solely based on exemplary damages.

Same—Evidence.

The fact that the master paid the servant one day's wages after his discharge is proper to be considered by the jury, in an action under the statute to recover such penalty, as bearing on the question of his indebtedness for wages, though the master claims that the payment was merely to settle a dispute.

Same—Same—Effect of Subsequent Payment.

Where there are no instructions in such action as to the consideration of the payment of the servant's wages after his discharge, as evidence of the indebtedness, it is error to refuse to instruct that the mere fact of the payment of the servant would not establish the fact that the

**Hicks v. Southern Ry. Co.* (S. Car.), 21 Am. & Eng. R. Cas., N. S., 217; *Cincinnati, etc., Ry. Co.'s Receiver v. Roberts* (Ky.), 21 Am. & Eng. R. Cas., N. S., 322; *Illinois Cent. R. Co. v. Stewart* (Ky.), 21 Am. & Eng. R. Cas., N. S., 874; *Texas & Pacific R. Co. v. Johnson* (Tenn.), 3 Am. & Eng. R. Cas., N. S., 439; *Norfolk, etc., R. Co. v. Ampey* (Va.), 5 Am. & Eng. R. Cas., N. S., 707.

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master was indebted to the servant, but that plaintiff would not be entitled to recover if, under defendant's usage and custom, and the contract of employment, the master was not indebted to the servant; the improper portion, relating to the defendant's usage and custom, being regarded as surplusage.

Wood, J., dissenting in part.

Appeal from circuit court, Miller county; Joel D. Conway, Judge.

Action by C. G. Pickett against the St. Louis, Iron Mountain & Southern Railway Company. From a judgment for plaintiff, defendant appeals. Reversed.

J. E. Williams and Dodge & Johnson, for appellant.

Oscar D. Scott and Paul Jones, for appellee.

BUNN, C. J. The appellee, who was plaintiff in the court below, was on the 15th December, 1898, employed by the appellant (the defendant in the court below) as baggage-master, at the stipulated price of \$65 per month. It appears from the testimony, as alleged in the defendant's answer, that he was employed as an extra man; that is to say, he was assigned to work as the exigencies of the service demanded, and was paid by the day for the days he actually worked. On the 27th day of January 1899, he was discharged, and his actual wages due were paid, except that the plaintiff claimed that one day more than was allowed him on the paymaster's books was due him, to wit, for the day occupied in returning from Bald Knob or Newport, Ark., to Poplar Bluff, Mo., in answer to a recall order of the proper official of the defendant company. This day was not paid for by the paymaster, but plaintiff was directed to correspond with the timekeeper on the subject, which he did, and finally with the chief official of the company on that division of its road, and the extra \$2 was then paid by the company, after a delay, as plaintiff claims, of 57 days from the time when the other wages actually due were paid by the company. The plaintiff received the \$2 on the 15th March, 1899, and on the 29th of the same month brought this suit for the amount of the penalty imposed by statute for failure to pay employees their wages when discharged; that is, for the sum of \$123.50 and interest. The defendant failing to appear in the justice's court when the suit was instituted, judgment by default was rendered therein against it; and thereafter in due time it took an appeal to the circuit court, where it filed its answer to the complaint, admitting the employment of plaintiff as set up in the complaint, but alleging that he was so employed as an extra man, to receive pay only for the time he should actually work. Defendant denies that it ever withheld wages actually due the plaintiff, but avers that he was paid all that was due him at the date of his discharge, and denies that it failed or refused to pay him any part of the wages until the 16th March, when the said \$2 is admitted to have been paid. Defendant further alleges that plaintiff, having received from

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it his wages, and having receipted in full for all wages claimed by him to be due, is estopped from claiming anything further by reason of any failure or refusal to pay him. Judgment was rendered for plaintiff in the sum of \$125.50, and defendant appealed to this court.

Several preliminary questions were raised on the pleadings. The first is whether a suit for a penalty, as denominated in the statute under which this suit is brought, is maintainable without a claim for actual damages. In *Leep v. Railway Co.*, 58 Ark. 407, 57 Am. & Eng. R. Cas. 1, 58, 25 S. W. 75, 23 L. R. A. 264, 41 Am. St. Rep. 109, this court held that, notwithstanding the use of the word "penalty" in the statute, the imposition therein made for a failure to pay the wages due on discharge or failure to re-employ is in fact in the nature of exemplary damages. Now, the general rule is that a separate and independent action cannot be maintained for exemplary or punitive damages, but such damages are received, if at all, as an incident to the claim and judgment for actual damages. But in a case like this, construing the act of March 25, 1889, entitled "An act to provide for the protection of servants and employees of railroads" (Acts 1889, p. 76), it was said by this court that "the additional amount is allowed on account of the failure to pay the wages when due, and is regulated according to the length of the delay of payment. It is allowed for a double purpose,—as a compensation for the delay, and as a punishment for the failure to pay." The additional amount, being partly compensatory and partly exemplary damages, as was held in that case, really does not bring this class of cases under the general rule; and as the amount paid under the terms of the contract, but not at the time when due, is not necessarily a satisfaction of the claim for the additional amount, which is itself at least partly actual or compensatory damages, a receipt in full by the employee, or any other act of his indicating a final settlement of all claims growing out of the transaction, must be considered a waiver of further claim, after the amount due under the contract has been paid and received.

On the trial, one of the material questions was whether or not the plaintiff was entitled to the extra day's pay claimed by him. He claimed that it was owing him, and that it was not paid until 57 days after the same was due, and the other wages paid. His main evidence to support this contention that the extra day was owing to him was the fact that the defendant had finally paid it, and that of itself was an acknowledgment of its justness. On the other hand, the defendant claimed that the \$2 for the extra day was paid in nature of a compromise, and not that the same was due, but only to get rid of the matter, without any regard for its justness or injustice. The fact whether this payment was an admission of the justness of the claim or not was material, and should have been submitted to the jury fairly and definitely.

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This had not been done, and the defendant, among others, asked its fifth instruction, which was refused by the court, which is as follows: "The court instructs the jury that the mere fact that the defendant paid the plaintiff the one day's extra time, as claimed by him, does not establish the fact that it owed it; and if, as a matter of fact, under defendant's usage and custom, and the terms of employment with plaintiff, such one day's time was not due plaintiff, he would not be entitled to recover in this case, and the fact that the defendant paid it would make no difference." As there was none other given to cover this point, this instruction should have been given, notwithstanding the improper use therein of the expression "under defendant's usage and custom," which may be regarded as mere surplusage, when coupled with the proper expression, "and terms of employment with plaintiff," as in this instance. The refusal of this instruction was tantamount to holding that the payment for the extra day was conclusive of this fact that it was justly owing under the contract of employment.

For the error in refusing this instruction over defendant's objection, the judgment is reversed, and the cause remanded for new trial.

WOOD, J., dissents from that part of the opinion which holds that a suit for exemplary damages may be maintained independently of the suit for actual damages.

SLOAN v. SEABOARD & R. RY. CO. *et al.*

(*Supreme Court of South Carolina, July 5, 1902.*)

[42 S. E. Rep. 197.]

Negligence—Pleading.

Where, in an action to recover for personal injuries, two or more acts of negligence are alleged as contributing to the injury, the plaintiff may submit his whole case to the jury under allegations of one cause of action, without election, under Act 1898, Code Civ. Proc. § 186a, providing that where two or more acts of negligence are set forth in the complaint as causing the injury the party was not to be required to elect upon which he shall go to trial.

Appeal from common pleas circuit court of Abbeville county; Gage, Judge.

Action by Thomas Sloan against the Seaboard & Roanoke Railway Company, the Raleigh & Gaston Railway Company, as lessees of the Georgia, Carolina & Northern Railway Company, and the latter company. From order sustaining in part demurrer, both parties appeal. Reversed on plaintiff's appeal; on defendants' appeal, affirmed.

Wm. N. Graydon, for plaintiff.

Wm. P. Greene and J. L. Glenn, for defendants.

POPE, J. Both parties to this action being dissatisfied with the order made by his honor, Judge Gage, in passing

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upon the demurrer interposed by the defendants to the complaint, that said complaint failed to state facts sufficient to constitute a cause of action, have appealed from said order. The complaint, so far as its first, second, and third paragraphs are concerned, stated the residence of the plaintiff and the acts of incorporation of the defendant railways, the first two of whom are alleged to be controlling and operating the last, the Georgia, Carolina & Northern Railway, in this state. The other paragraphs are as follows:

"(4) That on the 1st day of April, 1901, the plaintiff was in the employ of the defendants in the mechanical department of the said defendants at their shops in the city of Abbeville, S. C., and was under the direction and control of the officers of said defendants, and it was a part of the plaintiff's duty to assist in moving cars from one part of the yard to another part when ordered by those in authority.

"(5) That on the 1st day of April, 1901, the plaintiff was ordered by one of the officers of said defendants to assist the switch engineer to move a car box from one part of the yard to another, and in pursuance of said order plaintiff went between the car he was ordered to move and the car attached to the engine, and opened the knuckle of the car he was ordered to assist in moving, and signed the engineer to come back and make the coupling. The engineer attempted to make the coupling, but owing to the fact that said coupling was defective, the pin in the said coupling or drawhead being broken, said coupling failed to work, and the cars would not couple together, but, impelled by the force with which the engine ran against the car, the said car ran down the track and was about to run off the switch. The plaintiff then waived the engineer to stop, and went after the car to apply the brake and keep said car from running off the switch. When plaintiff was about halfway across said track of said railroad the engineer carelessly, negligently, and with great force, disregarding his duty in the premises, and well knowing the dangerous position in which plaintiff was, unless he stopped said engine, ran said engine back with great force and violence, pinned plaintiff between said cars, dislocated his hip, bruised him internally, and inflicted great and permanent injury upon the plaintiff.

"(6) That by reason of the defective machinery as aforesaid, and the careless, reckless, and negligent conduct of the engineer operating said switch engine, this plaintiff was mashed, bruised, his hip dislocated, was made ill and sick, was compelled to walk on crutches for three months, lost his employment, for which he was receiving \$23 per month, suffered great pain, and has been permanently and seriously disabled, to his damage \$2,000.

"(7) That by reason of the carelessness and the negligence of the defendants in attempting to move a car with a broken and defective coupling or drawhead, and by reason of the

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carelessness and negligence of the defendants' engineer in operating said switch engine, the plaintiff herein was injured in the manner and by the means hereinabove set forth, to the damage of the plaintiff in the sum of \$2,000."

The demurrer was as follows: "Upon the call of the case for trial the defendants' attorneys interposed an oral demurrer to the complaint for the reason that it did not state facts sufficient to constitute a cause of action, in that the complaint showed on its face that the defective appliances of the defendant, alleged and set forth in the complaint, did not contribute to the injury of the plaintiff as a proximate cause, and that it further appears from the face of the complaint that the alleged injuries of the plaintiff were the result of the negligence of a fellow servant of the plaintiff engaged in the same work on the same train of cars, which fellow servant was not plaintiff's superior officer or the agent of the defendants, and he had no control over nor direction of the plaintiff at the time of the alleged negligence, which grounds of demurrer were taken down by the stenographer."

After argument the circuit judge passed this order: "The defendants in this case having interposed a demurrer to the plaintiff's complaint on the ground that it does not state facts sufficient to constitute a cause of action, in that the complaint shows on its face that the alleged defects in the defendants' appliances were not a proximate cause of the plaintiff's alleged injuries, and in that the complaint shows on its face that the alleged injuries were the result of the negligence of a fellow servant of the plaintiff engaged in the same work on the same train of cars, which fellow servant was not plaintiff's superior officer or the agent of the defendants, and who had no control over or direction of the plaintiff at the time of the alleged negligence, after argument of counsel I hold that so much of the demurrer as relates to the alleged defects in defendants' appliances should be sustained, and that so much thereof as relates to the negligence of the fellow servant be overruled; my ruling being that the question whether one party sustains to another the relation of fellow servant is a mixed question of law and fact, which must be settled by the verdict of the jury."

Plaintiff's exceptions were as follows: "(1) Because his honor erred in sustaining so much of defendants' demurrer as related to the defective appliances, it being respectfully submitted that a plaintiff has the right, under the act of 1898, now section 186a of the Code of Civil Procedure, to set out as many causes of action as he pleases, and cannot be required to elect on which he shall go to trial, but shall have the right to submit his whole case to the jury, under the instruction of the court. (2) Because, the demurrer having been interposed as a whole, his honor should have overruled the demurrer, as said demurrer was on the ground that the complaint failed to state facts sufficient to constitute a cause of action; and if the

complaint stated any cause of action the entire demurrer should have been overruled. (3) Because, under section 186a of the Code of Procedure, the defect in the machinery having been stated in the complaint as contributing to the injury, it was error in his honor to sustain a demurrer to it."

Defendants' exceptions are as follows: "(1) Because his honor should have held that the complaint shows on its face that the alleged injuries of the plaintiff were the result of the negligence of a fellow servant of the plaintiff engaged in the same work on the same train of cars, which fellow servant was not plaintiff's superior officer or the agent of the defendants, and who had no control over nor direction of the plaintiff at the time of the alleged negligences resulting in the alleged injuries, and should have held, therefore, that the complaint stated no cause of action against the defendants, and should have sustained the demurrer and dismissed the complaint. (2) Because his honor erred in holding that the question of fellow servant is a mixed question of law and fact, to be passed upon by a jury, and in overruling the demurrer on that point, when he should have held that it was first for the court to say from the facts alleged in the complaint whether one party bears to another the relation of fellow servant; and that it is further for the court to say, as a matter of law, whether under the given state of facts (the allegations of the complaint) a cause of action was stated or whether any negligence is alleged for which the defendants are liable. (3) Because the allegations of the complaint in this case show that the injuries received by the plaintiff were the result of the negligence of the defendants' switch engineer, who was engaged in the same department of work as the plaintiff and upon the same train of cars, and that the said switch engineer was not plaintiff's superior officer, nor the agent of the defendants, but that he was operating the said engine and train of cars under the direction of the plaintiff, and had no control over nor direction of the plaintiff, and his honor should have concluded, as a matter of law, that the switch engineer was the plaintiff's fellow servant, for whose negligence the defendants were in no wise responsible to the plaintiff; that he should therefore have sustained the demurrer, and dismissed the complaint."

We will first in order dispose of plaintiff's exceptions.

First. We think this ground of exception well taken. Even before the act of 1898, now section 186a of our Code of Civil Procedure, this court had pointed out, in *Mew v. Railway Co.*, 55 S. C. 97, and 32 S. E. 830, that when the allegations of the complaint show co-operating causes leading to the result instead of any cause sufficient of itself to produce the result such acts of negligence might very properly have all been alleged in a single cause of action. "It was only when the alleged acts of negligence were distinct and independent, and capable severally of producing the result complained of, that it was necessary, previous to the act (1898), that each of

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said acts of negligence should be stated as a separate cause of action. But, where the act complained of is the resultant of several co-operative acts of negligence, manifestly the cause of action is single." In the complaint at bar the resultant is the injury to the plaintiff; the co-operating causes thereof are the defective appliances of defendants for coupling the cars in question, and the defective car put in motion thereby, and the failure of switching engineer to heed the signals of plaintiff to stop his engine, and the reckless disregard of his signal by the engineer, by carelessly, negligently, with great force, driving his engine against the car, thereby injuring the plaintiff. It is true the circuit judge regarded that there were two causes of action thus stated in the complaint. However, the act of 1898, now section 186a of our Code, is as follows: "That in all cases where two or more acts of negligence or other wrongs are set forth in the complaint as causing or contributing to the injury for which such suit is brought, the party in such suit shall not be required to elect upon which he shall go to trial, but shall be entitled to submit his whole case to the jury under the instructions of the court, and to recover such damages as he has sustained, whether such damages arose from one or another, or all such acts or wrongs alleged in the complaint." And the terms therein employed seem to have changed what had been the practice in the circuit courts as recognized by this court. It has been held that in those cases, where confessedly two causes of action are stated, this new act requires that both causes shall be submitted to the jury. See *Bowen v. Railway Co.*, 58 S. C. 226, 36 S. E. 591, where the court held: "The acts of negligence alleged are: (1) Failure to comply with the statutory requirements as to signals; (2) 'causing the said locomotive and train of cars to approach the plaintiff without warning and unexpectedly to him, and at a rapid and high rate of speed.' The plaintiff, under the act of 1898 (22 St. at Large, p. 693), entitled 'An act to regulate the practice in the courts of this state in actions ex delicto for damages,' had the right to submit to the jury both acts of alleged negligence." See, also, *Glover v. Railway Co.*, 57 S. C. 234, 35 S. E. 510; *Proctor v. Railway Co.*, 61 S. C. 184, 39 S. E. 351; *Appleby v. Railroad Co.*, 60 S. C. 48, 38 S. E. 237. This exception is sustained.

We must sustain the second exception. The demurrer was to the whole complaint, for its failure to state a cause of action. The circuit judge overruled the demurrer to a part of the complaint and sustained it as to a part. Under exception 1 we have held that the complaint only stated one cause of action. Such being the case, under the authority of *Buist v. Salvo*, 44 S. C. 143, 21 S. E. 615, and *Lawson v. Gee*, 57 S. C. 502, 35 S. E. 759, it was not in the power of the circuit judge to sustain a demurrer to a part of the allegations of a complaint setting out a single cause of action. The Code provides a different remedy. In *Buist v. Salvo*, supra, this

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court held: "A demurrer cannot be sustained which is good only as to some of the paragraphs of the complaint. A demurrer, to be well taken, must be interposed to the whole complaint or to one of its causes of action, but objection to irrelevant paragraphs should be by motion, under section 181 of the Code." This exception is sustained.

Third. This exception must be sustained by reason of the views already herein expressed in passing upon exceptions 1 and 2.

Let us now consider the three exceptions presented by the defendant: First. Inasmuch as this exception deals with only that part of plaintiff's complaint relating to the engineer of defendants' train, which we have already held was only one of the co-operating causes contributing to plaintiff's injuries, and as we have also held, under the authority of *Buist v. Salvo*, supra, and *Lawson v. Gee*, supra, that a demurrer could not be sustained as to part of one cause of action, this exception is overruled. Second. The foregoing holdings compel us to overrule this exception. Third. We must overrule this exception, in view of our holding already announced in this case.

It is the judgment of this court that so much of the circuit court judgment as is affected by plaintiff's exception be overruled and reversed, and that so much of the judgment of the circuit court judgment as is covered by the exceptions of defendants be affirmed.

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CENTRAL TRUST CO. *et al.* v. RICHMOND & D. R. CO. *et al.*

(Circuit Court of Appeals, Fourth Circuit, July 10, 1902.)

[117 Fed. Rep. 417.]

Contract—Parties—Purchase of Railroad Equipment by Lessee.

The general purchasing agent of a railroad company ordered certain equipment to be furnished to his company from a manufacturer with whom he customarily dealt, but directed the bills therefor to be made against another company, whose lines his own company operated under a lease. Such lease provided that where new equipment was needed, and was agreed on between the two companies, the same should be furnished by the lessor; but it did not appear that any such agreement was made with respect to that in question. The equipment was shipped as ordered: *held*, that the lessee, and not the lessor, was the purchaser.

Railroads—Receivership—Preferential Debts.

Three things are necessary in order to give a claim for supplies against a railroad company, in the hands of a receiver, a preference over the mortgage lien: (1) That the supplies furnished must be of that ordinary character necessary for operating a railroad and keeping the mortgaged property a going concern; (2) that the person furnishing them relied upon the interposition and protection of his equity by the court, and did not contract upon the personal responsibility of the railroad company; (3) that the debt was contracted but a short time before the appointment of the receivers, and was left unpaid because of the sudden action of the court in making such appointment.

Same.

One furnishing car wheels under a contract with a railroad company, relying upon being paid for the same in 60 or 90 days in accordance with a previous course of dealing, and with knowledge that they were to be used in repairing the equipment of a leased road, while he has a legal claim therefor against the company, has no equity which entitles him to preference of payment over its mortgagees, whose mortgages do not include the leased road, and where the receivers appointed in the foreclosure suit did not take possession of, nor operate, the same.

Appeal from the Circuit Court of the United States for the Eastern District of Virginia, at Richmond.

This case comes up on appeal from the circuit court of the United States for the Eastern district of Virginia. The questions in the case arise in the administration of the affairs of the Richmond & Danville Railroad Company, in the consolidated cause of Central Trust Company of New York v. Richmond & Danville Railroad Company. This consolidation was of two causes, one known as "Clyde v. Richmond & Danville Railroad Company," brought by stockholders and unsecured creditors, and the other by the Central Trust Company against the same defendant, seeking foreclosure of a mortgage executed October 22, 1886, by the railroad to secure certain bonds. This mortgage covered the main line and property of the Richmond & Danville Railroad Company, between Richmond and Danville, all its rights in the Richmond, York River & Chesapeake Railroad, all of its rights in the Piedmont Railroad, and all its leasehold interest in the Virginia Midland Railway, the Western North Carolina Railroad, the Charlotte, Columbia & Augusta Railroad, and the Greenville & Columbia Railroad. The decree of foreclosure was entered. Among its provisions was the following: "The purchaser or purchasers at said sale shall also, as part of the consideration, in addition to the payment of the sum or sums bid, take the property purchased upon the express condition that he or they, or his or their assigns, approved by the court, will pay off and satisfy all debts or obligations, incurred or to be incurred by the receivers having possession of such property, which have not been or shall not be paid by said receivers, and which shall be adjudged by this court to be debts or obligations properly chargeable against the property purchased, and to be prior or superior to the lien of said mortgage of October 22, 1886." Receivers had theretofore been appointed, first under the Clyde bill, June 15, 1892, and then under the consolidated bill, April 13, 1894. The sale took place, the Southern Railway Company became the purchaser, and the sale was confirmed June 15, 1894. On June 28, 1892, special masters were appointed, before whom claims coming within the order of sale could be presented and proved. On November 23, 1892, the Ensign Manufacturing Company filed with Messrs. Pleasants and Atkins, the special masters, its claim under the order of reference. From time to time it made inquiry as to the result of its application. Receiving no

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satisfactory reply, finally on July 18, 1901, it filed its petition in the consolidated cause, seeking payment of its claim. The petition was answered. The cause was heard before A. B. Dickinson, who had succeeded Messrs. Pleasants and Atkins as special master, and the claim was allowed by him in the sum of \$1,590. Exceptions were taken to the report, were heard by the circuit court, were overruled, and the report was confirmed. Leave to appeal was given, and the cause is here on the assignments of error.

One of the grounds of defense, included in exceptions to the report of the special master and in the assignments of error, is laches on the part of the Ensign Manufacturing Company in pressing its claim after filing it with the special masters. The record discloses no ground for such a charge, and we concur in this respect with the court below. The claim is based upon three orders of Joseph Minetree, styling himself "General Purchasing Agent of the Richmond & Danville Railroad Company." Two of these orders are for car wheels, and the other is for car wheels and spoke truck wheels. This is the form of one of the orders (the others are precisely similar, except as to dates and amounts):

"Order No. 9,994.

"Please Put This No. on Your Invoice and Make All Invoices in Triplicate.

"Joseph P. Minetree, General Purchasing Agent,
Richmond & Danville Railroad Company.

"Office of General Purchasing Agent,
Atlanta, Ga., Oct. 17, 1891.

"Ensign Manf. Co., Huntington, W. Va.: Please furnish the Richmond & Danville Railroad Company with the following supplies, viz.: 100 33" Passgr. Car Wheels Bored 5". Make bill against Central Railroad of Georgia. Prepay freight to Rich'd, Va. Guaranties herewith. Ship via C. & O., via R. & D. at Richmond, Va., and Central R. R. at Augusta, Ga. Mark: 'Richmond & Danville R. R. Co. To D. D. Curran, Supt., Care of F. H. McGee, M. M., Macon, Ga.'

Joseph P. Minetree, General Purchasing Agent.

"Acknowledged."

One order has direction to ship to "B. C. Epperson, Supt., care G. W. O'Brien, M. M., Augusta, Ga."; another, to "D. D. Curran, Supt., care of F. H. McGee, M. M., Macon, Ga."; the third, to "B. C. Epperson, Supt., care E. M. North, Storekeeper, Augusta, Ga."

The Ensign Manufacturing Company for some time had had frequent dealings with the Richmond & Danville Railroad Company, furnishing the railroad company with supplies of this character. It is alleged, and not seriously denied, that these articles were purchased to be used on the system of the Central Railroad & Banking Company of Georgia. They were charged on the books of the Ensign Manufacturing

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Company to this last-named company, and an effort was made to collect the bill. This failing, the claim comes here. At the date of this purchase and the delivery of the goods the railroad part of the system of the Central Railroad & Banking Company of Georgia was operated by the Richmond & Danville Railroad Company under the terms of a lease executed by the former company to the Georgia Pacific Railroad Company, and by it turned over to the Richmond & Danville Railroad Company. This lease was dated June 1, 1891. Whether this lease was valid or not (and that has been a subject of controversy not now concerning us), under its operation the railroad property of the Central Railroad & Banking Company was managed and controlled by the Richmond & Danville Railroad Company from June 1, 1891, to March, 1892. The rental under the lease was to be paid in the shape of meeting all increments of interest on the obligations of the Central Railroad & Banking Company, and a further sum in cash of \$625,000 per annum, being a dividend of 7 per cent. on its capital stock. Neither this lease nor any part of the property of the system of the Central Railroad & Banking Company of Georgia was included in the mortgage foreclosed in the main cause, and no part of it, or of the lease, ever came into the hands of the receivers in the main cause or of the purchaser under the sale for foreclosure.

Willis B. Smith, for appellants.

Wyndham R. Meredith, for appellees.

Before SIMONTON, Circuit Judge, and BRAWLEY and WADDILL, District Judges.

SIMONTON, Circuit Judge (after stating the facts as above). Our first inquiry is, between whom was the contract of purchase of these goods? Was the Richmond & Danville Railroad Company, or the Central Railroad & Banking Company, the purchaser? The goods were delivered upon an order of the general purchasing agent of the Richmond & Danville, with whom the Ensign Manufacturing Company had had long and frequent dealing, and in the regular course of that dealing. The goods were shipped upon that order, and as directed in that order. The Richmond & Danville did not profess to be acting as agent for the Central Railroad & Banking Company, and in fact had no authority to act as such agent. One of the express terms of the lease was that when additional equipment was needed for the lessee, and its supply demanded by the lessee, and the lessor shall agree that such additional equipment is necessary, the moneys requisite to pay for the same shall be provided by the lessor. There is no evidence in the record of such demand, or of any concurrence in the necessity for it. So the contract was between the Ensign Manufacturing Company and the Richmond & Danville Railroad Company. This being so, the direction upon the order, "Make bill against Central Railroad," could only have been

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intended to direct the purchasing company upon what part of the property it was operating the goods were to be used and against whom in its own books they were to be charged,—a part of its system of bookkeeping.

But this does not constitute the case. The vital question is: Granting that this is in law a debt of the Richmond & Danville Railroad Company, is it in the class of those favored debts to which the court gives a claim prior in lien to the mortgage foreclosed in this suit? It will not do to stand upon the legal demand. Were this the case, the legal demand of the bondholder, secured by his recorded mortgage, must prevail. The intervener must rely on its equity, and then the question arises, can this equity be asserted against the mortgagees of the Richmond & Danville Railroad Company and the Southern Railway Company, its purchaser, or is it more properly an equity to be asserted against the Central Railroad & Banking Company of Georgia? The supreme court of the United States, in *Fosdick v. Schall*, 99 U. S. 235, 25 L. Ed. 339, and the many cases following it, applying the principles therein established, has recognized an equity in creditors, who supplied a railroad company with labor and supplies necessary to keep it a going concern, to be reimbursed from earnings of such road in the hands of a receiver. This equity is held to be superior to the claims of the mortgage creditors. Sometimes it is so potent as to justify payment out of the corpus of the property, in the absence of earnings. The reason for this exceptional rule, which is applied only to railroads, is because of their quasi public character. They obtain and use certain franchises granted by the public, and in consideration thereof must subserve the interests of the public. Especially must every railroad be kept a going concern. To this end, their earnings are first applied to debts incurred for labor and supplies necessary to keep the road in actual operation. In this way not only is the public interest served, but the value of the property covered by the mortgage is maintained, and the interests of all concerned not allowed to go to ruin. *Southern Ry. Co. v. Carnegie Steel Co.*, 176 U. S. 289, 20 Sup. Ct. 347, 44 L. Ed. 458. In this way those furnishing such necessary labor and supplies are assured that, even if the railroad should unexpectedly go into the hands of receivers, the earnings thereafter will be applied to meet their demands; and if, in the operation of a railroad by a receiver, earnings which should have been used in meeting obligations for current supplies are diverted from this purpose, and are used for the advantage of the mortgage creditors, such diversion must be made good, even if it be necessary to encroach upon the corpus of the mortgaged property. *Fosdick v. Schall*, 99 U. S. 235, 25 L. Ed. 339; *Burnham v. Bowen*, 111 U. S. 776, 4 Sup. Ct. 675, 28 L. Ed. 596; *Trust Co. v. Morrison*, 125 U. S. 591, 8 Sup. Ct. 1004, 31 L. Ed. 825; *St. Louis, A. & T. H. R. v. Cleveland, C., C. & I. R. Co.*, 125 U. S. 658, 8 Sup.

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Ct. 1011, 31 L. Ed. 832; Southern Ry. Co. v. Carnegie Co., supra. The rule is expressed in terse form in *Bur v. Bowen*, supra:

"If current earnings are used for the benefit of mortgage creditors before current expenses are paid, the mortgage security is chargeable in equity with the restoration of a fund which has thus been applied improperly to their use."

In *Kneeland v. Trust Co.*, 136 U. S. 89, 10 Sup. Ct. 99, 34 L. Ed. 379, the general doctrine was recognized. But the court, speaking with emphasis of the sacred character of the vested liens, declared that the rule should be applied only in a few specified and limited cases. In *Thomas v. Trust Co.*, 149 U. S. 95, 13 Sup. Ct. 824, 37 L. Ed. 663, the doctrine of *Fosdick v. Schall* was recognized, but was not applied because the party seeking the preference over the mortgage had contracted upon the responsibility of the railroad company, the mortgagor, and not in reliance upon the interposition of a court of equity. In *Virginia & A. Coal Co. v. Central R. & Banking Co.*, 170 U. S. 355, 18 Sup. Ct. 657, 44 L. Ed. 1068, a rule is laid down reconciling *Burnham v. Bank* and *Thomas v. Car Co.* See *Niles Tool Works Co. v. Ives*, 112 U. S. 177, 4 Sup. Ct. 475, 29 L. Ed. 278, 112 Fed. 561.

No hard and fast rule has been adopted. Each case depends upon its own circumstances. "Whether the debt was contracted upon the personal credit of the railroad company, without any reference to its receipts, is to be determined in each case by the amount of the debt, the time and terms of payment, and all other circumstances attending the transaction." *Southern Ry. Co. v. Carnegie Steel Co.*, 176 U. S. 20, 20 Sup. Ct. 358, 44 L. Ed. 458. One of these circumstances upon which great stress is laid is that this equity is applied to such claims only as arose within a reasonable time before the receiver was appointed. *Paine v. Railroad Co.*, 118 U. S. 159, 6 Sup. Ct. 1019, 30 L. Ed. 193; *Miltenberger v. Railroad Co.*, 106 U. S. 288, 1 Sup. Ct. 140, 27 L. Ed. 117; *Thompson v. Railway Co. (C. C.)* 36 Fed. 817; *Blair v. Railway Co. (C. C.)* 22 Fed. 471. In this last case Judge Brewer said that six months is the longest time within his knowledge that has ever been given. In the opinion of this court in *Thompson v. Railway Co.*, 7 C. C. A. 322, 58 Fed. 473, 8 U. S. 472, these claims to be preferred are said to be for "ordinary and necessary current expenses of operating a railroad way contracted within a short time before a receiver was appointed, which by the sudden action of the court in appointing a receiver were left unpaid."

Three things, therefore, are necessary in order to give a claim against a railroad company, in the hands of a receiver, a preference over the mortgage lien: The supplies furnished must be of that ordinary and necessary character for operating a railroad, and keeping the mortgaged property in going concern; that the person furnishing them relied

the interposition and protection of his equity by the court, and did not contract upon the personal responsibility of the railroad company; that the debt was contracted but a short time before the appointment of the receivers, and was left unpaid because of the sudden action of the court in making such appointment.

Taking these up in their order: The car wheels, no doubt, were of that character of supplies necessary for the operation of a railroad; but in the case before us an equity is claimed, superior to the vested lien of these mortgagees of the Richmond & Danville Railroad. The supplies were not furnished for the use of any railroad on which these mortgagees had a lien, nor for the benefit of any such railroad. On the contrary, they were furnished to the Richmond & Danville Railroad, in the performance by it of the obligations it assumed for the Georgia Pacific Railroad Company to the Central Railroad & Banking Company, and were on the latter road, in which these mortgagees and the receivers appointed at their instance had no interest whatever, and from which there is no evidence in the record that they derived any benefit. The claim does not come within "those ordinary and current expenses of operating a railroad," referred to in *Bound v. Railway Co.*, supra. In this respect the case differs essentially from *Southern Ry. Co. v. Carnegie Steel Co.*, supra, in which case the steel rails upon which claim was made were furnished for the use of the mortgaged property, came into the hands of the receivers, were used by them, and at the sale went into the hands of the purchasers.

Did the Ensign Manufacturing Company furnish these goods, relying upon the interposition and protection of their equity by the court, or did they contract upon the personal responsibility of the Richmond & Danville Railroad Company? On this point Mr. Ensign, the manager of this company, speaks as follows:

"I further desire to state that the supplies furnished to the Richmond & Danville Railroad Company, being car wheels and in small lots, and being sent to different points along the line of its road, were furnished because of the fact that the Ensign Manufacturing Company had had a running account with the Richmond & Danville Company for a number of years, and had been engaged in making and shipping car wheels, and would fill orders from time to time from the said Richmond & Danville Railroad Company, and ship them wherever and to whatever points the said Richmond & Danville Railroad Company, or its purchasing agent, desired, without question as to who would pay the same, looking to the Richmond & Danville Railroad Company, and the current receipts of the road for payment for said supplies. These supplies were usually paid for in the course of 60 or 90 days. Payments were made by checks from the Richmond & Danville Railroad Company office, and while the Ensign Man-

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manufacturing Company made out bills for the goods in controversy in this matter, amounting to \$1,590, against the Central Railroad & Banking Company of Georgia, it was simply because the Richmond & Danville Railroad Company's purchasing agent so requested on the orders, and not because the Ensign Manufacturing Company looked to the Central Railroad & Banking Company of Georgia for payment."

It appears from this that the manager knew that the goods were purchased for and were used by the Georgia railroad. In *Kneeland v. Trust Co.*, 136 U. S. 89, 10 Sup. Ct. 950, 34 L. Ed. 379, the court, animadverting upon the disposition to extend the equitable doctrine of *Fosdick v. Schall*, says:

"No one is bound to sell to a railroad company, or to work for it. Whoever has dealings with a company whose property is mortgaged must be assumed to have dealt with it on the faith of its personal responsibility, and not in expectation of subsequently displacing the priority of the mortgage. * * * It is the exception, and not the rule, that such priority of lien can be displaced. We emphasize the fact of the sacredness of the contract lien."

Following the *Kneeland* Case, the court, in *Thomas v. Car Co.*, 149 U. S. 110, 13 Sup. Ct. 824, 37 L. Ed. 663, decided that, in order to secure this equity, the creditor must have furnished the supplies relying upon the interposition of the court. In *Southern Ry. Co. v. Carnegie Steel Co.* the same doctrine is reiterated, having previously been recognized in *Virginia & A. Coal Co. v. Central R. & Banking Co.*, 170 U. S. 355, 18 Sup. Ct. 657, 42 L. Ed. 1068. The same doctrine was applied in this court in *Bound v. Railway Co.*, *supra*.

So the question comes, were these goods furnished on the credit of the Richmond & Danville Railroad Company,—its personal credit,—or in reliance on this equity? The testimony of Mr. Ensign, above quoted, answers this question. His company had had frequent dealings with the Richmond & Danville Railroad Company, had had a running account with it for years, had filled orders when made, looking to the Richmond & Danville Railroad Company and the current receipts of that road, presenting its bill in 60 or 90 days, and in all previous instances had been promptly paid. The goods had been in this instance charged to the Georgia railroad simply because the purchasing agent of the Richmond & Danville so requested it, and not because the Ensign Company looked to the Georgia road for payment. Now, as the goods furnished under the order of the Richmond & Danville Railroad Company were for the use of the Georgia road, and were actually used by it, the Ensign Company could have relied upon this equity, and could have asserted it against the current earnings of the Central Railroad & Banking Company of Georgia in priority to its mortgages. *Virginia & A. Coal Co. v. Central R. & Banking Co.*, 170 U. S. 368, 369, 18 Sup. Ct. 657, 42 L. Ed. 1068. The equity exists, notwithstanding the mortgages,

notwithstanding the lease which is subordinate to the mortgages, notwithstanding the fact that the Richmond & Danville Railroad Company ordered the goods. It is an equity in favor of the materialman, existing against any person interested in the railroad property, either as owner, lessee, or mortgagee. If, however, the goods were not delivered in reliance on this equity, but because they were ordered by the Richmond & Danville in the satisfactory course of dealing existing between it and the Ensign Company for years, they were delivered on the personal credit of the Richmond & Danville, and under the cases cited above the claim for them cannot be preferred.

The mere fact that the payment for the goods was expected from the earnings of the railroad company is not sufficient to put the equity in motion. See *Lackawanna Iron & Coal Co. v. Farmers' Loan & Trust Co.*, 176 U. S. 303, 20 Sup. Ct. 393, 44 L. Ed. 475; *Bound v. Railway Co.*, *supra*.

This conclusion is strengthened by the fact that the account in this case was made in October and November, 1891, and the receivers were not appointed until August, 1892. We have seen how much stress the court places on the period elapsing between the incurring the debt and the sudden action of the court in appointing a receiver. Indeed, in the order appointing receivers in the main cause, the only current and unpaid pay rolls and vouchers and supply accounts incurred in the operation of the railroad system which they were directed to pay out of the earnings coming to their hands were limited to such as were incurred within six months prior to the date of the order.

The case at bar strongly resembles, if it is not on all fours with, *Virginia & A. Coal Co. v. Central R. & Banking Co. of Georgia*, 170 U. S. 355, 18 Sup. Ct. 657, 42 L. Ed. 1068. In that case the same purchasing agent of the Richmond & Danville Railroad Company, while that company was operating this Central Road, contracted with the coal company to furnish coal to the Central Railroad for 12 months from July 1, 1891, to July 1, 1892. The coal was furnished. The bill not having been paid, the coal company intervened in a suit in which the receiver of the Central Road and the Richmond & Danville Railroad Company were parties. To its petition for intervention it made both of these parties defendant, and by it sought payment for the coal. They claim against the Richmond & Danville under the contract. That against the Central was through the equity, in that the coal was purchased for the use of, and was used by, the Central Road. The supreme court held that the equity, under which payment for supplies should be paid out of current earnings in the hands of the receiver, existed against the Central Railroad & Banking Company, because the supplies were used in its operation, notwithstanding that the contract of purchase was that of its lessee. As the result of the case, payment was ordered

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to be made by the company for whose use the goods were brought. No decree was entered against the Richmond & Danville. The court, in fact, held that the legal contract was with the Richmond & Danville, but, when it was sought to enforce the equity, the earnings of the Central were liable to it. So we hold in this case. Although the contract was made with the Richmond & Danville Railroad Company, and the Ensign Manufacturing Company is a creditor thereunder against this company, yet, as the goods were purchased for and were used by another company, no equity exists, as against the mortgagees of the Richmond & Danville, giving the claim priority over them.

The decree of the circuit court is reversed, and the cause is remanded to that court, with instructions to dismiss the petition.

Reversed.

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(Supreme Court of South Carolina, Sept. 4, 1902.)

[42 S. E. Rep. 427.]

Pleading—Amendment—New Cause of Action.

A complaint alleging a willful tort cannot be amended so as to also allege a cause of action based on mere negligence, and the rule is not changed by Act 1898 (22 St. at Large, p. 693) § 2, which provides that in all cases where two or more acts of negligence or other wrong are set forth in the complaint as causing or contributing to the injury the plaintiff shall not be required to state such single acts separately, nor to elect on which he will go to trial, but shall be entitled to submit his whole case to the jury, etc.

Appeal from common pleas circuit court of Greenwood county; Townsend, Judge.

Action by John M. Proctor against the Southern Railway. From the circuit order refusing motion to amend complaint, plaintiff appeals. Affirmed.

Graydon & Giles, for appellant.

T. P. Cothran, for appellee.

JONES, J. The appeal herein is from an order refusing to grant an amendment to the complaint. The paragraph of the complaint sought to be amended is as follows: "(4) That the plaintiff, seeing that the said engine and train of freight cars attached thereto had come to a full stop, then drove his wagon and team back into the said public road, and attempted to pass the said engine and train of freight cars attached thereto while standing; but as soon as the plaintiff approached near and opposite to the said engine, he being in the said public road, the defendant, its agents, servants, and employees, who were in charge of said engine and train of freight cars attached thereto, and being in full and plain view of the plaintiff and his wagon and team, with intent to frighten and scare the plaintiff's team and injure the plaintiff willfully and

wantonly and recklessly, and not regarding the rights of the plaintiff in that regard, let off steam from said engine, so that the said team of mules became frightened and unmanageable, and were made to run away, and threw the plaintiff out of said wagon, and the wheels of said wagon were made to pass over the body of the plaintiff, inflicting serious and painful wounds and bruises on the plaintiff's back, foot, and injuring the plaintiff internally so that he became ill and sick, and for a long time was unable to attend to his business, and was confined to his bed, and suffered intense pain from the injuries to his left kidney; and he fears that from the effects of said injuries he will never be well and strong again." The amendment proposed was to strike out the words "with intent to frighten and scare the plaintiff's team and injure the plaintiff willfully, wantonly, and recklessly, and not regarding the rights of the plaintiff in that regard, let off steam from said engine," and insert in lieu thereof the following words: "willfully, wantonly, recklessly, negligently, and carelessly, and without regard to the rights of the plaintiff, let off steam from said engine in an unusual and unnecessary manner and in large quantities." On the former appeal in this case (61 S. C. 170, 39 S. E. 351) this court held the complaint only alleged a willful tort, and that the plaintiff could not recover for mere negligence. The object of the proposed amendment was to change the complaint so as to permit a recovery not only for a willful tort, but for negligence. The order refusing the amendment was in these words: "In the above-stated action a motion was made before me at Greenwood, S. C., at the August term, 1901, to amend the complaint in several particulars. The first I allow with hesitation, but the second—the really important one—I cannot allow. At the hearing I thought that the amendment might be allowed under the act of 1898 (22 St. at Large, p. 693), and reserved my opinion, in order that I might consider the matter more thoroughly. On examination of said act, however, and of recent opinion of the supreme court in this same case, I conclude that the amendment asked for cannot be allowed, and it is so ordered.

Appellant contends that the single question presented by this appeal is, "Did the presiding judge err in holding that he had no power to allow the plaintiff to amend his complaint?" We do not so construe the order, for in the same order another amendment was allowed. All that the judge meant by the language used was that the particular amendment proposed was not one which he could properly allow. In this, we think, he was right. The Code does not authorize the insertion of a new cause of action by way of amendment. The amendment proposed should be material to the case which has been defectively stated, and must not substantially change the cause of action. Section 194 of the Code of Civil Procedure, which has been construed and applied in numerous cases, among which see *Trumbo v. Finley*, 18 S. C. 305; *Whaley*

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v. Stevens, 21 S. C. 221; *Kennerty v. Phosphate Co.*, Id. 240, 53 Am. Rep. 669; *Skinner v. Hodge*, 24 S. C. 165; *Sullivan v. Sullivan*, Id. 474; *Clayton v. Mitchell*, 31 S. C. 199, 9 S. E. 814, 10 S. E. 390; *Lilly v. Railroad Co.*, 32 S. C. 142, 10 S. E. 934; *Mayo v. Railroad Co.*, 43 S. C. 225, 21 S. E. 10; *Brown v. Railroad Co.*, 58 S. C. 468, 36 S. E. 852. The opinion on the former appeal in this case shows that an action based upon negligence is wholly distinct from an action based upon a willful tort. The same evidence will not support both, for the former is for an injury done inadvertently, while the latter is for an injury done willfully. The same measure of damages does not apply to both, for in an action for negligence actual damages alone are recoverable, while in an action for a willful tort not only actual, but punitive, damages may be recovered. The same defenses are not available in both, for in an action based upon mere negligence the plea of contributory negligence is available to the defendant, while in an action for a willful tort, such plea is not available. These are some of the tests in determining whether a new cause of action is alleged in the proposed amendment. 1 Enc. Pl. & Prac. 556. The amendment proposed in this case, subjected to these tests, attempted to allege a new and distinct cause of action, and there was, therefore, no abuse of discretion in refusing to allow the amendment.

We do not think the act of 1898 (22 St. at Large, p. 693) to regulate the practice in the courts of this state in actions *ex delicto* for damages applies to the particular question before us. That act, by section 1, allows actual damages to be recovered in an action *ex delicto* in which punitive damages are claimed, and provides that no party shall be required to make any separate statement of facts as a basis for the claim of either actual or punitive damages, or to elect whether he will claim actual or punitive damages. In section 2 of said act it is provided: "That in all cases where two or more acts of negligence or other wrong are set forth in the complaint as causing or contributing to the injury for which such suit is brought, the party plaintiff in such suit shall not be required to state such several acts separately, nor shall such party be required to elect upon which he will go to trial, but shall be entitled to submit his whole case to the jury under the instructions of the court and to recover such damages as he sustained, whether such damages arose from one or another or all of such acts or wrongs in the complaint." The effect of this act is to change the rule as stated in *Spellman v. Railroad*, 35 S. C. 486, 14 S. E. 947, 28 Am. St. Rep. 858, to the effect that, when the cause of action is for exemplary or punitive damages, actual damages may not be recovered (*Glover v. Railroad*, 57 S. C. 234, 35 S. E. 510), and also to change the rule laid down in *Ruff v. Railroad Co.*, 42 S. C. 114, 20 S. E. 27, that, when two or more unconnected acts of negligence are stated as causing the injury, the plaintiff may be required to elect. The statute

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also permits the jumbling together in one statement of all acts of negligence and other wrongs, which include acts of willful wrong, but the statute does not expressly or by implication undertake to declare that an action based upon mere negligence is not wholly distinct from an action based upon a willful tort. If plaintiff had originally alleged as proposed by the amendment, he could not have been required to make a separate statement of the acts or facts showing negligence on the one hand or willful wrong on the other, and could not have been required to elect upon which acts or class of acts he would rely; but, having elected to bring his action for willful tort in the first instance, he cannot now be permitted to insert a new cause of action based on mere negligence.

The judgment of the circuit court is affirmed.

METROPOLITAN ST. RY. CO. v. AGNEW *et al.*

(*Supreme Court of Kansas, Oct. 11, 1902.*)

[70 Pac. Rep. 345.]

Street Railways—Injuries to Persons on Track—Instructions.

In an action against an electric street railway company, by a party who was struck by a car and injured while attempting to drive over its tracks in a walk at a street crossing, the company introduced testimony that an approaching car could be seen for a distance of 277 feet by a person standing within 15 feet of the railway tracks. This contradicted the plaintiff, who testified that by reason of obstructions to her view she could see in the direction the car came 80 or 90 feet only, when she was 15 feet from the crossing: *held*, that it was error to refuse an instruction tendered by the railway company to the effect that, if an approaching car was within the range of vision of the person injured, she was chargeable with knowledge of its coming, notwithstanding the fact that she testified that she did not see it.

(Syllabus by the Court.)

In banc. Error from district court, Wyandotte county; E. L. Fischer, Judge.

Action by Marie M. Agnew and others against the Metropolitan Street Railway Company. Judgment for plaintiffs, and defendant brings error. Reversed.

Miller, Buchan & Morris, for plaintiff in error.

Anderson & Robinett, for defendant in error.

SMITH, J. Defendant in error recovered a judgment against the Metropolitan Street Railway Company for personal injuries sustained at a place where Parallel avenue, in Kansas City, Kan., crosses the tracks of said company. She was driving a horse hitched to a surrey, and in attempting to go over the railway tracks the vehicle was struck by a car. She testified that the horse was going in a walk, and that at a distance of 15 feet from the crossing she could see up the track, from which direction the car came that caused her injuries, no further than 80 or 90 feet, by reason of obstructions to her

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view caused by houses and trees. She also testified that when within 6 or 8 feet from the track she looked up north, and saw no car approaching. The defendant below introduced a witness who testified that he had made measurements and taken observations at the place where the accident occurred, showing that at a distance of 15 feet west of the street railway track a car could be seen approaching from the north at a distance of 277 feet. Plaintiff below was familiar with the crossing, and knew that cars were constantly passing over it. The negligence alleged and sought to be proved by the plaintiff below was that the street car was recklessly run at a speed of 18 miles per hour, and that it approached the street crossing without ringing the bell or giving other warning. Plaintiff below did not deny that the car could be seen at a distance of about 80 or 90 feet from the crossing when she was within 6 or 8 feet from the track.

Counsel for the street railway company requested the court to give the following instruction to the jury, which request was denied: "If you find from the evidence that plaintiff looked to the north for an approaching car before going upon the track, and you further find that at the time she so looked the said car was there approaching and within view of her, then you are instructed that plaintiff is chargeable with knowledge of its approach, although plaintiff claims that she did not see said car approaching." No instruction was given covering the same point, nor was the attention of the jury called to the legal effect of a failure on the part of the plaintiff below to observe the car if it was within the range of her vision. If the jury believed the testimony of the witness above referred to, who measured the distances and made the observations, they must have concluded that, if the plaintiff looked up the track with an unobstructed view for 277 feet, she could have seen the approaching car in time to have avoided the accident. In view of this, it was proper that they should have been directed to consider the effect of her negligence in attempting to cross in the face of visible danger. It seems probable, also, that she might have escaped injury, at the gait the horse was going, had she seen the car coming, from a distance of 80 or 90 feet, when she was 6 or 8 feet distant from the crossing. She either saw the car, or else her testimony was untrue, if the testimony introduced by defendant below was given credence. *Young v. Railway Co.*, 57 Kan. 144, 45 Pac. 583. In the case cited the court quoted approvingly from the case of *Railway Co. v. Elliott*, 28 Ohio St. 340-355, where it is said: "It is nothing to the purpose that he should say he looked this way and that, when the object he seeks to discover is plainly and palpably before him, and he fails to see it. Either his statement is not true, or his exercise of vision was such as to be not only negligent, but culpable." The instruction asked should have been given.

The judgment of the court will be reversed, and a new trial ordered. All the justices concurring.

WALLACE v. CENTRAL OF GEORGIA RY. CO.

(Supreme Court of Georgia, Aug. 8, 1902.)

[42 S. E. Rep. 209.]

Injury to Servant—Directing Verdict.

There was no material error in rejecting or in admitting testimony, but the error committed in directing a verdict requires a new trial. (Syllabus by the Court.)

Error from city court of Atlanta; H. M. Reid, Judge.

Action by Josephine Wallace against the Central of Georgia Railway Company. Judgment for defendant, and plaintiff brings error. Reversed.

Hoke Smith and H. C. Peeples, for plaintiff in error.

Dorsey, Brewster & Howell, for defendant in error.

LUMPKIN, P. J. The plaintiff in error, Mrs. Josephine Wallace, brought against the Central of Georgia Railway Company an action for the homicide of her husband, which occurred on the 1st day of August, 1898.

The undisputed facts of the case, as developed by the evidence, are substantially as follows: The deceased was an engineer in the service of the defendant, and was at the time of his death engaged in running the locomotive of an extra train which was operated between Atlanta and Hapeville. Between these points there were two main tracks, one of which was used for trains going out of the city, and the other for trains coming into it. At McPherson station, looking towards Hapeville, the right-hand main track was the one for outgoing trains, and the opposite main track was the one for incoming trains. Between these two main lines, there was a middle track, used for switching. A spur track passed from the middle track, and ran across the right-hand main line into McPherson barracks. Eason was the conductor of the train upon which Wallace was engineer. On the morning of the day on which the killing occurred, Eason, under the direction of the proper authority, had left a number of passenger cars to be loaded in the barracks with troops, and had gone to Hapeville, where he worked during the forenoon. His orders were to return to the barracks at 1 o'clock, and carry the passenger cars containing the soldiers to Atlanta. Eason's train reached McPherson on its return from Hapeville a few minutes after 1 o'clock. A passenger train, No. 33, was due to pass McPherson on the outgoing main line at 15 minutes after 1. After reaching McPherson on the incoming main line, Eason left a number of cars upon it, and then had the locomotive pulled further up this main line, and from it backed upon the middle track, and coupled to several box cars which were standing thereon. There the locomotive and these cars remained till No. 33 had passed. Eason then ordered Wallace to back the box cars attached to his locomotive.

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tive across the outgoing main line, and had these cars coupled to the passenger cars which had been left in the yard. After this coupling had been made, and the train had been set to a standstill, a portion of the locomotive occupied the space of the outgoing main line. In this situation of affairs, while the soldiers were getting aboard the passenger train, a freight train, known as No. 42, coming from Atlanta, coupled with the locomotive of Eason's train, and, as a result, Wallace was killed.

Numerous rules of the company were introduced in evidence. Such of them as require special consideration are hereinafter noticed. There was much conflict in the testimony as to various matters other than those mentioned, and, after both sides had closed, the court directed a verdict for the defendant. Mrs. Wallace made a motion for a new trial, which was overruled, and she excepted. We will now dispose of the minor points, and then pass upon the main question, which is whether or not the court erred in not committing the case to the jury.

The plaintiff's counsel offered certain testimony to which counsel for the defendant objected. The court intimated that the testimony was inadmissible, and after some discussion the counsel first mentioned remarked to the court: "I will not insist upon it at the present." This was certainly sufficient to warrant the inference that the offer to introduce this testimony was withdrawn, and the judge certified that this was his understanding of the matter. It was on this point below contended that the plaintiff's husband was engaged in switching and moving his train at McPherson under the protection of certain rules of the company provided for the operation of what is called the "Block System." Counsel for the company insisted that these particular rules were not applicable in such a case as the present. The plaintiff's counsel introduced testimony tending to show that, under a custom or practice which had prevailed for many years, the block system had been relied on for the protection of crews which engaged in switching at stations within the territory covered by the system. To meet this, the defense counsel were permitted to introduce, over objection, the testimony of several witnesses who had been employed by the company in the running of trains, to the effect that, so far as they knew, no such custom or practice had ever prevailed. Some of this testimony was irrelevant because it related to a period subsequent to the date of the homicide, and so it was probably so because it related to a period long anterior to that date, when the rules of the company were not the same as those in force when Wallace was killed. The judge testified that he ruled repeatedly and distinctly that "evidence of any custom subsequent to August, 1898, was inadmissible." With this restriction, and the further qualification that it was not permissible to show what the custom was under different

rules, the testimony in question was proper. The rules pertaining to the block system were not luminously clear as to whether or not it was applicable to a situation like that involved in the case in hand. The plaintiff undertook to show that it was, by some of the company's servants, treated as being so, and the defendant was allowed to show that, by others of them, it was not so treated. As will appear before we conclude, this is not really a matter of much importance, for we will endeavor to show that the block system does not cut a substantial figure in this case. The plaintiff also excepted to other rulings made by the court in admitting and in rejecting testimony. With these we will not undertake to deal specifically, for they are, in view of what we regard as the controlling issue upon which the case should be made to turn, of but trivial moment.

The action of the court in directing a verdict for the defendant can be sustained only upon the theory that, viewing the testimony and all legitimate inferences therefrom most favorably for the plaintiff, she was not entitled to recover. As a reviewing court, we must treat as established in her behalf every contention of fact insisted upon by her which the jury would have been warranted in sustaining. There was ample evidence to show negligence on the part of the defendant, and the real issue in controversy was whether or not the deceased was guilty of contributory negligence. If he was, his widow has no right of action. If he was not, she has. If the deceased relied exclusively upon the supposed protection afforded by the block system as a justification for leaving his locomotive in its exposed condition upon the outgoing main line, he was negligent. One of the general rules of the company, No. 399, provides that "when a train stops or is delayed, under circumstances in which it may be overtaken by a following train, the flagman must go back immediately with danger signals a sufficient distance to insure full protection. When recalled, he may return to his train, first placing two torpedoes on the rail, when the conditions require it. The front of a train must be protected in the same way, when necessary, by the fireman." General rule No. 402 reads as follows: "When it is necessary for a train on double track to cross over to the opposite track, a flagman must be sent out with danger signals, as provided in rule No. 399." Rule No. 10 in the joint timetable declares that: "Flagmen will not, under any circumstances, depend upon the block signals to protect their trains, but must go back with signals, as required by the general rules." It will not do to say that this rule is binding upon flagmen only. It is, under other rules introduced in evidence, but which need not be set forth, incumbent upon conductors to see to it that flagmen perform their duties; and, as has been seen, if the front of a train is exposed to danger, the fireman must act as flagman "when necessary." If, upon such a necessity arising, the fireman did not so act,

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and the engineer knew this to be so, he would surely be unwarranted in assuming that protection from threatened danger would come from some other source. Interpreting the special rule last quoted in the light of the others, its plain meaning is that no person connected with the running of a train has the right to rely absolutely for protection upon the block system. For this reason, we have not deemed it necessary to go into further detail as to what the record discloses with regard to the nature of this system, or to discuss the particular rules relating to it; and for the same reason we now dismiss it from further consideration.

Under the rules above copied, and others in evidence regulating the duties of conductors and engineers, the contents of which are not here essential, it was the duty of Eason, before placing his train in the position it occupied when the collision took place, to send a flagman towards Atlanta to intercept train No. 42. It was the duty of Wallace, if he knew that the conductor had neglected to take this precaution, to send the fireman forward on this mission. Under such circumstances, it would have been "necessary" for the engineer to take this step. The evidence on these vital matters, taking it most favorably for the plaintiff, and giving her the benefit of the strongest legitimate inferences which could be drawn therefrom in her favor, would have warranted a finding that Eason, before causing the box cars to be backed into the barracks, did order Griggs, a flagman, to go forward and flag No. 42; that he started out as if to obey this order, and that Wallace was in a position where he could have heard and seen what occurred. In point of fact, Griggs did not flag No. 42; and he, as a witness, denied having been ordered to do so at all. Indeed, we wish to state just here in the plainest terms that we are not undertaking to say what was the truth as to any feature of the case, or to intimate what the verdict should have been. The testimony was, as already stated, conflicting at every issuable point, and we are dealing with it merely from the standpoint that it was the plaintiff's right to have the jury pass upon her contentions, and to obtain the benefit of that result which would properly ensue from their finding that the same were well founded in fact. If the truth was as above outlined, Wallace was not negligent in failing to send the fireman forward to flag No. 42. Whether, upon the assumption that he neither heard Eason order Griggs to flag that train nor saw Griggs make any movement towards doing so, he would have been negligent in not sending out the fireman, we do not now decide, but leave this question open for determination, if need be, at the next hearing. Nor did the evidence demand a finding that Wallace was negligent in not himself looking towards Atlanta, and discovering the approach of No. 42 in time to get his train out of its way. Nor were the jury by any means bound to find that Wallace was negligent in not backing far enough into the barracks to clear the

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main line of his locomotive at the time the box cars were coupled to the passenger cars, or that it was his duty, after this coupling had been made, to then push the entire train further back into the barracks so as to leave the main line open. On all these and many other strenuously contested questions, there was much oral testimony pro and con, and many pertinent rules of the company were introduced. We do not deem it essential to enter upon a detailed discussion of these various matters. Enough has been said, we think, to enable the clear-headed and most-capable judge of the trial court to apprehend upon what lines the case should be submitted to the jury, and we are quite confident that he will do so in the able and satisfactory manner with which he usually conducts the business of his court.

Judgment reversed. All the justices concurring, except LEWIS, J., absent on account of sickness.

DANIELS v. COVINGTON & C. EL. R. & TRANSFER & BRIDGE Co. *et al.*

(Court of Appeals of Kentucky, Jan. 17, 1902.)

[66 S. W. Rep. 187.]

Injury to Bridge Builder—Assumption of Risk.*

A bridge builder engaged in repairing a bridge assumed the risk of the danger necessarily incident to such work.

Same—Same.

Where plaintiff, who was one of a crew of four men engaged in removing ties from a railroad bridge for the purpose of putting in new ties, placed his hand on the end of a tie in guiding it so that his hand struck a girder, causing him to faint, and fall into the river below, the fact that the foreman, whose duties called him to another part of the bridge, did not call some one to take his place for the purpose of giving the word to heave or launch the ties did not render the master liable, as one of the crew gave the word, as had been the custom in the foreman's absence, and plaintiff, with knowledge of that method of working, had made no complaint, thereby assuming the risk.

Same—Contributory Negligence.

As the proximate cause of the injury was plaintiff's negligence in placing his hands upon the end of the tie, where, if the tie struck a girder, it was certain to be injured, a peremptory instruction for defendant was also proper on that ground; a servant having no right to look to the master for damages for negligence if, by the exercise of ordinary care, he could have avoided injury.

Appeal from circuit court, Kenton county.

"Not to be officially reported."

Action by Gregory Daniels against the Covington & Cincinnati Elevated Railroad & Transfer & Bridge Company and another to recover damages for personal injuries. Judgment for defendants, and plaintiff appeals. Affirmed.

*As to what risks are assumed by employees, see generally, *Smith v. Wilmington & W. R. Co. (N. Car.)*, 23 Am. & Eng. R. Cas., N. S., 467, and foot-note.

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Harvey Myers and W. S. Pryor, for appellant.
Galvin & Galvin, for appellees.

DU RELLE, J. The appellant, who is a bridge maker, was employed by appellee bridge company in repairing a bridge across the Ohio. The bridge, which was being repaired by putting in new ties, is a double-track railway bridge with wagon and foot ways on either side of the tracks. Between the tracks and the wagon and foot ways is a narrow space some feet in width, and about three feet below the top of the tracks is a series of parallel steel bars, called "hog chain," running lengthwise of the bridge, and forming a platform some two feet or more in width, upon which the men could walk. The purpose of the hog chain is explained in the briefs as similar to that of the cable in a suspension bridge. The ties could only be removed and replaced a few at a time so as not to interfere with the passage of trains. The work in which Daniels worked seems to have consisted of shoving out four of whom furnished the power which moved the ties from under the rails. The rails were jacked up a little from the ties, which seem to have been sawed ties, about the same size and weight as ordinary railroad ties. At each end of a tie two men lay down astride of the rail, one on each side of the tie, and, to use appellant's expression, "launched" the tie, shoving it toward the open space. The other two men stood on the hog chain, and guided the tie, so that it might strike against the uprights, and might be dropped in the river below through the open space. The work had been going on for some time. Appellant had been doing work on the bridge and bridge approaches for some weeks, and, on some days, at least, had been engaged in this particular work. There was a foreman in charge of several crews engaged in similar work, and in doing other things toward the repair of the bridge. He had general supervision over all the work, and gave general directions as to what work each crew was to perform. As matter of course, he did not remain continually with any one crew. This was not necessary. The men understood their work, and nothing could have been done by the foreman except to give the word to the four men engaged in shoving the ties out, so that they might shove the tie out. This word could be given as well by one of the men as by the foreman, and seems to have been so given. As the tie was pushed out one by one, if they struck one of the uprights beyond the hog chain the men on the hog chain pushed the tie so as to clear the upright, and the tie dropped into the river below, and floated away. The work was necessarily dangerous, as all bridge work must be, and that danger the men assumed the risk. In guiding the ties, Daniels appears to have put his hand upon the top of the tie. It was shoved against an upright, and his hand was badly mashed, though it does not appear that any bone was broken. He undertook to bandage his thumb with his

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kerchief. The foreman came up, and stooped to assist him in doing so, but, probably from the shock of the injury, he fainted, and fell 94 feet to the river. How he was gotten out does not appear, but he regained consciousness in the hospital, from which he was discharged some two weeks later. Daniels thereupon brought suit against the appellees for \$10,000 damages, the negligence alleged being that the section hands, "in the presence of and by the consent of their said foreman, while plaintiff necessarily had his hand upon said timber or cross-tie for the purpose of guiding it through said opening and throwing it into the river, did, with negligence and carelessness, in the presence of and by the consent of said foreman, and without warning to plaintiff, so throw or push the same that it caught and crushed the thumb upon plaintiff's right hand," etc., and carelessly permitted him, while unconscious, to fall from the bridge to the river. By amendment he also averred negligence on the part of the foreman, who knew of his dangerous position, to watch and prevent injury to him, and failure to employ a sufficient number of hands to handle and remove the cross-ties in a reasonably safe manner, and the employment of unskilled laborers.

There is no evidence to connect the railway company with the appellant's employment or injury. The bridge company was his sole employer. The claims that the force was insufficient, and that the injury was inflicted in the presence of or by the consent of the foreman, seem to have been abandoned. In the argument it is not insisted that the foreman was compelled to remain at the point of danger, but that it was his duty, in the exercise of proper care and precaution, when he left that place to discharge other duties, to have called some of the hands working on the bridge to take his place. The case of *Railroad Co. v. Semonis* (Ky.) 51 S. W. 612, was a case of insufficient working force, and does not seem to us at all analogous to the case at bar. There seems to have been no one outside of the crew to give the word to heave or launch the ties, except at long intervals, when the foreman happened to be present. This was known to appellant, who continued to work without complaint; and we doubt whether it would have been a just ground of complaint. The two men upon the hog chain occupied a much better position to see what was going on than the men who were launching the ties. They were standing upon the steel-hog chain, some two feet or more in width, with their bodies above the level of the ties. Indeed, the proximate cause of the injury to appellant's thumb seems to have been his own negligence in placing his hand upon the end of the tie, where, if the tie struck a girder, it was certain to be injured. The servant cannot look to his employer for damages for negligence if, by the exercise of ordinary care, he could have avoided injury. The action of the trial court in granting a peremptory instruction seems fully justified by the doctrine laid down in the cases of

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Kelly v. Asphalt Co., 93 Ky. 363, 20 S. W. 271; Lostutter v. Dailey, 14 Ky. Law Rep. 926; Mellott v. Railroad Co., 101 Ky. 212, 40 S. W. 696; Lee v. Railway Co. (Ky.) 38 S. W. 509, 6 Am. & Eng. R. Cas. 783; Volz v. Railway Co., 95 Ky. 188, 24 S. W. 119; and Clark's Adm'r v. Railroad Co., 101 Ky. 34, 39 S. W. 840, 8 Am. & Eng. R. Cas., N. S., 355.

The judgment is affirmed.

FIDELITY INSURANCE, TRUST & SAFE DEPOSIT CO. v. NORFOLK & W. R. CO. (HAMPTON, Intervener).

(Circuit Court, W. D., North Carolina, March 20, 1902.)

[114 Fed. Rep. 389.]

Railroads—Effect of Receivership—Judgment against Company.*

A railroad corporation does not go out of existence because of the appointment of receivers for its property, and may be sued, and a judgment obtained against it, notwithstanding the receivership; but, where the cause of action arose before the appointment of the receivers, such judgment does not constitute a debt of the receivership whether the receivers were parties to it or not.

Same—Foreclosure Suit—Preferential Debts.†

A judgment obtained against a railroad company after its property has been placed in the hands of receivers in a suit to foreclose a mortgage thereon for a tort committed by the company prior to the receivership is not entitled to priority of payment over claims of the mortgage bondholders from the earnings of the receivership.

Same—North Carolina Statute.

Code N. C. § 1255, which provides that the giving of a mortgage by a corporation shall not exempt its property or earnings from execution for the satisfaction of a judgment against the corporation for a tort, can operate only on property within the state; and where the property of a railroad company in the state consisted solely of a lease of the property and franchises of another company, taken subject to a mortgage given by the lessor, and which had been displaced and superseded by the appointment of receivers in a suit to foreclose such mortgage and the subsequent sale of the property therein prior to the rendition of a judgment by a state court against the lessee company for a tort, there were at the time of the rendition of the judgment no property or earnings of the defendant within the state to which such statute can apply, and it does not affect the rights of the judgment creditor with respect to other property or funds of the defendant.

In Equity. Suit for foreclosure of a mortgage. On petition of intervention of Gideon D. Hampton.

The petition of the intervener was as follows:

"The petition of Gideon D. Hampton respectfully sheweth to the Court: (1) That on the 22d day of February, 1897, he recovered judgment against the defendant, the Norfolk & Western Railroad Co., in the superior court of the county of Forsyth and state of North Carolina, for the sum of one thousand dollars and costs in an action for tort against the

*See note, 7 Am. & Eng. R. Cas., N. S., 601.

†See notes, 5 Am. & Eng. R. Cas., N. S., 155; 9 Am. & Eng. R. Cas., N. S., 851.

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said railroad for personal injuries inflicted by the said railroad upon the said Gideon D. Hampton. That the said judgment remains wholly unpaid and unsatisfied, although demand had been made upon defendant and the receivers hereinafter referred to for the payment thereof. (2) That by an order made in the above-entitled cause on the 7th day of February, 1895, Frederick J. Kimball and Henry Fink, Esqs., were appointed receivers of the properties and franchises of the defendant, the Norfolk & Western Railroad Co. That as such receivers there came into their hands large sums of money, and, as your petitioner is informed, advised, and believes, there are still in the hands of said receivers large sums of money, more than enough to satisfy the judgment of your petitioner; and your petitioner insists that there ought now be paid by the said receivers to your petitioner enough of said funds to satisfy the said judgment and costs. (3) That your petitioner is informed and believes, and so avers, that from the properties and franchises aforesaid, besides the mortgage properties coming into the possession of the said receivers, there also came into the hands of the said receivers a large amount of properties of the said railroad not covered by any lien or mortgage, the exact amount of which your petitioner is unable to ascertain; but your petitioner avers, as aforesaid, that the same would be more than enough to satisfy his judgment, and therefore asks that the said receivers be ordered to account with petitioner, and show what funds and properties not subject to the mortgage sought to be foreclosed came into their hands. (4) Your petitioner further alleges that the purported lease of the Roanoke & Southern Railway Company to the Norfolk & Western Railroad Company for nine hundred and ninety-nine years was, in effect, a sale; that, although the aforesaid lessee at the time of the injury complained of was nominally operating said road as such lessee, that it was in reality the owner thereof. (5) Your petitioner further prays that an order be passed by this honorable court directing that any property, franchises, leasehold interests, or other property whatever, subject to the lien of petitioner's judgment, be applied to the satisfaction of the same. (6) And your petitioner further prays for such other and further relief in the premises as may be just and proper.

"J. S. Grogan,
"Jones & Patterson,
"Holton & Alexander,
"Attorneys for Petitioner."

"To Watson, Buxton & Watson, Attorneys for Defendant:
You will take notice that on the 27th day of January, at 12 o'clock m., 1902, before his honor the circuit judge of the United States circuit court presiding at the city of Greensboro, N. C., at the special term, to be holden, beginning on the 20th day of January, 1902, a motion will be made in the

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above-entitled cause for the relief demanded in the accompanying petition.

"This January 9th, 1902.

J. S. Grogan,
"Jones & Patterson,
"Holton & Alexander,
"Attorneys for Gideon D. Hampton."

Indorsed on back:

"Executed by delivering a copy of this writ to J. C. Buxton, of the firm of Watson, Buxton and Watson, attorneys for the N. & W. Railroad Co.

"January 13th, 1902. J. M. Millikan, U. S. Marshal,
"Per A. O. Griffin, D. M."

[Seal United States Circuit Court, Western Dist. of N. C.,
at Greensboro.]

"A true copy. Test: Sam'l L. Trogdon, Clerk."

J. S. Grogan, Jones & Patterson, and Holton & Alexander, for intervener.

Watson, Buxton & Watson and Jos. C. Doran, for defendants.

SIMONTON, Circuit Judge. This case comes up by petition of intervention in the main cause, of the Fidelity Insurance, Trust & Safe Deposit Company against the Norfolk & Western Railroad Company. On 6th February, 1895, under proceedings instituted in the circuit court of the United States for the Eastern district of Virginia by the Fidelity Insurance, Trust & Safe Deposit Company against the Norfolk & Western Railroad Company, the defendant company was placed in the hands of F. I. Kimball and Henry Finck as receivers of all of its property and assets. On 7th February in the same year, by auxiliary proceedings had in this court, the appointment of said receivers was recognized and confirmed, and they were made receivers in this jurisdiction. Before the appointment of said receivers, and whilst the Norfolk & Western Railroad Company was operating the Roanoke & Southern Railway under a lease of 999 years, the petitioner, Gideon D. Hampton, on 21st December, 1894, was injured on the track of the Roanoke & Southern Railway in or near the town of Winston, N. C. On the 6th March, 1895, subsequent to the appointment of said receivers, Hampton instituted a suit in tort in the superior court for Forsyth county, N. C., against the Norfolk & Western Railroad Company, the lessee, for injuries sustained on this leased road. On 22d February, 1897, he obtained a verdict against the defendant in the sum of \$1,000, and entered judgment therefor, which judgment was affirmed on appeal by the supreme court of North Carolina on 21st April, 1897. Hampton v. Railroad Co., 120 N. C. 534, 7 Am. & Eng. R. Cas., N. S., 510, 27 S. E. 96, 35 L. R. A. 808. The summons and complaint in this case were served upon H. H. S. Handy, who had been an official of the defendant company at Winston,

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and who also had been appointed by this court the agent of the receivers, upon whom process might be served. In the suit the firm who were counsel for the receivers appeared and defended the action in the name and on behalf of the railroad company. Some discussion arose in the argument of the present cause upon the question if the suit in the state court was a suit against the receivers. In its terms it was a suit against the Norfolk & Western Railroad for a tort committed by that company before the cause in which the receivers were appointed was instituted. The railroad company did not go out of existence when the receivers were appointed. *First Nat. Bank v. Pahquioque Nat. Bank*, 14 Wall. 383, 20 L. Ed. 840. It still remained a legal entity, and could be sued, no injunction forbidding it having been passed. *Ex parte Bates* (C. C.) 84 Fed. 67. The act complained of was not the act of the receivers or their agents. Nor did the receivers make themselves parties to the suit on the record. It may be—no doubt it was—the fact that they instructed defense to be made to the suit. This it was their duty to do. *Bosworth v. Association*, 174 U. S. 186, 19 Am. & Eng. R. Cas., N. S., 680, 19 Sup. Ct. 625, 43 L. Ed. 941; *Davis v. Gray*, 16 Wall. 217, 21 L. Ed. 447. But in doing this they did not assume the obligation of the corporation; nor was the judgment against them as receivers for things done in the receivership; nor could it rank as such judgment, even were the judgment against the receivers *eo nomine*. Conclusive as it might be as to the existence and amount of the plaintiff's claim, the time and manner of its payment must be controlled by the court appointing the receiver. *Dillingham v. Hawk*, 9 C. C. A. 101, 60 Fed. 494, 23 L. R. A. 517. Having obtained and entered his judgment, Hampton intervened in a cause entitled "*Mercantile Trust & Deposit Company v. Roanoke & Southern Railway Company and Norfolk & Western Railroad Company*." This cause was instituted to foreclose a mortgage upon the property of the Roanoke & Southern Railway Company, and had ripened into an order for foreclosure, and a sale thereunder; the purchaser being the Norfolk & Western Railway Company. The order for sale had provided as follows:

"The purchaser shall, as part consideration for the railroad property and franchises purchased, take the same, and receive the deed therefor, upon the express condition that, to the extent that the assets or the proceeds of assets in the receivers' hands not subject to any other lien or charge shall be insufficient, such purchaser, his successors or assigns, shall pay, satisfy, and discharge (a) any unpaid compensation which shall be allowed by the court to the receivers; (b) any indebtedness and obligations or liabilities which shall have been contracted or incurred by the receivers before delivery of possession of the property sold in the management, operation, use, or preservation thereof; and (c) also all unpaid

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indebtedness or liability contracted or incurred by the defendants, or either of them, in the operation of said railroad and property sold, which is prior in lien or superior in equity to said mortgage, except such as shall be paid or satisfied by the receivers, upon the court adjudging the same to be prior in lien or superior in equity to said mortgage, and directing payment thereof."

The intervention sought to subject the property so purchased to the lien of his judgment. The prayer of the intervention was refused. The intervener had based his claim on the provisions of section 1255 of the Code of North Carolina. This section gives priority to a judgment in tort over any mortgage executed by a corporation. The court held that, as the property sold was the property of the Roanoke & Southern Railway Company, lessor, a judgment against the Norfolk & Western Railroad Company, the lessee, did not take priority, under this section, of the mortgage creditors of the lessor, to whose rights the Norfolk & Western Railway Company had succeeded. 90 Fed. 175. Mr. Hampton now files his intervention in the case of the Fidelity Insurance, Trust & Safe Deposit Company against the Norfolk & Western Railroad Company, claiming to be paid out of the earnings and assets which came into the hands of the receivers of the defendant railroad company. It is evident that this is a different proceeding from the first intervention. That sought to subject the purchaser of the property of the Roanoke & Southern Railway Company to the payment of this judgment, which had been obtained against the Norfolk & Western Railroad Company. This intervention seeks to subject funds which came into the hands of the receivers of the Norfolk & Western Railroad Company, during their receivership, to the payment of the judgment. The matter is not *res judicata*.

Under the decisions of the supreme court of the United States the earnings in the hands of receivers derived from the management of property in their hands are devoted to the payment of claims arising during the receivership, and expenses necessarily incurred in the management. Besides this, when there has been, before or during the receivership, a diversion of earnings to the payment of interest upon the mortgage debt, or to the improvement of the security of the mortgage debt, the courts have required the receivers to restore the amounts so diverted, and to apply them to certain claims for supplies furnished within a limited period before the receivership, which were necessary to keep the railroad company a going concern. Sometimes the necessity to this end for these supplies has been such as to warrant the court in subjecting the corpus of the property to their repayment. This doctrine has been established by a long line of cases, beginning with *Fosdick v. Schall*, 99 U. S. 235, 25 L. Ed. 399, down to *Southern R. Co. v. Carnegie Steel Co.*, 176 U. S. 273, 6 Am. & Eng. R. Cas., N. S., 420, 20 Sup. Ct. 347.

44 L. Ed. 458. And in applying this doctrine the courts are not disposed to enlarge it in any way. They realize the necessity of a court of equity confining itself within very restricted limits in the application of the doctrine that in certain cases a court having a road or fund under its control, may be justified in awarding priority over the claims of mortgage bondholders to unsecured claims originating prior to the receivership. *Kneeland v. Trust Co.*, 136 U. S. 89, 10 Sup. Ct. 950, 34 L. Ed. 379, 43 Am. & Eng. R. Cas. 519; *Thomas v. Car Co.*, 149 U. S., 95, 13 Sup. Ct. 824, 37 L. Ed. 663. In the *Kneeland Case* it is said that such priority has been given in a few specified and limited cases. In all the long line of cases referred to, in not one is this extraordinary preference allowed to a judgment obtained, after the receivership, on a tort of the corporation committed before the receivership. After a road has been placed in the hands of a receiver, and is managed and controlled by him, the receivership is responsible for all lawful contracts of the receiver, and for the negligent acts and torts of him or of his agents. A judgment against a receiver for any of these causes of action binds the receivership, and must be paid out of its earnings in the hands of the receiver; and, if these be deficient, then out of the corpus of the property of the proceeds of its sale. *Cowdrey v. Railroad Co.*, 93 U. S. 352, 23 L. Ed. 590; *Barton v. Barbour*, 104 U. S. 126, 4 Am. & Eng. R. Cas., 1104, 26 L. Ed. 672; *McNulta v. Lochridge*, 141 U. S. 327, 12 Sup. Ct. 11, 35 L. Ed. 706. But this doctrine is confined to cases in which the act complained of occurred during the receivership. It does not apply to a tort or to an ordinary contract of the corporation before the receivership began. A receiver is not bound by such torts or contracts. *Oil Co. v. Wilson*, 142 U. S. 313, 12 Sup. Ct. 235, 3 L. Ed. 1025. He cannot be compelled to assume the obligations of a lease made by the company. *Railroad Co. v. Humphreys*, 145 U. S. 105, 12 Sup. Ct. 795, 36 L. Ed. 690; *Railroad Co. v. Humphreys*, 145 U. S. 82, 12 Sup. Ct. 787, 36 L. Ed. 632. In *Thomas v. Car Co.*, 149 U. S. 95, 13 Sup. Ct. 824, 37 L. Ed. 663, it is declared that indebtedness for necessary supplies can seldom be allowed priority to the mortgage debt, and, whilst that case allowed priority to claims for rental of cars by and during the receivership, it disallowed such priority to rental of cars prior to the receivership. In *Morgan's L. & T. R. & S. S. Co. v. Texas Cent. R. Co.*, 137 U. S. 171, 45 Am. & Eng. R. Cas. 631, 11 Sup. Ct. 61, 34 L. Ed. 625, the supreme court refused priority out of proceeds of the sale of a railroad to one who had advanced money to pay operating expenses of a railroad prior to the receivership. If contracts of this character have no priority, surely damages for tort have none, unless such priority is secured by the statute laws of the state.

This brings us to the discussion of section 1255, Code of North Carolina. This section is in these words:

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"Mortgages of incorporate companies upon their property or earnings, whether in bonds or otherwise, hereafter issued, shall not have power to exempt the property or earnings of such incorporations from execution for the satisfaction of any judgment obtained in the courts of the state against such incorporation, for labor performed, nor for materials furnished such incorporation, nor for torts committed by such incorporation, its agents or employees, whereby any person is killed or property injured, any clause or clauses in such mortgage to the contrary notwithstanding."

This statute, being a statute of the state of North Carolina, can only operate upon property within that state. It will be noted that this section gives priority over a mortgage executed by a corporation to a judgment obtained against the mortgagor corporation, and declares that neither the property nor earnings of such mortgagor corporation are exempt from execution for the satisfaction of a judgment. It appears that in the case at bar the Norfolk & Western Railroad Company had a lease of the Roanoke & Southern Railway, its property and franchises. Prior to this lease all the property and franchises of the Roanoke & Southern Railway Company had been mortgaged to the Mercantile Trust & Deposit Company of Baltimore, this mortgage bearing date March 16, 1892. The lease was subordinate to the mortgage. On the 29th May, 1896, the Mercantile Trust & Deposit Company of Baltimore filed its bill for foreclosure of this mortgage against the Roanoke & Southern Railway Company, the mortgagor and lessor, and the Norfolk & Western Railroad Company, the lessee; and on the same day F. J. Kimball and Henry Fink were appointed receivers of the Roanoke & Southern Railway Company, and were put in possession of all its property and franchises, thus displacing and superseding the lease. This bill of foreclosure culminated in a decree for sale. Under this decree all the property and franchises of the Roanoke & Southern Railway Company were sold, the sale was confirmed by the court, and on the 25th November, 1896, a deed sextipartite was executed, Messrs. Bowden and Sharp, special masters of the court, being of the first part, Kimball and Fink, receivers of the Roanoke & Southern Railway Company, of the second part, the Mercantile Trust & Deposit Company, of Baltimore, trustee under said mortgage, of the third part, the Roanoke & Southern Railway Company, of the fourth part, certain other persons (Glyn and others), of the fifth part, and the Norfolk, Roanoke & Southern Railroad Company, of the sixth part; whereby the whole of the property and franchises of the Roanoke & Southern Railway Company was conveyed to the party of the sixth part in fee. So that it appears that when the judgment of Gideon Hampton against the Norfolk & Western Railroad Company was obtained (February 22, 1897) the lease of the Norfolk & Western Railroad Company had been displaced by the proceedings for the foreclosure of

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a mortgage prior to the lease, and that on the day the judgment was entered the whole property of the Roanoke & Southern Railway Company had for nearly six months been conveyed to another wholly distinct corporation, in whose property and earnings at the date of the judgment the Norfolk & Western Railroad Company had no interest whatever. There was, therefore, no property upon which this section of the Code could operate, over which the Norfolk & Western Railroad Company had given a mortgage, or in whose earnings it shared,—nothing which could be taken in execution. The record does not disclose any other property of the Norfolk & Western Railroad in North Carolina, covered by mortgage, to which section 1255 of the Code of North Carolina can apply. The only other property in North Carolina in which the Norfolk & Western Railroad Company had an interest,—the Durham Division,—like the Roanoke & Southern, was held under a lease from the Lynchburg & Durham Railroad Company to the Norfolk & Western Railroad Company, subsequent to and subordinate to a mortgage of the lessor company. This mortgage was foreclosed in 1896. So at the entry of this judgment the Norfolk & Western Railroad Company had lost all estate and interest in the Durham Division and its earnings.

The petition of intervention is dismissed.

BANK OF COMMERCE *et al.* v. CENTRAL COAL & COKE CO. *et al.*

(Circuit Court of Appeals, Eighth Circuit, April 14, 1902.)

[115 Fed. Rep. 878.]

Railroads—Foreclosure of Mortgage—Priority as between Receiver's Certificates.

It is the duty of the court to pay indebtedness which it has authorized its receiver to contract in the administration of railroad property, before any indebtedness of the company, from the proceeds of the property, and receiver's certificates representing such indebtedness are entitled to priority of payment over those issued by order of the court for preferential debts of the company.

Same—Construction of Decree.

A provision of a decree foreclosing a railroad mortgage, and directing a sale of the property, that the fund arising therefrom, after payment of costs, etc., shall be applied "(3) to the payment of all interventions or other claims heretofore or hereafter to be allowed * * * as superior to the lien of the bonds, * * * or, if the fund realized be not sufficient to pay the same, then to the payment of the same pro rata," does not apply to receiver's certificates issued by direction of the court in payment of indebtedness it has itself contracted in the operation of the property, but should be construed as referring only to claims against the railroad company; and it does not put it out of the power of the court to thereafter deal with the question of the priority of such certificates under a general provision of the decree passing the cause "for further orders."

Appeal from the Circuit Court of the United States for the Eastern District of Arkansas.

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John M. Taylor (P. C. Dooley, Morris M. Cohn, and J. G. Taylor, on the brief), for appellants.

W. C. Perry (Samuel H. West, on the brief), for appellees.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge. The Farmers' Loan & Trust Company filed a bill against the Stuttgart & Arkansas River Railway Company to foreclose a mortgage on the company's road. A receiver was appointed to operate the road pending the foreclosure proceedings. The order appointing the receiver authorized him to pay certain debts of the railroad company incurred for labor, materials, and supplies prior to the appointment of the receiver. Subsequently the court authorized the receiver to issue certificates for such indebtedness, which were declared to constitute a lien on the road paramount and superior to the lien of the mortgage in suit. The certificates issued under this order are known as "Class B." The court made an order authorizing and directing the receiver to borrow money to pay the taxes on the road, and to construct a Y, and make needed repairs on the engines and cars on the road; and for the debts incurred in complying with this order he was authorized to issue certificates which were declared to constitute a lien on the road superior and paramount to that of the mortgage in suit. The certificates issued by the receiver for expenses incurred by him under this order of the court are known as "Class A." It will be observed that the indebtedness for which the receiver's certificates in class A were issued was contracted by the receiver in compliance with an order of the court. This indebtedness was incurred by the court while it had the possession and custody of the road, and was operating it, through its receiver. Properly speaking, the certificates issued by the receiver for this indebtedness are the obligations of the court issued for debts incurred by the court itself in the operation of the road and the administration of the trust. The certificates embraced in class B were issued for the debts incurred by the railroad company prior to the appointment of the receiver, but which were declared to be paramount and superior in right of payment to the mortgage debt. The lower court held that the certificates in class A should be paid in preference to the certificates in class B. The opinion of the circuit court is reported in *Farmers' Loan & Trust Co. v. Stuttgart & A. R. R. Co.* (C. C.) 106 Fed. 565. The appellants contend that all the certificates stand on the same footing, and should be paid pro rata.

When the debts of the railroad company were contracted, the credit was given to the railroad company. The creditors extended the credit to the company with the full knowledge of all the risks incident to extending credit to a railroad company, among which may be mentioned the insolvency of the

company, the appointment of a receiver therefor, and the right and authority of the court appointing the receiver to incur debts in the operation of the road which would have the preference right of payment over any and every class of indebtedness of the railroad company. On the other hand, when the debts of the receiver were contracted in pursuance of the order of the court the credit was given to the court. The railroad company was not liable for such indebtedness. The creditors knew they must look to the court alone for payment, but they also knew that it was the duty of the court contracting this indebtedness to discharge the same if the property or its proceeds in its custody and possession was adequate to that purpose. Debts contracted by the railroad company on its credit, although they belong to the class called "preferential," do not rank on the same high plane with debts contracted by the court on its credit; and, where the property or fund in the custody and control of the court is not adequate to pay both classes, preference will be given to the debts contracted by the court. The obligations of the railroad company to pay its debts is not affected by the receivership and foreclosure. It retains its corporate existence, and its creditors may still pursue it, and in some cases its officers and stockholders. But it is not so with the debts contracted by the court. They are not debts of the railroad company, and the company is not liable for them. The court alone is liable for its debts. That obligation imposes on the court the duty to apply the property or its proceeds in its custody and control to the payment of the debts contracted by it in and about the management of the property. Judicial repudiation of obligations is not to be sanctioned under any conditions. One of the chief duties of courts of justice is to compel delinquent debtors to pay their debts. It could do this with poor grace indeed if it neglected to pay its own debts when it had the means to do so. It is true that the errors and mistakes of courts, though they may ruin a citizen, are placed in the category of injuries produced by the law, and for which the law furnishes no redress. But here the court has committed no error or mistake, and has it in its power to protect its contracts and its credit, and do justice to the citizens who trusted it. While a court cannot be adjudged a bankrupt, and no proceedings can be taken against it to enforce payment of its obligations, these very facts make it all the more important that it should scrupulously observe its obligations to the citizen. A court that would fail to do this would speedily and justly forfeit the respect and confidence of the public. We conclude, therefore, that the lower court was right in ordering the payment of the receiver's certificates issued for the court's debts in preference to those issued for the company's debts, though those debts were declared to be preferential. *Dow v. Railroad Co.* (C. C.) 20 Fed. 260, 17 Am. & Eng. R. Cas. 324; *Mercantile Trust Co. v. Farmers'*

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Loan & Trust Co., 26 C. C. A. 383, 81 Fed. 254; *Miltenerberger v. Railroad Co.*, 106 U. S. 311, 1 Sup. Ct. 140, 27 L. Ed. 117, 12 Am. & Eng. R. Cas. 464; *Butler v. Cockrill*, 20 C. C. A. 122, 73 Fed. 945, 953; *Bank v. Ewing*, 43 C. C. A. 150, 103 Fed. 168.

But it is said, while the court might originally have given this preference, it was foreclosed from doing so by the terms of the final decree of foreclosure, which, it is claimed, put all the receiver's certificates on an equality. We do not so construe the decree. The clauses of the decree on which this contention rests read as follows:

"It is also ordered, adjudged, and decreed that the lien of said mortgage is prior to any other lien in favor of any party to this cause, except so far as this court has heretofore ordered certain intervening claims paid by S. W. Fordyce, the receiver herein, and has, by certain decrees and orders of this court heretofore entered herein, declared such claims, and judgments entered thereon, to be paramount and superior to the lien of the mortgage described in the bill of complaint herein, as shown by the records of this court in this case, reference thereto will more fully appear; and except, also, to the interventions of S. R. Cockrill, receiver of the First National Bank of Little Rock, Arkansas, the Arkansas Supply Company, A. C. Barstow, executor and trustee, three separate interventions for \$5,000, cash advanced; \$2,108.96, taxes paid; and on account of Illinois Steel Company, four notes, each for \$1,650.96. *The question as to the priority of the lien of each of the claims or interventions above described being passed for further consideration and decree of this court.* It is further ordered and decreed that the fund to arise from said sale shall be applied as follows: (1) To the payment of all proper expenses attendant upon said sale, including the expenses, outlays, and compensation of the master commissioner to make said sale, as such expense, outlays, and compensation may be hereafter fixed and allowed. (2) To the payment of the costs of this suit, and the compensation of the plaintiff herein for its services, charges, and expenses in the execution of its trust under said mortgage so made to it as aforesaid, including its own compensation and commissions, and its disbursements for solicitor's and counsel fees in the execution of said trust, as such charges, expenses, and compensation may be hereafter fixed and allowed by this court. To the payment of all interventions or other claims heretofore or hereafter to be allowed by this court in this case as superior to the lien of the bonds mentioned in mortgage foreclosed hereby; if the fund realized be not sufficient to pay the same, then to the payment of same pro rata."

We think the clause of the decree which we have italicized was intended to reserve the question of priority between the several classes of debts contracted by the railroad company having preference over the mortgage debt. If the clause of

the decree we have italicized included the debts contracted by the receiver under the order of the court, then the question of priority between these debts and the other debts mentioned in the decree was expressly reserved for further consideration; and, if such debts were not included in this clause of the decree, then they were unaffected by it, and it remained for the court to order and direct their payment according to the principle we have indicated should apply to such debts.

Touching the "(3)" clause of the decree, we think it refers to the debts of the railroad company which had been or might thereafter be allowed and given a preference over the mortgage debt,—in other words, to the class of debts contracted by the railroad company which are commonly called "preferential." It was obvious to the court and to the parties when this decree was rendered that the property or its proceeds would not be adequate to pay the costs of foreclosure, the debts of the receiver contracted by order of the court, and the debts of the railroad company which had been or might be adjudged to be preferential, and this fact accounts for this clause of the decree. The term "interventions," in this clause of the decree, was not appropriate to describe the receiver's certificates embraced in class A. When the court makes an order authorizing its receiver to incur a debt, and issue a receiver's certificate for the same, and the receiver, in compliance with such order, contracts the debts and issues his certificate therefor, no petition of intervention and no further order are necessary to establish that debt or its preferential character. That was done by the order of the court authorizing and directing the receiver to contract the debt and issue the certificate. A debt thus contracted is an audited claim from its inception. It then becomes the duty of the court to make suitable provision for the payment of such debt, which is, in effect, as we have seen, a debt of the court.

But a further answer to the contention of the appellants that the decree of foreclosure put it out of the power of the court to subsequently deal with the question of the order of payment of the receiver's certificates is found in the last clause of the decree, which gives to the parties the right to "apply to the court for further orders and directions at the foot of this decree, and this cause is passed for further orders." We think the retention of the cause "for further orders" authorized the court to make any further appropriate order on the subject of the receiver's certificates.

The circuit court held that the certificates in class A fell within the provisions of section "(2)" of the decree, and should be paid as part of the costs and expenses of the receivership under this clause. We do not find it necessary to discuss or decide that question.

The decree of the circuit court is affirmed.

ATLANTA, K. & N. RY. CO. *v.* WILSON.

(*Supreme Court of Georgia, Aug. 8, 1902.*)

[42 S. E. Rep. 356.]

Railroads—Actions for Injuries—Venue.

A suit against a railroad company for injuries sustained in a foreign state on account of the negligence of the agents and servants of the company in that state, if brought in this state must be brought in the county where the principal office of the company is located by its charter, no different provision having been made by the general assembly. This is true although the company may have established branch offices in another county, and its secretary, treasurer, and auditor, its traffic manager, and its general manager reside in that county, and from the offices there conduct the active management of the company.

(Syllabus by the Court.)

Error from superior court, Cobb county; Geo. F. Gober, Judge.

Action by L. M. Wilson, administratrix, against the Atlanta, Knoxville & Northern Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

Smith, Hammond & Smith, for plaintiff in error.

Clay & Blair, Hoke Smith, and H. C. Peebles, for defendant in error.

UNITED STATES *v.* CHICAGO, M. & ST. P. RY. CO. *et al.*

(*Circuit Court of Appeals, Eighth Circuit, June 16, 1902.*)

[116 Fed. Rep. 969.]

Public Lands—Suit by United States for Cancellation of Patent—Defenses.

Where a patent has been issued to a railroad company for land to which an individual had acquired a prior right under the homestead law, the United States is under an obligation to convey the land to the rightful claimant, which entitles it to maintain a suit to cancel the patent, but in such suit, which is in fact one between private parties, involving no public interest or right, the court may properly take into consideration the equities as between the real parties in interest.

Same—Suit for Benefit of Private Person—Defense of Laches.

At the time of the passage of an act making a railroad grant, and of the withdrawal thereunder of the lands within its limits from entry, a certain tract within the indemnity limits was covered by a valid homestead filing. This filing was subsequently cancelled on a contest, and the contestant then sought to file a homestead claim thereon, but was denied the right, by the local land office, on the ground that the land had been withdrawn under the railroad grant. The land was afterward selected by the railroad company as indemnity land, and was patented as such, and sold by the company to a purchaser who had no knowledge or notice of the homestead claim, which was not of record. After the purchaser and his grantees had been in possession for 16 years, and had paid for the land, suit was brought, by the United States against the railroad company and its grantees, to cancel the patent, for the benefit of the homestead applicant. It was 30 years after the original sale of the land by the company before subpoena in the suit was served on its grantees. Under the statute of the state, an action at law to recover land was defeated by 15 years' adverse possession:

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held, that the knowledge of the homestead claimant of the existence of his claim during the years the land was held by defendants was attributable to the United States, and that its right to maintain the suit in his interest was barred by laches.

Appeal from the Circuit Court of the United States for the District of Minnesota.

On March 6, 1893, the United States filed their bill of complaint in the above action against the Chicago, Milwaukee & St. Paul Railway Company, the Southern Minnesota Railway Company, Michael Donovan, Thomas S. Thompson, and O. C. Erichsrud. Service of subpoena was made upon the railway companies and Donovan, and on August 11, 1894, said companies answered the bill. Donovan did not answer the bill till March 6, 1901, and then by his answer confessed the same, and prayed that the relief asked for might be granted. On March 4, 1901, a supplemental bill was filed by the United States in said action, wherein it was stated that no service had ever been made upon Thompson or Erichsrud, and that no testimony had ever been taken in the cause; that O. C. Erichsrud had departed this life since the commencement of the action, leaving, surviving him, Anna Erichsrud, his widow, Addie J. Erichsrud, Mabelle Erichsrud, and Julia P. Erichsrud, his children and only heirs at law, and that on June 24, 1899, said heirs had joined in a deed of the land in question to Louis K. Woodwick. Process was prayed against these last-named defendants, and on May 2, 1901, Anna Erichsrud, Addie J. Erichsrud, Mabelle H. Anderson (formerly Erichsrud), (Julia P. Remington (formerly Erichsrud), and Louis K. Woodwick answered the bill and supplemental bill. This action was commenced by the United States for the purpose of having the E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of section 35, township 101, range 28, fifth P. M., Minnesota, restored to the United States, upon the ground that the land had been improperly certified to the state of Minnesota as a part of the indemnity lands of the land grant of July 4, 1866, made in aid of the Southern Minnesota Railway Company, for the reason that, prior to the passage of the land grant act of July 4, 1866, a homestead claim had been filed upon said land by one Luman Barkley. The material facts, as shown by the pleadings and proofs, are as follows: The land is within the indemnity limits of the act of July 4, 1866 (14 Stat. 87). The withdrawal of lands along that portion of the Southern Minnesota Railroad extension opposite said land was ordered August 23, 1866, and the order received by the district land office September 10th following. November 29, 1870, the Southern Minnesota Railroad Company selected the tract of land in controversy in lieu of land lost in the granted limits of the act of July 4, 1866, and the land department certified said land to the state of Minnesota for the benefit of said railroad company March 25, 1871. The state of Minnesota conveyed said land to said railroad company August 8, 1871. The land was sold under a mortgage foreclosure to A. P. Mann and H. H.

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Camman in February, 1877. It was conveyed by Mann and Camman to the Southern Minnesota Railway Company March 3, 1877. It was conveyed by said railroad company to O. C. Erichsrud March 20, 1888. November 6, 1898, it was decreed by the probate court of Faribault county, Minn., to Anna Erichsrud, Addie J. Erichsrud, Mabelle H. Anderson, and Julia P. Remington, as heirs at law of O. C. Erichsrud, deceased. May 24, 1899, these heirs at law conveyed the same to the defendant Louis K. Woodwick, for the sum of \$2,000 cash. On June 21, 1866, Luman Barkley, a person duly qualified to acquire lands under the homestead law of the United States, duly made entry as a homestead of the land in controversy, together with an adjoining tract of 80 acres in section 26. January 14, 1868, the entry of Barkley was canceled on account of the abandonment of the land by Barkley. June 6, 1868, Michael Donovan entered as a homestead the 80-acre tract in section 26, and subsequently received patent for the same. It was in pursuance of a contest initiated by Michael Donovan in 1867 that Barkley's entry was canceled. When Michael Donovan was notified by the local land office that Barkley's entry was canceled, he, about June 6, 1868, applied to enter the tracts of land of 80 acres each in sections 35 and 26, respectively. Donovan was allowed to enter the tract in section 26, but was informed by the local office that the tract in section 35, the land in controversy, had been withdrawn from sale for the reason that it was within the indemnity limit of the land grant contained in the act of July 4, 1866. Donovan made no written application in June, 1868, to enter the tract in section 35. When Donovan initiated the contest against Barkley in 1867, he signed a paper which was called an application to enter the land in controversy. This paper was in blank as to date, and it was undoubtedly to be properly filled out when Barkley's entry should be canceled, but when the entry was canceled this paper was destroyed, as it was claimed the land was not subject to entry for the reasons herein stated. Donovan used the land in controversy, in connection with his homestead in section 26, till 1885, when one Thompson went into possession of the same as assignee of a contract made by the Southern Minnesota Railway Company, and under and in pursuance of which title to the land was finally conveyed to Erichsrud. Donovan has not been in possession of the land since 1885.

John M. Gilman (Milton D. Purdy, on the brief), for appellant.

Burton Hanson and W. H. Norris, for appellees railway companies.

Andrew C. Dunn, for appellees Erichsrud, Anderson, Remington, and Woodwick.

Before SANBORN and THAYER, Circuit Judges, and CARLAND, District Judge.

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CARLAND, District Judge, after stating the foregoing facts, delivered the opinion of the court.

The claim of the United States is this: At the time of the withdrawal of indemnity lands along the line of the Southern Minnesota Railway Company opposite the land in question, to wit, on September 10, 1866, there was a valid homestead filing on the land in question, made by Luman Barkley on June 21, 1866. That the cancellation of Barkley's entry on January 14, 1868, left the land in controversy open to selection by any legal applicant. *Ryan v. Railroad Co.*, 99 U. S. 382, 25 L. Ed. 305; *Wisconsin Cent. R. Co. v. Price Co.*, 133 U. S. 496, 10 Sup. Ct. 341, 33 L. Ed. 687. That as Michael Donovan applied to enter the land in June, 1868, and was wrongfully refused so to do by the local land office, that Donovan still is entitled to enter the land for the reason that the Southern Minnesota Railway Company did not select the same as indemnity land until November 29, 1870. There is no question but that the United States can commence and maintain this action, so far as its right to do so is concerned. *Van Wyck v. Knevals*, 106 U. S. 360, 1 Sup. Ct. 336, 27 L. Ed. 201; *U. S. v. San Jacinto Tin Co.*, 125 U. S. 273, 8 Sup. Ct. 850, 31 L. Ed. 747; *U. S. v. Missouri, K. & T. R. Co.*, 141 U. S. 358, 12 Sup. Ct. 13, 35 L. Ed. 766; *U. S. v. Oregon & C. R. Co.*, 101 Fed. 316; *U. S. v. Winona & St. P. R. Co.*, 15 C. C. A. 117, 67 Fed. 969; chapter 376, § 2, 24 Stat. 556. But as it conclusively appears by the record in this case that the United States has no interest in the land itself, and that the whole object of the action is to restore the land to the United States in order that it may convey it to Donovan, the case falls within the rule announced in *U. S. v. Beebe*, 127 U. S. 338, 8 Sup. Ct. 1083, 32 L. Ed. 121, wherein Justice Lamar uses the following language:

"We are of the opinion that when the government is a mere formal complainant in a suit, not for the purpose of asserting any public right, or protecting any public interest, title, or property, but merely to form a conduit through which one private person can conduct litigation against another private person, a court of equity will not be restrained from administering the equities existing between the real parties by any exemption of the government designed for the protection of the United States alone."

The fact that this action is claimed to have been brought under the act of March 3, 1887 (24 Stat. 556), cannot affect this rule. The act referred to simply confers the right to bring this action after demand and refusal to convey. It does not say that the government shall recover in any event. If this had been the object of congress, it would have been easier to have divested the title by the act itself, without going into court, which, of course, could not have been done. Conceding, but not deciding, that the facts show that Donovan obtained a right to the land in controversy superior to the

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Southern Minnesota Railway Company, still we are of the opinion that these same facts disclose a case where the doctrine of laches should be applied. This land was certified to the state of Minnesota March 25, 1871, 22 years, lacking a few days, prior to the commencement of this action against the railway companies. The Erichsrud heirs and Woodwick were not brought into the suit by supplemental bill till March 4, 1901, 30 years after said certification. This action could have been commenced by the United States at any time after the date of certification, and Donovan's knowledge of his claim to this land must be held in this action to be the knowledge of the United States. Donovan was out of possession of the land 16 years prior to the commencement of this suit against the Erichsrud heirs and Woodwick. By section 5134, Gen. St. Minn. 1894, actions for the recovery of real estate are limited to a period of 15 years from the last possession of the plaintiff or his ancestor or grantor. This court in the case of *Kelley v. Boettcher*, 29 C. C. A. 14, 85 Fed. 62, exhaustively discussed the rules which govern the application of the doctrine of laches. Without repeating what is there said, we may state on the authority of the case referred to, and the authorities therein cited, that the settled rule is that courts of equity are not bound by, but that they usually act or refuse to act in analogy to, the statute of limitations relating to actions at law of like character, and that, when a suit is brought after the statutory time has elapsed, the burden is on complainant to show, by proper averment and proof, that it would be inequitable to apply the doctrine of laches to his case. We think that the evidence in this case not only does not show that it would be inequitable to apply the doctrine of laches, but, on the contrary, the evidence shows that in equity and good conscience it ought to be applied. O. C. Erichsrud, as assignee of the contract held by Thompson, paid the balance due on the contract to the Southern Minnesota Railway Company, and received a deed for the land in controversy March 20, 1888. At this time Erichsrud seems to have had no notice of the claim of Donovan. Donovan was out of possession, and there was no claim of record. On May 24, 1899, when Woodwick purchased the land from the Erichsrud heirs, paying \$2,000 therefor, O. C. Erichsrud had not been served with subpoena, and the heirs were not parties to this action. If Erichsrud was an innocent purchaser, then Woodwick obtained whatever title Erichsrud could convey. This suit, at the time Woodwick purchased, was not lis pendens, as Erichsrud had not been served with subpoena. *Murray v. Ballou*, 1 Johns. Ch. 566; *Union Trust Co. v. Southern Inland Nav. & Imp. Co.*, 130 U. S. 570, 9 Sup. Ct. 606, 32 L. Ed. 1043. It is claimed that Woodwick cannot be an innocent purchaser for the reason that he or his grantors never had the legal title. Whether the certification of the land in question under the facts as they appear in this case

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carried the legal title, or whether Woodwick can be said to be in a technical sense an innocent purchaser, we do not care to determine. He certainly occupies a position which appeals to a court of equity to such an extent as to justify this court in refusing relief after the statute of limitations at law has run.

The decree below was for the right party, and is affirmed.

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FARMERS' LOAN & TRUST CO. *v.* CENTRAL R. & BANKING CO. OF GEORGIA *et al.*

(*Circuit Court, S. D., Georgia, E. D., March 29, 1901.*)

[116 Fed. Rep. 700.]

Equity—Procedure—Intervention under General Order of Court.

Where the court, in litigation involving the distribution of the proceeds of the property of an insolvent railroad company sold under its decrees, made an order requiring all creditors of the company to appear before a master and prove their claims, it cannot be objected that a creditor, asserting a right to preferential payment over other claims from funds in the hands of the court, proceeds by intervention under such order, rather than by an original bill.

Negotiable Bonds—Defenses—Rights of Purchaser from Bona Fide Holder.

A purchaser of outstanding negotiable bonds, from one who was a bona fide holder for value before maturity without notice of an infirmity therein, takes all the rights of the seller, although the second purchaser may have had notice of such infirmity when he bought; and it is immaterial that he purchased after maturity.

Same—Purchase after Default in Payment of Interest.

Negotiable bonds are not dishonored, so as to affect the equities of a purchaser, because at the time of his purchase he had knowledge that there had been default in the payment of interest thereon.

Railroad Bonds—Enforcement against Sinking Fund in Hands of Trustee—Defenses.

The question whether or not a guaranty of the bonds of one railroad company by another was ultra vires is immaterial, in a proceeding by a holder to enforce payment of such bonds from a sinking fund which the company issuing them had paid into the hands of the guarantor as trustee for their redemption at maturity; nor is it any defense to such proceeding that the guarantor was without legal power to undertake the duties of trustee.

Railroad—Distribution of Assets in Insolvency—Trust Fund.

A railroad company guarantied the second mortgage bonds of another company, which it controlled, and required the latter to deposit with it as trustee a certain sum each year to create a sinking fund for the payment of the bonds at maturity. Both companies became insolvent, and their property was sold under decrees of foreclosure. A certain part of the guarantor's property, which was not covered by mortgage, was sold separately, and the proceeds were set aside by the court as a fund for unsecured creditors, who were directed to prove their claims before the master: *held*, that holders of unpaid guarantied bonds were entitled in equity to have so much of such proceeds as equaled the accumulated sinking fund treated as a trust fund and applied to the payment of their bonds, as against the holders of deficiency judgments taken in the foreclosure suits against the guarantor.

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In Equity. Consolidated causes. On intervention of Robert S. Adams and the Charleston & Western Carolina Railway Company. Exceptions to master's report.

Augustine T. Smythe, A. M. Lee, and Anton P. Wright, for interveners.

Henry C. Cunningham and Alexander R. Lawton, for Central of Georgia Ry. Co.

SPEER, District Judge. Robert S. Adams and the Charleston & Western Carolina Railway Company have brought interventions in the consolidated causes above mentioned for the following purpose:

Robert S. Adams seeks to obtain payment of 2 second mortgage bonds issued by the Port Royal & Augusta Railway Company, numbered 78 and 80, each for the sum of \$500, dated the 1st day of May, 1882. The Charleston & Western Carolina Railway Company seeks to obtain payment of the amount due on 79 similar bonds.

It appears from the record that the second mortgage bonds of the Port Royal & Augusta Railway Company were issued on the 1st day of May, 1882. They amount in all to \$150,000. At that time the Port Royal & Augusta was under the control of the Central Railroad & Banking Company of Georgia, which directed the operation of its physical properties and all of its financial undertakings. The Port Royal & Augusta was embarrassed and had but little credit, and in order to float these bonds the Central Railroad & Banking Company of Georgia guarantied their payment. The terms of the guaranty were as follows:

"For value received the Central Railroad & Banking Company of Georgia does hereby covenant and agree with the holder of the bond for the time being that the said Port Royal & Augusta Railway Company will pay the principal of said bond at maturity and the interest coupons attached thereto as they severally become due, according to the tenor thereof, and in case of default by said Port Royal & Augusta Railway in payment of principal and interest the Central Railroad & Banking Company of Georgia will pay the same. In witness whereof the Central Railroad & Banking Company of Georgia has caused its corporate seal to be hereto attached and its guaranty to be signed by its president and countersigned by its cashier."

This guaranty is signed by William M. Wadley, president, under the seal of the indorsing corporation. Having been given a marketable value by this guaranty, these bonds were sold, and purchased by a number of persons, who paid value therefor, and bought in good faith, without knowledge or suspicion of any want of validity in the guaranty, if, indeed, it is invalid. Among these were the intervener Robert S. Adams, who bought the two bonds he has proven. Other purchasers were Simon Borg & Co., Francis R. Appleton,

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Abram S. Hewitt, executor, and Robert M. Ogden. It cannot be fairly contended, and is, indeed, undisputed, that these were innocent purchasers in good faith in open market and for a fair consideration. It further appears that Thomas & Ryan, a partnership dealing largely in railroad securities, bought all of these bonds held by the purchasers mentioned, save those held by the intervener Robert S. Adams. This appears from a schedule of the bonds submitted in evidence with the distinguishing numerals of each attached. These bonds thus purchased by Thomas & Ryan were by them assigned to the Charleston & Western Carolina Railway Company, the intervening corporation. The Port Royal & Augusta Railway Company, the principal obligor of these bonds, has been long insolvent and has been sold under mortgage foreclosure. The same fate has visited the Central Railroad & Banking Company of Georgia. The properties of these corporations, by judicial orders, decrees, and sales, have been transferred to other corporations. The former properties of the Central Railroad & Banking Company of Georgia are now held and operated by the Central of Georgia Railway Company. The properties of the Port Royal & Augusta Railway Company were held and operated for a time by the intervening corporation, the Charleston & Western Carolina Railway Company, which has in turn passed under the control of the system known as the "Atlantic Coast Line." These results were accomplished in the main through the process known as "reorganization."

Enormous judgments, aggregating many millions of dollars of indebtedness of various descriptions, were taken against the Central Railroad & Banking Company of Georgia. Many of these judgments long antedate the decree of the circuit court for the district of South Carolina which ascertained the amount due on these bonds by the Port Royal & Augusta Railway Company, as principal, and the Central Railroad & Banking Company of Georgia, as guarantor, and the subsequent finding of the standing master. It is obviously true that if the liens of such judgments, aggregating in the neighborhood of \$17,000,000, are to be treated as superior to the lien of the interveners, their demand for payment of their bonds must be denied. It is, however, true that, pending litigation, the court, the circuit judge, the Honorable Don A. Pardee, presiding, attempted to make provision for the payment of debts due by the Central Railroad & Banking Company of Georgia to creditors whose demands had not been included in the large judgments above mentioned, which were taken practically by consent in the process of reorganization. With this purpose, about the 19th of October, 1898, certain assets belonging to the said Central Railroad & Banking Company of Georgia, which were not included or covered by the terms of any mortgage on the property of said company, were ordered to be sold by a special master. The order pro-

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vided that all claims of every nature whatsoever against the Central Railroad & Banking Company of Georgia or the receivers thereof were to be referred to Geo. W. Owens, standing master of this court, who was directed as special master to publish in the city of Savannah a notice calling upon all creditors to prove their claims. The property which had escaped the liens of the gigantic mortgages, which by creation or indorsement had been placed in rapid succession on the property of this ill-fated corporation, and which quite inaccurately has been termed the "overflow property," were sold for the sum of \$266,000 by the special master designated for that purpose. This sum resulting from this sale, pursuant to the order of Judge Pardee, was intrusted to the custody of the Central of Georgia Railway Company. It was, however, distinctly set apart by the court to be divided among the creditors of the Central Railroad & Banking Company of Georgia whom the master should find were duly entitled thereto. The interveners now before the court have filed their intervention, setting out the facts relative to their ownership of the bonds of the Port Royal & Augusta Railway Company as above stated, and asking that their petition be referred to the special master whose duty it was to inquire into such outstanding claims, that he might proceed, conformably to the order of the court above set forth, to ascertain and make effective their demands against the fund thus set apart by the court. Becoming apprehensive, however, that the master would subject the said sum of \$266,000 to the large judgments, obtained in the process of reorganization, particularly to the judgment of \$7,250 for a deficiency on certain bonds of the Central Railroad & Banking Company of Georgia, known as the "consolidated mortgage bonds," which bonds had been issued to secure a floating indebtedness of about \$4,000,000, interveners applied to the court upon a petition in the main cause and obtained an order directing the master to withhold further action in hearing and reporting on the matters involved until a hearing by the court could be had. This order was of force when counsel for the interveners and for the Central of Georgia Railway Company entered into the stipulation following:

"Petition of Robert S. Adams and C. & W. C. Railway Company."

"It is stipulated between counsel that in the references to be held before Geo. W. Owens, as special master, under order of this court bearing date the 19th day of October, 1898, Robert S. Adams and the Charleston & Western Carolina Railway Company, creditors of the Central Railroad & Banking Company of Georgia, by virtue of its indorsement and guaranty upon certain second mortgage bonds of the Port Royal & Augusta Railway Company, shall be at liberty to contest the claim of the Central of Georgia Railway Company to any right to share in any of the proceeds of the overflow

assets by reason of the claim of the Oglethorpe Savings & Trust Co., trustee, against the Central Railroad & Banking Co. of Georgia, in the sum of \$251,981.30, and also by reason of the claim of the Central Trust Company of New York against the Central Railroad for the amount of \$7,250,000, with interest, on the consolidated mortgage bonds of the said Central Railroad & Banking Co. of Georgia, irrespective of the fact that an order was taken in the first-mentioned claim, to wit, the claim of the Oglethorpe Savings & Trust Co., trustee, on the 13th of March, 1899, and in the second-mentioned claim of the Central Trust Company by virtue of an order dated the 10th day of May, 1898, by which orders a deficiency was declared to exist in favor of the said trustees on the said mortgage bonds, and that no claim will be interposed that the said parties are precluded from making any and all such objections as they may see proper against the said claims because of the taking of the said orders; and in view of this stipulation no further proceedings will be had under the petition of Robert S. Adams and the Charleston & Western Carolina Ry. Co. filed herein, and that the restraining order granted by Judge Speer on that petition be rescinded; and that said master, Geo. W. Owens, Esq., shall proceed and make his report to the court with all convenient speed as to the distribution of the funds arising from the sale of the property and assets of the Central Railroad & Banking Company of Georgia now for distribution.

"Smythe, Lee & Frost, Anton P. Wright, for Adams and C. & W. C. R. R.

"Lawton & Cunningham, Attys. for Central of Ga. Ry. Co."

This stipulation, it will be observed, relates distinctly to the interventions now before the court, and, in consideration of the vacation by consent of the restraining order to the master above referred to, not only concedes to counsel for interveners the liberty to contest the claim of the Central of Georgia Railway Company to any right to share in any of the proceeds of the "overflow assets" by reason of the several large judgments above referred to, but also agrees "that the master, Geo. W. Owens, Esq., shall proceed to make his report with all convenient speed as to the distribution of the fund arising from the sale of the property and assets of the Central Railroad & Banking Company of Georgia now for distribution." Pursuant to the original order of his honor, Judge Pardee, and to this stipulation of counsel, ample and, indeed, copious answers were filed, and the master has considered the evidence, heard the arguments of counsel for both parties, and made his report. In view of the tremendous magnitude of the record, the report of the master is necessarily voluminous; but it will suffice to say that he finds the Central of Georgia Railway Company liable for the principal and interest due on the bonds before the court upon two grounds, namely: That they are entitled to payment from the fund resulting from the sale

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of the unpledged property, called the "overflow assets," and, again, because it appears from the record that when the Central Railroad & Banking Company of Georgia affixed its guaranty to the second mortgage bonds of the Port Royal & Augusta Railway, a provision was made for a sinking fund to meet those bonds, of which the president of the Central was made the trustee, and as such trustee he actually received in cash from the Port Royal & Augusta Railway Company a sum which, principal and interest, now amounts to \$105,000, upon which sum the interveners hold in their proven bonds a lien possessing the highest equity. To the report of the master the Central of Georgia Railway Company has filed numerous exceptions. It is found convenient to consider these in the order in which they were discussed in the brief of counsel for interveners.

In this order, first, we will consider the contention of counsel for the Central of Georgia Railway Company that the interventions cannot be maintained, but that the interveners should be given to an original bill in equity. Upon this exception it will suffice to say that the interveners are here by the invitation of the court, as expressed by the order of the 19th of October, 1898. In this order the honorable circuit judge has utilized the procedure heretofore afforded by standing order for the expeditious and inexpensive determination throughout the entire litigation of the claims of the great mass of the general creditors. It has afforded the respondent full opportunity to be heard, of which it has availed by extended answers and voluminous exceptions. But, if all of this were not true, the respondent must be regarded as estopped by that provision of the stipulation above set forth which agrees "that the master, Geo. W. Owens, shall proceed to make his report to the court with all convenient speed as to the distribution of the fund arising from the sale of the property and assets of the Central Railroad & Banking Company of Georgia now for distribution." It is wholly inconsistent for the respondent to agree that the master shall report as to the distribution of this fund to creditors, and deny to such creditors the right to present their claims to the master.

Exceptions from 28 to 32, inclusive, relate to the pleadings in the consolidated causes, and are apparently made for the purpose of attacking the decision of the circuit court of appeals in the case of *Railway Co. v. Paul*, 35 C. C. A. 639, 93 Fed. 878. These exceptions, therefore, present matters not appropriate for the consideration of the master, and which are also without the pale of judicial attention here. The conclusion of the circuit court of appeals in that case was affirmative of the action of this court. Had it been otherwise, it would still afford a rule for our guidance.

The exception to the finding of the master that the interveners Robert S. Adams and the Charleston & Western Carolina Railway passed the equities of bona fide holders of the

bonds proven in this proceeding is also without foundation. In the first place, under the circumstances, there is a *prima facie* presumption of good faith in favor of the holders, which respondent must overcome. *Town of Pana v. Bowler*, 107 U. S. 541, 542, 2 Sup. Ct. 704, 27 L. Ed. 424. Not only is there no attempt to do this, but it abundantly appears from the record that the holders of these bonds, Abram S. Hewitt, Simon Borg, and others, who sold them to Thomas & Ryan, were innocent purchasers *bona fide* and for value. The title of some of these purchasers dated from the original issue, and the title of all long antedated any of the litigation in these causes. If it were conceded that Thomas & Ryan had notice of the alleged infirmities in these securities, which the respondent insists has vitiated them, nevertheless, since they bought from innocent purchasers, the bonds in their hands are attended by all the equities they ever possessed. The rule is announced in *Cromwell v. Sac Co.*, 96 U. S. 59, 24 L. Ed. 681:

"Whenever a negotiable paper has passed into the hands of a party unaffected by previous infirmities, its character as available security is established, and its holder can transfer it to others with the like immunity. His own title and right will be impaired if any restriction were placed upon his power of disposition."

The court continues:

"The plaintiff, therefore, holds the bonds and the subsequent coupons as his vendor held them, freed from all infirmity attending the original issue."

In *Commissioners v. Clark*, 94 U. S. 286, 24 L. Ed. 59, the rule is otherwise expressed as follows:

"Where the first indorsee purchases an instrument before due, and pays value, without notice of any prior equities, the second indorsee, holding under the first, takes a good title, even though he had notice of such prior equities."

This rule is expressed in *Story, Eq. Jur.* § 409, as follows:

"A purchaser with notice may protect himself by purchasing the title of another *bona fide* purchaser for a valuable consideration without notice; for, otherwise, such *bona fide* purchaser would not enjoy the full benefit of his own unexceptionable title. Indeed, he would be deprived of the marketable value of such title, since it would be necessary to have public notoriety given to the existence of the prior incumbrance, and no buyer could be found, or none except at a depreciation equal to the value of the incumbrance. For the same reason, if a person who had notice sells to another who had no notice and is a *bona fide* purchaser for a valuable consideration, the holder may protect his title, although it was affected with an equity arising from notice in the hands of the person from whom he derived it; for, otherwise, no man would be safe in any purchase, but would be liable to have his own title defeated by secret equities of which he could have no possible means of making discovery."

The rule and its reason has been stated as follows:

"A purchaser without notice from one who has fraudulently purchased is not affected by the fraud; and it is also a well-settled rule of equity that a man who is a purchaser with notice himself from a person who bought without notice may protect himself under the first purchaser. The reason is to prevent a stagnation of property, and because the first purchaser, being entitled to hold and enjoy, must be equally entitled to sell." Will. Eq. Jur. p. 608.

If, then, it be conceded that the interest of Thomas & Ryan, who acted for the Charleston & Western Carolina Railway in buying these bonds, was precluded by some actual notice of some invalidity, yet they can call to their aid the fact that their predecessors in ownership, who purchased without notice of any defense, and with propriety, contend that to the rights of those predecessors they have succeeded. *Commissioners v. Bolles*, 94 U. S. 109, 24 L. Ed. 46. But we have not been able to discover in this record any evidence of fraud on the part of Thomas & Ryan which, if they were the present holders, would deny them payment for these bonds. Nor, if, as contended, the bonds were purchased after maturity, does this avail the respondents. A bond, if valid at all, is as good after as before maturity, and it is valid unless there is some defense to it. Certainly, the principal obligor, the Port Royal & Augusta Railway Company, made no defense, and by the judgment of a court having jurisdiction the bonds have been pronounced valid. It is true that the Central Railroad & Banking Company of Georgia insists that its guaranty of these bonds was ultra vires of its charter. But this defense, if good at all, is as good against a purchaser before maturity of the bond as afterwards. It appears, however, that the purchase of Thomas & Ryan was not made after maturity. Thomas & Ryan purchased these bonds, paying face value and interest therefor, in March, 1896. The bonds were transferred to the Charleston & Western Carolina Railway on the 16th of September, 1896. The bonds matured the 1st of July, 1898. It is true that there has been a default in interest on these bonds, and thus they were said to be dishonored. But it is said in *Foley v. Smith*, by the supreme court of the United States (6 Wall. 492, 18 L. Ed. 931):

"The rule of law that he who takes a note overdue and dishonored takes it incumbered with all equities between the parties to it is the law of Louisiana, as well as of those states which have adopted the common law."

As we understand the rule, there is no dishonor which affects the equities of the purchaser of negotiable instruments, save the failure to pay at maturity.

We refrain from discussing the alleged fraud in the reorganization of the Central Railroad & Banking Company of Georgia, referred to by counsel. Counsel on either side had much to say about this supposititious fraud, and yet on both

sides they protested that there was no fraud. The discussion seems superfluous, and, in view of the mutual protestations, not a little mystifying and vague. Certainly nothing was said on this topic to affect the right of the interveners to have their bonds paid from the unpledged property set apart by the order of the circuit court for creditors of the class to which they belong.

Nor is it deemed important to consider whether the indorsement of the second mortgage bonds of the Port Royal & Augusta Railway by the Central Railroad & Banking Company of Georgia was *ultra vires*. Other similar indorsements by that company of the bonds of other railroads, to wit, the Macon & Northern, Savannah & Western, Savannah & Atlantic, and Chattanooga, Rome & Columbus, have been held, not *ultra vires*, but valid. This was done by this court in this litigation, Mr. Justice Jackson rendering the decision. The master in this case held that the guaranty was not affected by the doctrine of *ultra vires*, and there was no specific exception to his finding on that point. Whether the indorsement of these bonds was *ultra vires* or not, it was in fact made; and, moreover, the Central Railroad & Banking Company of Georgia had more than once insisted, through its proper officers, by solemn pleadings in this litigation, that it was entirely valid and constituted a part of their indebtedness. It is, moreover, indisputable from the record that the Central received large advantages by its control of the Port Royal & Augusta Railway Company, of which this indorsement was an incident. The Central owned a large and controlling interest in the stocks and bonds of that road. It was operated by the Central's traffic manager, and was completely dominated by the Central directorate. This relationship has been judicially determined in *Phinizy v. Railroad Co.* (C. C.) 62 Fed. 771. These bonds were made marketable by that indorsement, and to secure itself from loss on the guaranty the Central Railroad & Banking Company provided a sinking fund into which the Port Royal paid large sums to retire these bonds. This sum, with its accrued interest, whether the guaranty was *ultra vires* or not, we are satisfied, ought clearly to be appropriated to the satisfaction of the interveners' bonds, with interest. The clause of the second mortgage providing for this sinking fund stipulated that the Port Royal & Augusta Railway should pay over annually the sum of \$6,000 for the redemption of the aforementioned bonds at maturity. The Central, no doubt, in consideration of the actual benefits it received because of its guaranty, accepted this provision, and became a trustee for this sinking fund, and agreed that it should bear interest at 5 per cent. per annum, to be compounded annually until maturity, and the president of the Central was made trustee. These payments to the sinking fund, made for a number of years by the Port Royal & Augusta Railway, now, as we have stated, amount, with interest, to \$105,000.

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It is said that the Central Railroad & Banking Company of Georgia was without power to undertake to act as trustee for this sinking fund. It is clear enough that it took the money of the Port Royal & Augusta Railway, and that it has that money, and if, of its own volition, it could not become an express trustee for these bondholders, a court of equity will declare an implied trust in their behalf, and require the Central to account to them for the values which are equitably subject to the payment of these bonds. We regard this view as conclusive of the controversy before the court. It makes it unnecessary for us to consider the claim by the Central of Georgia Railway Company that it has the right to subject to their judgments for about \$17,000,000 the fund set apart by his honor, Judge Pardee, for the unsecured creditors. This would not only defeat the claims of the interveners, but would render inutile and idle the direction to creditors to prove before the standing master their right to participate in this fund. It is evident that his honor, Judge Pardee, never contemplated such a demand on the part of the reorganized company, to which these \$17,000,000 of judgments have been transferred; otherwise, the order would not have been passed. If, however, we are in error in this, certainly it seems true that the petition of the holders of these bonds, that the sums received by the Central Railroad & Banking Company of Georgia to constitute a sinking fund for their protection should be treated as a trust in their behalf, presents a demand which a court of equity will find it impossible to resist. Its values cannot be subjected to judgments against the Central Railroad & Banking Company of Georgia, because they do not constitute an asset of that company. They belong to the second mortgage bondholders of the Port Royal & Augusta Railway. Under the orders of the court the Central of Georgia Railway Company has succeeded to the liability of the Central Railroad & Banking Company of Georgia as to this particular claim.

It is said that the Central Railroad & Banking Company of Georgia also owns a large number of bonds of the Port Royal & Augusta Railway Company, and that it is entitled to a pro rata share in the values of the sinking fund. This contention must be denied. In the first place, these alleged bonds of the Central have not been proven before the master, and we have no evidence of their existence. Secondly, if, as contended, these bonds represent an investment of a portion of the sinking fund, the title would not be in the Central Railroad & Banking Company of Georgia, but in the Central Railroad & Banking Company of Georgia as trustee of the sinking fund, and the value of these bonds should in that event be added by the Central to the amount of the sinking fund.

Reviewing the entire case, and without discussing the reasoning of the master, or expressing any opinion as to his views on any topic not necessarily involved in this finding, we are satisfied that his conclusion that Robert S. Adams is entitled

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to judgment against the Central of Georgia Railway Company and the Central Railroad & Banking Company of Georgia for the sum of \$1,000, with interest on his bonds at 6 per cent. from July 1, 1892, and that the Charleston & Western Carolina Railway Company is entitled to a judgment against the Central Railroad & Banking Company of Georgia and the Central of Georgia Railway Company for the sum of \$39,500, with interest on its bonds at 6 per cent. from July 1, 1892, should be affirmed; and, without adopting the phraseology of the master, we further find that these sums should be paid from the sum of \$266,000, the proceeds of the sale of the unpledged properties of the Central, known as the "overflow fund" hereinbefore defined, and that these sums, principal and interest, shall be paid without reference to any other claim, decree, or judgment against the Central Railroad & Banking Company of Georgia owned or controlled by either of said respondent companies or by any person or corporation for them.

A decree will be entered in accordance with this decision.

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(*Supreme Court of Pennsylvania, May 19, 1902.*)

[52 Atl. Rep. 106.]

Street Railway—Duty to Pave Streets with Different Material from That Specified in Prior Ordinance—Impairment of Contract Rights.*

A street railway company which has been allowed by a city to occupy a macadamized street, by ordinance requiring it to pave its right of way with cobblestones, and keep said paving in good repair, thereby acquires no contract rights which will relieve it from complying with demand of the city that it replace the pavement on its right of way, which is in fact out of repair, with pavement corresponding with an improved pavement adopted for the rest of the street.

Same—Right of City to Lower Tracks.

Under a provision in a street railway company's charter that the city council may establish such regulations in regard to the railway as may be required for the purpose of grading streets and to prevent obstructions, the company may be required, at its own expense, to lower its tracks to conform to a change in grade of street.

Recovery by City Where Street Railway Has Neglected to Pave.

Where a city has done paving on a street railway's right of way which the company was bound, but neglected, to do, the sum expended thereon is *prima facie* the amount the city is entitled to recover of the company.

Appeal from court of common pleas, Berks county.

Action by the city of Reading against the United Traction Company for cost of paving defendant's tracks and for depressing its tracks. Judgment for plaintiff, and defendant appeals. Affirmed.

The opinion of the court below, per Endlich, J., discharging rule for judgment non obstante veredicto, is as follows:

*See note, 5 Am. & Eng. R. Cas., N. S., 663.

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"The principal question raised by this rule is this: Where a street railway company has with its tracks occupied streets of a city with its consent, and on condition (a) that it pave its right of way and keep the same in good repair, or (b) that it pave said right of way in a specified manner, superior to the then construction of the streets, and keep said paving in good repair, can the city, upon adoption, and upon notice to the company of the adoption, of an improved pavement for the rest of the street, with which the original pavement of the right of way is incongruous and practically incompatible, require the company, the pavement upon its right of way being in fact out of repair, to replace the same with a pavement reasonably corresponding with the street pavement adopted? It will at once be seen that a comprehensive and conclusive answer to this question is not furnished by the decisions in *City of Philadelphia v. Ridge Ave. Pass. Ry. Co.*, 143 Pa. 444, 22 Atl. 695, and *Same v. Hestonville, M. & F. P. R. Co.*, 177 Pa. 371, 35 Atl. 718, which involved the liability of street railway companies to reconstruct the entire streets over which they had been granted a right of way on condition of keeping them in repair, nor by those in *Norristown v. Norristown Pass. Ry. Co.*, 148 Pa. 87, 23 Atl. 1060, and *City of Philadelphia v. Philadelphia City Pass. Ry. Co.*, 177 Pa. 379, 35 Atl. 720, 5 Am. & Eng. R. Cas., N. S., 720, in which there was no pretense that the company's right of way was out of repair, but a claim on the part of the municipality, that, regardless of that question, it could insist upon a reconstruction by the company whenever a new style of street pavement was adopted, and with the identical material used therein. Like distinctions are to be drawn between the present case and those passed upon in the decisions of other jurisdictions cited by defendant's counsel. Of one of them (*Gilmore v. City of Utica*, 121 N. Y. 561, 24 N. E. 1009), it may be remarked that the point there decided was simply that, if the municipality made no use of its mere discretion under the law to compel a street railway company to bear a share of the expense of repaving a street in part occupied by it, the owner of a property along the street had no standing to question the validity of a municipal assessment laid upon properties fronting thereon to meet the entire cost of the improvement. On the other hand, the applicability of the main ruling in *McKeesport Borough v. McKeesport Pass. Ry.*, 158 Pa. 447, 27 Atl. 1006, 1 Am. & Eng. R. Cas. 171, 286, 291, where the ordinance consenting to the company's occupation of the streets required it to keep its right of way in good repair, and also, in the event of change of grade or improvement of the streets, to conform thereto, depends upon the question, not expressly passed upon in that decision, whether the ordinance is or is not simply declaratory of the duty of railway companies in such circumstances.

"When, looking beyond the decisions referred to, we search

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for principles to guide us to a conclusion, we find, first of all, that it is recognized with substantial unanimity that a railway company, whether general or passenger, is bound to keep the portions of streets occupied by its right of way in good condition, even in the absence of any express contract or statutory direction to that effect. 2 Wood, R. R. pp. 758, 760; Pierce, R. R. p. 245; Mills, Em. Dom. § 198; Elliott, Roads & S. p. 591; Worster v. Railroad Co., 50 N. Y. 203; North Hudson County Ry. Co. v. City of Hoboken, 41 N. J. Law, 71; Memphis, P. P. & B. R. Co. v. State, 87 Tenn. 746, 11 S. W. 946. As illustrating the acceptance of this principle in Pennsylvania, it is only needful to refer to Phoenixville v. Iron Co., 45 Pa. 135; Pennsylvania R. Co. v. Borough of Irwin, 85 Pa. 336; City of Harrisburg v. Harrisburg Pass. Ry. Co., 1 Pears. 298. But in the next place, the duty to keep in repair involves something more than the mere preservation of the condition in which the street was when first occupied by the railway, or in which the right of way was then put by the company. In Phoenixville v. Iron Co., 45 Pa. 135, the duty to repair is declared to be a continuing one; and as such it is held in Burritt v. City of New Haven, 42 Conn. 174; State v. St. Paul, M. & M. Ry. Co., 35 Minn. 131, 28 N. W. 3, 59 Am. Rep. 313; State v. Minneapolis & St. L. Ry. Co., 39 Minn. 219, 39 N. W. 153,—to embrace a liability to make such subsequent alterations and improvements (e. g., changing a grade to an overhead crossing) as from time to time may become necessary for the convenience of the public in the use of the streets. Succinctly and most aptly put by Mr. Justice Mitchell in City of Philadelphia v. Thirteenth & Fifteenth Sts. Pass. Ry. Co., 169 Pa. 269, 33 Atl. 126, at page 280, 169 Pa., and page 128, 33 Atl.: 'The duty to repair, where it exists, extends to the replacement of an old pavement by a new one of different and improved kind. * * * The company is bound to keep pace with the progress of the age in which it continues to exercise its corporate functions.' Understanding this utterance as made in view of the decision in Norristown v. Norristown Pass. Ry. Co., and as perfectly consistent with that in City of Philadelphia v. Philadelphia City Pass. Ry. Co., supra, it would appear that the company's duty to repair does not exist, in the sense that it calls for no action on the company's part, while the condition of the pavement as originally required on that portion of the street occupied by the right of way is such that it needs no mending, and that in such case the city has no right to call upon the company to replace it with a different and better one, i. e., to engage in what then would be more properly termed 'reconstruction' than 'repair.' Accordingly, in Elliott, Roads & S. pp. 594, 595, the doctrine is laid down as the one deducible from the authorities that a railway company, in respect to the condition of its right of way upon the streets of a city, is bound to repair, but not to improve, but that the

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duty of making repairs requires them to be made in such manner and with such materials as will correspond with the general condition of the street at the time the repairs are needed; so that whilst the company is not compellable to tear up a sound pavement of antiquated style, and replace it with a different and better one, yet, if a necessity for repairing the pavement within the right of way arises after an improved pavement has been laid in the remainder of the street by the city, the latter may require the company reasonably to conform with such improved pavement. And it is pertinently observed at page 594: 'If it be true that the company is not bound under the continuing duty to make repairs to correspond with the improved or changed condition of the street, then the practical result would be that it would be entirely released from its duty, since it is quite clear that repairs of any other character would be without value or service to the public.' Nor can it require any elaboration to show that the company's duty, in repairing its defective pavement, to conform to the improved street pavement, exists equally whether, when the occasion for repairs arises, the street pavement be already fully laid, or whether the work of laying it be only begun or determined upon by the city, provided, in the latter case, that the company have notice of the fact. Of course, all this refers solely to the company's right of way, its duty to repair which exists with or without contract, and with or without express legislative declaration,—that is to say, exists as a common-law duty. No such duty is imposed upon it as to the remainder of the street. Where as to that any exists, it must be by virtue of statutory imposition or of contract; the precise terms of either, creating it, necessarily furnishing the only measure for the extent of it.

"It is however, contended that any common-law duty, such as has been spoken of, concerning the conformity of repairs required from the company to changes in its general street pavement, is superseded by the specification, in an ordinance consenting to the occupation of a street, of a particular pavement upon the right of way granted, and the requirement that it be kept in repair, and that the enactment and acceptance of such an ordinance preclude the city from calling upon the company thereafter to put down a different and more expensive pavement. That the enactment of such an ordinance, and its acceptance and subsequent action thereunder by the railway company, establish a contract between the latter and the city, is admitted. But every contract, as is well known, must be construed and understood in the light of the circumstances under which it was made (*Callen v. Hilty*, 14 Pa. 286, 288; *Berridge v. Glassey*, 112 Pa. 442, 455, 3 Atl. 583, 56 Am. Rep. 322; *McKeesport Mach. Co. v. Ben Franklin Ins. Co.*, 173 Pa. 53, 57, 34 Atl. 16), and with a view to effectuating the objects the parties meant to attain (*Allison's Appeal*, 77 Pa. 221, 226; *Richardson v. Clements*, 89 Pa. 503, 505, 33 Am.

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Rep. 784), and in its effect is limited to these (*Doster v. Zinc Co.*, 140 Pa. 147, 150, 151, 21 Atl. 251). When this railway was constructed, the streets of Reading were macadamized. The requirement to pave with cobblestones was intended to exact from the company something more, not something less, than a reasonable correspondence with the rest of the street. There was no thought of relieving the company from any obligations devolving upon it under the law, but to impose upon it a duty greater than, in view of the then condition of the streets, the law would have imposed upon it. Indeed, of the contention that it may have been intended to settle, as between the city and the company, that the maintenance of a cobblestone pavement should forever be the measure of the latter's service in return for the grant of the former's streets, it may be said, in the language of the supreme court in *City of Philadelphia v. Ridge Ave. Pass. Ry. Co.*, 143 Pa., at page 472, and page 699, 22 Atl.: 'It cannot be entertained for a moment. It was never contemplated that the railway company would continue to exist and perform its corporate functions in a cobblestone age. It was called into being with a view of progress.' Certainly no contract was made between the city and the company, designed to stand as an obstacle in the path of progress, corporate or municipal. In no event could the effect insisted upon by defendant's counsel be given to the ordinance in question, in the absence of express language surrendering on the part of the city the right to exact from the company the performance of the continuing duty imposed upon it by common law. *Johnson v. City of Philadelphia*, 60 Pa. 445, 452. Neither is there any room for doubting that performance of the duties devolving upon the original companies which constructed these railways, and obtained the city's consent to the occupation of its streets, can properly be exacted from the lessee of the former operating the railway. *City of Philadelphia v. Philadelphia City Pass. Ry. Co.*, 177 Pa. 381, 35 Atl. 720; *Mullen v. Traction Co.*, 20 Wkly. Notes Cas. 203.

"It thus seems to be clear (1) that a railway company occupying streets in a city is, at common law, liable to repair the space covered by its right of way thereon, when out of repair, in a manner corresponding with the pavement of the rest of the street; (2) that this liability was not taken away or in any degree curtailed by the terms of the ordinance by virtue of which the railway companies under whom the defendant operates the roads as lessee occupied the streets here in question; and (3) that the duties imposed upon the original companies in this respect devolved upon, and are enforceable against, the defendant company, as such lessee. That being so, the liability of the defendant in this case is precisely the same as that which rested upon the appellant in *McKeesport Borough v. McKeesport Pass. Ry. Co.*, supra, under the ordinance there produced, which therefore must be regarded as simply declaratory of the company's common-law liability.

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Hence the decision is that case virtually settles the rule to be applied in this. And when it is further remembered that the notice given by the city of Reading to the defendant was substantially like that given by the borough of McKeesport to the defendant in that case, and that the verdict here, based upon abundant evidence, establishes all the essential facts there shown, viz., that an improved street pavement upon those portions of the streets outside of defendant's right of way had been determined upon by the city; that the pavement upon said right of way was in a state of dilapidation, so that it was the duty of the company presently to repair; that defendant was notified of the adoption of the new street pavement, and of the fact that the city was about to lay it, and was required by that notice to conform thereto; that it refused so to do; that the city then proceeded to do the work for it; that a continuance of the previous cobblestone pavement was incompatible with the improved street pavement; that the pavement put down upon the company's right of way was a reasonably proper and economical one, in correspondence with the paving of the remainder of the street; and that the work was done by the city at the same cost per unit as the paving upon the remainder of the street,—there seems to be no question left upon this main branch of the case which is not fully disposed of by the express or implied rulings in that decision. It may be added, however, that this case is stronger in favor of the plaintiff than the McKeesport Case, in this: that, by the bargain between the city and the paving contractor, not only was the work done more cheaply than the company could have procured it to be done under an independent contract, but the repairing of the entire street, including the right of way, was assumed for a period of ten years by the contractor; thereby easing the defendant for that length of time of a burden which confessedly lay upon it.

"On the remaining branch of the case,—the claim for depressing a portion of the defendant's track to conform to a change in the grade of the street,—little need be said. Section 10, Act April 3, 1874 (P. L. 346, 348), the charter of the company under which the defendant operates this part of the railway, is as follows: 'The councils of Reading shall have the power to establish such regulations in regard to said railway as may be required for the purpose of paving, repairing, grading * * * in and along the streets in said city used by said company, and to prevent obstructions thereon.' What was said by Mr. Justice Strong in *Phoenixville v. Iron Co.*, 45 Pa. 139, 140, is peculiarly applicable to the construction of this clause: 'It is a fair presumption that the legislature never intended to give away public rights, or to impose burdens upon any local community, without compensation.' If by the grant of power to lay this track upon a street of the city of Reading the power of the latter was taken away to require it to be depressed by the company, and at its expense,

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when a change of the grade of the street became necessary, then such depression could only be made, if at all, at the expense of the city (that is to say, in the language of the decision just quoted, 'a burden has been imposed upon the plaintiffs * * * solely for the private advantage of those who are using the railway'). Obviously the above clause was designed to guard explicitly against such an absurd and unjust result, and to render it clear that necessary changes, without which the presence of railway tracks upon a street would become an obstruction of it and a public nuisance, might by the city at all times be required to be made at the expense of the company.

"As to the measure of the recovery in this case, if that is not covered by the decision in *McKeesport Borough v. McKeesport Pass. Ry. Co.*, supra, as the right of action certainly is, it may be added that it was held in *City of New York v. Second Ave. R. Co.*, 102 N. Y. 572, 7 N. E. 905, that where a city has done work upon a railway company's right of way, which the company was bound, but neglected, to do, and has proceeded in the usual way, and no fraud is shown, nor any facts to impeach the reasonableness of the account, the sum actually expended in the work is prima facie the amount which it is entitled to recover, and an instruction directing a verdict therefor is justified. Substantially the same rule, with the addition of interest, is approved in *Pennsylvania R. Co. v. Duquesne Borough*, 46 Pa. 223 (see page 227).

"The conclusion is that the case was one for the jury's determination upon the lines laid down with substantial accuracy in the charge, and that no warrant has been shown for the entry of a judgment contrary to the verdict. The rule to show cause is discharged."

Richmond L. Jones, for appellant.

William J. Rourke, City Sol., and Isaac Hiester, for appellee.

PER CURIAM. The judgment in this case is affirmed on the opinion of Judge Endlich.

TEXARKANA & FT. S. RY. CO. v. TEXAS & N. O. R. CO. *et al.*

(*Court of Civil Appeals of Texas, March 5, 1902.*)

[67 S. W. Rep. 525.]

Ultra Vires*—Entry on Spur Track by Another Company.

That the act of a railroad company in building a certain spur track was ultra vires does not justify an entry on such track by another railroad.

Right to Use Spur Track.

Where a lumber company and a railroad construct a spur track from

*See note, 17 Am. & Eng. R. Cas., N. S., 258. See also, *Chicago & N. W. R. Co. v. Morehouse* (Wis.), 23 Am. & Eng. R. Cas., N. S., 413.

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the former's premises to the latter's line, the former has no right to authorize a use of the spur by another railroad.

Permission to Build Track in Highway.

The commissioners' court of a county has authority to grant a railroad a right to build a track in a public road or highway.

Same.

A city has a right to grant a railroad company a right to lay a track in a street.

Same.

Where a city authorizes a railroad to lay a track in a street, it may not thereafter, without consent of such railroad, authorize another railway to use the track.

Appeal from district court, Jefferson county; Stephen P. West, Judge.

Suit by the Texarkana & Ft. Smith Railway Company against the Texas & New Orleans Railroad Company and others. From a decree for defendants, complainant appeals. Modified.

Greer, Greer & Nall, for appellant.

J. W. Terry, F. J. & R. C. Duff, Baker, Botts, Baker & Lovett, Watts, Chester & Ellison, O'Brien, Bordages & O'Brien, and Geo. C. O'Brien, for appellees.

HOLMAN v. OMAHA & C. B. RY. & BRIDGE CO.

(Supreme Court of Iowa, May 31, 1902.)

[90 N. W. Rep. 833.]

Action for Personal Injuries—Company Estopped by Act of Officer.

Where an officer of a railway company negotiated with one who had been injured on its cars, and, acting for the company, assured her that the statutory limitation would not be interposed, intending that she should rely on such assurance, and she, doing so, postponed the bringing of her action until after the expiration of the statutory period, the company was estopped from pleading the statutory bar.

Appeal from district court, Pottawattamie county; Walter I. Smith, Judge.

Action to recover damages for personal injuries alleged to have been received by plaintiff while on an electric car operated by defendant company, by reason of the negligence of the employees of said company in carelessly causing the electric car to be started forward suddenly, by reason of which plaintiff was thrown violently against the railing and steps of said car. Verdict on a former trial was set aside by the court, and this action was affirmed. 110 Iowa, 485, 81 N. W. 704. On the next trial the verdict was for plaintiff for \$12,000, and from the judgment on such verdict defendant appeals. On suggestion of the death of plaintiff pending this appeal, her administrator has been substituted. Affirmed.

Wright & Baldwin, for appellant.

Flickinger Bros., for appellee.

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McCLAIN, J. This suit was instituted more than two years after the injury was received, and under the provisions of Code, § 3447, subd. 3, it was barred, unless something was shown by the plaintiff to take it out of the statute. For this purpose the plaintiff alleged in her petition that at the time of the injury, and subsequent thereto, one Dimmock was general superintendent and manager of the defendant corporation, and on behalf of the defendant, within two years after the injury, he negotiated with plaintiff with reference to a settlement of her claim, and, in the course of such negotiation, represented that the defendant would not interpose the plea of the statute of limitations, and that plaintiff, relying on such representation, failed to bring her action within two years, whereas she would otherwise have done so. With reference to this claim, it is first objected that Dimmock had no authority to waive the statute for defendant; but the court instructed that while the jury would not be authorized in finding such authority in the general employment of Dimmock as general superintendent and manager, nor in any resolutions of the board of directors authorizing him to settle specific claims, yet his authority to negotiate for the settlement of this particular case, and, in connection therewith, to waive the statute of limitations, might be found from evidence showing that he was in the habit, with his principal's knowledge and consent, of negotiating such settlements without previous and specific authority, and without the necessity of subsequent ratification, and that the claims thus settled by him were of such a number and character, and so treated by the defendant, as to indicate a general intention and purpose upon the part of defendant's board of directors to intrust Dimmock generally with authority to make such settlements on his own responsibility. The correctness of this instruction as a statement of law is not questioned, and we find that there was sufficient evidence to sustain a finding by the jury that Dimmock did have the authority to settle the claim in question, and that he did, in connection with negotiations for a settlement had with plaintiff prior to the expiration of the statutory period, represent to her that, if she would delay bringing suit until such negotiations could be completed, the defendant would not interpose the bar of the statute of limitations, which might accrue during such delay. It is not necessary that we set out the evidence, nor is it our practice to do so in such cases.

In support of plaintiff's contention that Dimmock had been allowed to act for defendant in making settlements of claims, the pleadings in an action brought by another claimant against this same defendant for personal injuries were offered in evidence, and received over the objection as to each on behalf of defendant that they were incompetent, immaterial, and irrelevant. It is not now contended in behalf of appellant that the petition or answer were incompetent, but it is urged that the reply contained an averment of matter reflect-

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ing on Dimmock, and therefore prejudicial to the defendant in this case, and not in any way material to the issue on which the pleadings were introduced in evidence; but the difficulty is that no objection was made to this particular matter, it being conceded that there were averments in the petition, answer, and reply which were competent evidence in this case. The action of the court in permitting all these pleadings to be introduced cannot be questioned, on account of immaterial matter in the reply, unless the lower court's special attention was called thereto, and some action in that respect was asked.

But an important question of law is involved, to wit, whether such a waiver, even if made with authority, is binding upon the defendant; that is, whether any representation or agreement that the statute of limitations will not be interposed is valid and effectual. On this question there is great conflict in the authorities. The courts have approached it from different points of view, and have reached inconsistent conclusions. In the early New York cases of *Insurance Co. v. Bloodgood*, 4 Wend. 652, and *Gaylord v. Van Loan*, 15 Wend. 308, it was held that an agreement not to plead the statute of limitations, made before the expiration of the statutory period, and relied on by the creditor until after the statutory period had expired, operated as an estoppel in pais as against the debtor, and precluded him from interposing the defense of the statute to defeat the action. This view was disapproved in the subsequent case of *Shapley v. Abbott*, 42 N. Y. 443, 1 Am. Rep. 548, which is the leading case now relied on by appellant. In that case it was thought that, as both parties were equally advised as to the law, the debtor had no right to assume that the creditor would be bound by way of estoppel by such an agreement; and this view received some countenance in *Andreae v. Redfield*, 98 U. S. 225, 25 L. Ed. 158. In *Crane v. French*, 38 Miss. 503, the view is expressed that an agreement not to plead the statute of limitations, not amounting to an acknowledgment or new promise in writing, within statutory provisions, would be contrary to public policy, and therefore not effectual to defeat the bar. On the other hand, it has been held in a number of cases that, even though the statute requires an acknowledgment or new promise in such case to be in writing, yet the plea of the statute of limitations will not be allowed where, in view of a parol agreement not to plead the statute, relied on by the other party, the interposition of the defense would be "unconscientious and inequitable, and would perpetrate a fraud." *Cecil v. Henderson* (N. C.) 28 S. E. 481; *Trust Co. v. Sheldon*, 68 Vt. 259, 35 Atl. 177; *Trust Co. v. Cochran*, 130 Cal. 245, 62 Pac. 466, 600; *Quick v. Corlies*, 39 N. J. Law, 11. In view of the fact that the debtor may waive the benefit of the statute of limitations by failing to interpose the defense in the proper manner, we see no particular difficulty in the way of

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holding that the debtor may, at least, by an independent contract made after the statutory period has commenced to run, deprive himself, for a limited time, at any rate, of the right to interpose the statutory privilege. The argument as against such a contract, on the ground of public policy, can hardly be stronger than the claim of immunity from the result of fraud or unconscionable advantage arising out of the representation relied on by the other party, that the statutory bar would not be interposed. But we need not decide the question as to the validity of such a contract, for no such contract is involved in this case. We desire to insist on the distinction between a case of contract and a case of estoppel. It may be that such a contract, duly entered into, would operate as an estoppel, but it is clear that an estoppel may arise without contract. For instance, it has been held that a representation by which a debtor whose property has been sold under execution has been induced to let the statutory period of redemption expire without making redemption, in reliance on the representation of the purchaser that redemption would be allowed after the expiration of such period, would estop the purchaser from resisting redemption by the debtor after the statutory period. *Schroeder v. Young*, 161 U. S. 334, 16 Sup. Ct. 512, 40 L. Ed. 721. The case just cited furnishes an excellent illustration of an estoppel where there is no contract, for, while the debtor did rely on the promise of the purchaser, there was evidently no agreement on the part of the debtor to do anything, and therefore no consideration for the purchaser's promise to allow the debtor to redeem. Adopting, as we think we well may, the analogy of the cited case, we find no difficulty in the present case in holding that although the defendant did not definitely promise to pay any sum by way of settlement, and the plaintiff did not promise to forbear suit for any specified period, nevertheless, if Dimmock, for the defendant, gave assurance that the statutory limitation would not be interposed, with the intention that plaintiff should rely on such assurance, and plaintiff, relying on such assurance, postponed the bringing of action until after the expiration of the statutory period, then the defendant estopped itself from interposing the statutory bar to this action, which was brought as soon as it became apparent that the negotiations for an adjustment of the claim would be ineffectual. By putting our decision squarely on the doctrine of estoppel, and not on that of contract, we avoid difficulties which have been experienced when a contract has been relied on, either as binding in itself, or as a basis of an estoppel. For instance, we are not troubled as the court was in *Kellogg v. Dickinson*, 147 Mass. 432, 18 N. E. 223, 1 L. R. A. 346, with the question whether the promise not to interpose the statutory bar is to be effectual without limit of time, for the estoppel would only be effectual so long as the creditors reasonably relied upon defendant's representations as an excuse for not instituting the action. *Cowart v.*

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Perrine, 21 N. J. Eq. 101. Our conclusion finds support in Cecil v. Henderson (N. C.) 28 S. E. 481; Missouri Pac. Ry. Co. v. B. F. Coombs & Bro. Commission Co., 71 Mo. App. 299; Trust Co. v. Cochran, 130 Cal. 245, 62 Pac. 466, 600; and Randon v. Toby, 11 How. 493, 519, 13 L. Ed. 784; and, as already indicated, in Gaylord v. Van Loan, 15 Wend. 308, and Insurance Co. v. Bloodgood, 4 Wend. 652, in which we think the correct doctrine is recognized, although they are discredited, as we have seen, in the later case in the same state. The reasoning on which we rely is quite fully set out, and the authorities in support of it collected, in the first opinion in Bridges v. Stephens (Mo. Sup.) 34 S. W. 555; but in that case the court was evenly divided on the question. Our conclusion is also supported, by analogy, in Bish v. Insurance Co., 69 Iowa, 184, 28 N. W. 553, Little v. Insurance Co., 123 Mass. 380, 25 Am. Rep. 96, and like cases, where it is held that an insurance company may estop itself to set up a contractual limitation of the time for bringing action by representations in inducing the insured to believe that such limitation will not be relied on. We conclude, therefore, that the lower court did not err in overruling objections to evidence tending to show that such representations as we have referred to were made by Dimmock to plaintiff for the purpose of inducing her to refrain from bringing action until after the statutory limitation had expired.

We find no error in the action of the lower court, and the judgment is affirmed.

PEOPLE *ex rel.* PENNSYLVANIA R. CO. v. KNIGHT,
Comptroller.

(Court of Appeals of New York, June 10, 1902.)

[64 N. E. Rep. 152.]

Taxation—Interstate Commerce—Railroads—Cab Service.

Where a railroad company engaged in interstate commerce maintains a cab service at its terminus within the state, which carries its passengers under a separate contract, the cab business is not exempt from taxation under Tax Law, § 184 (Laws 1896, c. 908), exempting from the tax on corporate franchises property employed in interstate commerce.

Bartlett, J., dissenting.

Appeal from supreme court, appellate division, Third department.

Certiorari by the people, on the relation of the Pennsylvania Railroad Company, against Erastus C. Knight, as comptroller of the state, to review the decision of the comptroller assessing a tax against relator. From a decree of the appellate division (73 N. Y. Supp. 790) confirming the decision of the comptroller, the relator appeals. Affirmed.

Henry Galbraith Ward, for appellant.

John C. Davies, Atty. Gen. (Henry B. Coman, of counsel), for respondent.

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CULLEN, J. I agree with Judge Bartlett that the only question presented on this appeal is whether the business carried on by the relator, and for which a franchise tax has been imposed, is interstate commerce or not. For, though it may be that the state of New York could levy a franchise tax on the gross earnings of a foreign corporation for the privilege given it of running a cab line within this state, even for the purposes of interstate commerce (see *Maine v. Grand Trunk R. Co.*, 142 U. S. 217, 12 Sup. Ct. 121, 35 L. Ed. 994, 48 Am. & Eng. R. Cas. 602, cited with approval in *Refrigerator Transit Co. v. Hall*, 174 U. S. 70, 19 Sup. Ct. 599, 43 L. Ed. 899), section 184 of our tax law excludes earnings derived from business of an interstate character from liability to the tax. I insist, however, that the transportation for which the relator has been taxed is not interstate commerce. It is not rendered under any contract for transportation from a point within the state to a point without the state, or vice versa, but is solely a carriage between two points within the state under a separate contract. As pointed out by the appellate division, the use of the relator's cabs is not restricted to those who have previously secured transportation to or from some point on its railroad, nor is such use confined to travelers upon the railroad. Such a traveler may be accompanied by a friend to or from the ferry only, and one intending to travel upon the railroad may change his intention when he reaches the ferry. It is first to be observed that the fact that the relator is a foreign corporation has no effect on the question whether its cab service is interstate commerce or not. A domestic corporation or an individual citizen of this state may engage in interstate commerce as well as any foreign corporation. Transportation from the city of New York to the town of Port Chester is domestic, not interstate, commerce, because both places are in this state, although the transportation is performed by a foreign corporation,—the New York & New Haven Railroad Company. Transportation from the city of New York to Paterson, N. J., is interstate commerce, although it is over the road of a New York corporation, the Erie Railway Company. Therefore it is the character of the service, not the character of the carrier, that determines whether the transportation is interstate commerce or not. If in the instance suggested by counsel, when a person intending to travel to Washington takes one of the relator's cabs to carry him from the Fifth Avenue Hotel to the relator's ferry station, that transportation is interstate commerce, it is necessarily equally so when he is carried by a cab called from the hack stand in Madison Square opposite. A carrier may engage in both interstate commerce and in domestic commerce, but that fact does not determine the character of the carrier's whole business, or change what would otherwise be domestic commerce into interstate commerce, or vice versa. The fact, therefore, that cabs from the ordinary stands take

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passengers to any part of the city, does not affect the character of their service when they carry passengers to railway or ferry stations within the state on journeys to points without the state. Nothing is better settled by the decisions of the supreme court of the United States than that in the case of interstate transportation the legislature cannot prescribe the charge to be made for even that part of the transportation which is to be performed within the state. *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 557, 7 Sup. Ct. 4, 30 L. Ed. 244. Hence, if the doctrine contended for by the relator is correct, the city of New York has no right to prescribe the fares to be charged by public hacks or cabs for transporting travelers to the ferries on the North river except when the traveler intends to take passage to some point in the state of New York, nor for taking travelers to the Grand Central Station when such travelers are journeying to Boston or to the West.

If this cab service can in any way become part of interstate commerce (of which there may be some doubt, as I shall show by the authorities), I insist it can only be such when the service is rendered under an entire contract for continuous carriage to or from some point without the state. It may be that there is no case in the supreme court of the United States which directly decides this proposition. But there is no authority to the contrary, and there are a number of cases in that court which seem to recognize this as the true test of what transportation constitutes interstate commerce. The question has been presented in litigations arising under the interstate commerce act with reference to railroad companies whose roads lay entirely within a single state. Of such a case the supreme court said in *Cincinnati, N. O. & T. P. R. Co. v. Interstate Commerce Com'n*, 162 U. S. 184, 16 Sup. Ct. 700, 40 L. Ed. 935: "It may be true that the Georgia Railroad Company, as a corporation of the state of Georgia, and whose entire road is within that state, may not be legally compelled to submit itself to the provisions of the act of congress, even when carrying, between points in Georgia, freight that has been brought from another state. It may be that if, in the present case, the goods of the James & Mayer Buggy Company had reached Atlanta, and there and then, for the first time, and independently of any existing arrangement with the railroad companies that had transported them thither, the Georgia Railroad Company was asked to transport them, whether to Augusta or to Social Circle, that company could undertake such transportation free from the control of any supervision except that of the state of Georgia. But when the Georgia Railroad Company enters into the carriage of foreign freight by agreeing to receive the goods by virtue of foreign through bills of lading, and to participate in through rates and charges, it thereby becomes part of a continuous line, not made by a consolidation with the foreign companies, but made by an

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arrangement for the continuous carriage or shipment from one state to another, and thus becomes amenable to the federal act in respect to such interstate commerce." So, in *Railroad Co. v. Behlmer*, 175 U. S. 648, 20 Sup. Ct. 209, 44 L. Ed. 309, it was held that the fact that "the several carriers transported hay from Memphis under through bills of lading, by continuous carriage, to Summerville and Charleston," rendered the traffic interstate commerce, even as to that part of it performed by a carrier furnishing transportation wholly within a single state. If this be the true doctrine as to the transportation of property, I do not see why it is not equally the true doctrine as to the transportation of persons.

I have suggested that there was some doubt whether, under the authorities, the relator's cab service could become a part of interstate commerce. In *Munn v. Illinois*, 94 U. S. 113, 24 L. Ed. 77 (Chicago elevator cases), in answer to the claim that the warehouses and elevators were instrumentalities of interstate commerce, it was said by the court: "The warehouses of these plaintiffs in error are situated and their business carried on exclusively within the limits of the state of Illinois. They are used as instruments by those engaged in state as well as those engaged in interstate commerce, but they are no more necessarily a part of commerce itself than the dray or the cart by which, but for them, grain would be transferred from one railroad station to another. Incidentally they may become connected with interstate commerce, but not necessarily so. Their regulation is a thing of domestic concern, and certainly, until congress acts in reference to their interstate relations, the state may exercise all the powers of government over them, even though in so doing it may indirectly operate upon commerce outside its immediate jurisdiction." In *Coe v. Town of Errol*, 116 U. S. 517, 6 Sup. Ct. 475, 29 L. Ed. 715, it was said: "'Whenever a commodity has begun to move as an article of trade from one state to another, commerce in that commodity between the states has commenced. The *Daniel Ball*, 10 Wall. 565, 19 L. Ed. 999.' But this movement does not begin until the articles have been shipped or started for transportation from the one state to the other. The carrying of them in carts or other vehicles, or even floating them, to the depot where the journey is to commence, is no part of that journey. That is all preliminary work, performed for the purpose of putting the property in a state of preparation and readiness for transportation." In the recent case of *Detroit, G. H. & M. Ry. Co. v. Interstate Commerce Com'n*, 43 U. S. App. 308, 21 C. C. A. 103, 74 Fed. 803, it was held that the cartage of goods by the railroad company, to and from the station for shippers and consignees was not within the interstate commerce act. It is there said: "We cannot think that, under the circumstances, it was the intention of congress to confuse in our legislation the carting to and from the stations with the trans-

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portation on the rails, and, if the act can be interpreted to avoid that confusion, it should be done. We may suppose, since with us it is a business done almost exclusively by outsiders, and rarely by the railroad companies, and, being usually done wholly within the territorial limits of a state, is not within the jurisdiction of congress, that it was not intended to interfere with it, except so far as it might affect directly the transportation of goods between the states, by being used as a device to evade the jurisdiction over that subject." This case was affirmed by the supreme court in 167 U. S. 633, 17 Sup. Ct. 986, 42 L. Ed. 306, which expressed its approval of the view of the court below "that the railway transportation ends when the goods reach the terminus or station and are there unshipped, and that anything the company does afterwards, in the way of land transportation, is a new and distinct service, not embraced in the contract for railway carriage."

There remain to be considered two cases on which the relator largely relies as authorities for its contention. The first is a case of this relator in this court, reported in 138 N. Y. 1, 33 N. E. 720, 19 L. R. A. 694. There it was held that a franchise tax could not be imposed on the relator for capital invested in its ferry station and terminal grounds in the city of New York, although the property itself was subject to taxation. At that time the business of the relator, so far as it was prosecuted within this state, was confined to the operation of a ferry from Jersey City to New York, and to the maintenance at the latter place of its wharves, ferry house, and terminal facilities. The case was unquestionably properly decided under the doctrine declared in Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 5 Sup. Ct. 826, 29 L. Ed. 158. There the plaintiff, a New Jersey corporation, ran a ferry from Gloucester, in that state, to Philadelphia. It had no property in the latter city, other than a wharf which it leased. Its steamboats were registered in New Jersey. A tax imposed by the state of Pennsylvania upon the dividends of all corporations doing business within the state was held illegal as against that company. Judge Field said: "As to the second reason given for the decision below,—that the company could not lease its wharf in Philadelphia, except by the implied consent of the legislature of the commonwealth, and thus is dependent upon the commonwealth to do its business, and therefore can be taxed there,—it may be answered that no foreign or interstate commerce can be carried on with the citizens of a state without the use of a wharf or other place within its limits on which passengers and freight can be landed and received, and the existence of power in a state to impose a tax upon the capital of all corporations engaged in foreign or interstate commerce for the use of such places would be inconsistent with, and entirely subversive of, the power vested in congress over such commerce." It is contended that no distinction can be drawn between the right of the relator to transport its

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passengers by ferry to the city of New York across the waters of the Hudson, which are within the limits of this state, and its right to transport passengers by cabs to and from points in the city of New York. I insist that there is a marked distinction between the two rights, and that the distinction is recognized in all the cases in the supreme court of the United States which deal with the subject. In *Baltimore & O. R. Co. v. Maryland*, 21 Wall. 456, 22 L. Ed. 678, it was urged that transportation on land was governed by the same principal as transportation by water, and exempt to the same extent from state control. The court decided against this contention, and it was held: "Commerce on land between the different states is so strikingly dissimilar in many respects from commerce on water that it is often difficult to regard them in the same aspect in reference to the respective constitutional powers and duties of the state and federal governments. No doubt, commerce by water was principally in the minds of those who framed and adopted the constitution, although both its language and spirit embrace commerce by land as well. Maritime transportation requires no artificial roadway. Nature has prepared to hand that portion of the instrumentality employed. The navigable waters of the earth are recognized public highways of trade and intercourse. No franchise is needed to enable the navigator to use them. Again, the vehicles of commerce by water being instruments of intercommunication with other nations, the regulation of them is assumed by the national legislature. So that state interference with transportation by water, and especially by sea, is at once clearly marked and distinctly discernible. But it is different with transportation by land." The foregoing extract from the case cited was quoted with approval in *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 11 Sup. Ct. 876, 35 L. Ed. 613, 46 Am. & Eng. R. Cas. 236. The navigable waters of the United States, even when they lie exclusively within the limits of a state, are open to all the world, except so far as congress may prescribe to the contrary; and it requires no leave or license from a state (except compliance with its police regulations, and possibly payment of tolls imposed to defray the cost of improvements in navigation) for a vessel to journey on those waters. Not so on the land. No one can construct and operate a turnpike or railroad within a state unless by grant from the state or by the authority of congress under its constitutional power to establish post roads.

The second case relied on by the appellant is *The Daniel Ball*, 10 Wall. 557, 19 L. Ed. 999. In that case the question was whether a steamboat engaged in navigating Grand river, Mich., wholly within that state, was required to take out a license in compliance with the provisions of the United States statute. Some articles of freight carried by the vessel were marked for points without the state, though it did not appear

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that they were being transported under any agreement for continuous transportation to such points. It was held that the steamer was engaged in interstate commerce, and subject to the regulations of congress. Doubtless this case would be an authority for the position of the relator, had not the court been careful to say, "The present case relates to transportation on the navigable waters of the United States, and we are not called upon to express an opinion upon the power of congress over interstate commerce when carried on by land transportation." In *Lord v. Steamship Co.*, 102 U. S. 541, 26 L. Ed. 224, the question was as to the application of an act of congress limiting the liability of shipowners to the case of a vessel navigating the high seas between ports of the same state. It was held that the transportation was subject to congressional regulation. In that case there appears to have been found no freight destined to points without the state. So it was necessary to place the decision on a different ground from that on which the decision in *The Daniel Ball* rested. It was held that, while congress had no control over the internal commerce of the state, still the vessel, when navigating the Pacific Ocean, though between two ports of the same state, was engaged in commerce with foreign nations, and was subject to the regulating power of congress. *Ex parte Garnett*, 141 U. S. 1, 11 Sup. Ct. 840, 35 L. Ed. 631, presented the question again. There a steamer was engaged in the carrying trade between Augusta and Savannah, both on the same river in the state of Georgia. The petitioner, a shipper of goods between these two points, alleged that the shipowner's liability was not subject to limitation by the act of congress. The case did not fall within the principle of the decision in *The Daniel Ball*, or of that in *Lord v. Steamship Co.* It was held that the shipment was subject to the act of congress, not because it was any part of interstate or foreign commerce, but by virtue of "the admiralty and maritime jurisdiction granted to the federal government by the constitution of the United States," which extends to all public navigable waters. In *Lehigh Val. R. Co. v. Pennsylvania*, 145 U. S. 192, 12 Sup. Ct. 806, 36 L. Ed. 672, 53 Am. & Eng. R. Cas. 679, it was contended that the state of Pennsylvania had no power to tax the plaintiff on transportation over its railroad from one point in the state to another, where, for a part of the distance, a passenger was carried through another state. Reliance was placed by the plaintiff in error on the decision of the court in *Lord v. Steamship Co.*, *supra*. It is difficult to see why, if the fact that transportation from one point in a state to another was foreign commerce, because the vessel furnishing the transportation navigated the high seas in its voyage between those places, the same principle would not render transportation by railroad from one point to another in the same state, where the line of the railroad for a part of the distance lay in another state, interstate commerce. The

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court, however, held that it was not interstate commerce, and, while upholding the decision in the Lord Case, practically repudiated the ground on which the decision had been placed. Of the Lord Case the court said: "But it was unnecessary to invoke the power to regulate commerce in order to find authority for the law in question. As stated by Mr. Justice Bradley in *Ex parte Garnett*, 141 U. S. 1, 12, 11 Sup. Ct. 840, 842, 35 L. Ed. 631: 'The act of congress which limits the liability of shipowners was passed in amendment of the maritime law of the country, and the power to make such amendments is coextensive with that law. It is not confined to the boundaries or class of subjects which limit and characterize the power to regulate commerce, but in maritime matters it extends to all matters and places to which the maritime law extends.' " It will thus be seen that the control of congress over ships, vessels, and the navigation of public waters has finally been placed by the supreme court of the United States on the solid foundation of the maritime and admiralty jurisdiction of the federal government, and that, while the decisions actually made in *The Daniel Ball* and *Lord Cases* remain the law, the grounds on which they proceeded are no longer deemed tenable, and the opinions rendered in those cases no longer authorities.

In closing, reference should be made to the recent decision of this court in *People v. Morgan*, 168 N. Y. 1, 60 N. E. 1041. That case, so far from being in conflict with the views I have expressed, is a direct authority for the proposition that the liability of a carrier corporation to a franchise tax on its transportation depends not on the question whether the carrier is a domestic or foreign corporation, but on the character of the transportation itself.

The order appealed from should be affirmed, with costs.

BARTLETT, J. (dissenting). The relator is a foreign corporation, chartered by the state of Pennsylvania, and engaged in the transportation of freight, mails, and passengers in the states of New York, New Jersey, Pennsylvania, Delaware, and Maryland. Its rail terminus is in the state of New Jersey, at Jersey City, from which point it conveys passengers and their baggage by ferry boats operated by it to various points in the city of New York, including Twenty-Third street and North river. The sole business of the relator in the city of New York, with reference to passengers and their baggage, was taking them from and landing them on the New York shore of the North river, until the month of May, 1897, when it established a cab stand at the Twenty-Third Street Ferry, which it has since maintained; its sole object being to carry passengers and their baggage, arriving at and departing from the city of New York at this point, to and from their residences or hotels. The facts are undisputed, and the statements contained in the petition for the writ of certiorari, and the affidavit of the officer of the relator

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subsequently submitted, are the foundation upon which the assessments involved herein rest. The relator alleges that the cab service is incidental to, and part of, its business of interstate commerce, and is of no value whatever except as a part thereof, because it is, and always has been, separately considered, carried on at a loss. It is further alleged that the charge for cabs is separate from the charge for the balance of the passenger's transportation, and that it is necessarily so, from the nature of things; it being impossible to include in the railroad and ferry tickets the price of the cab service, as it varies in amount in every case, according to the distance the passenger is to be carried; and also for the reason that passengers buying railroad tickets to New York do not know whether they will employ a cab or not, and, in respect to passengers starting from New York, it would be impossible to supply the drivers of the cabs with tickets to distant destinations in other states.

The record discloses that the state comptroller did not assess a tax on this cab service until the autumn of the year 1900, when he applied to the relator for a statement of the gross receipts and gross expenses of the cab service to June 30, 1900, and also for the value of personal property employed during that time, and the value of any real estate used by the relator in the city of New York in connection with such cab service. The comptroller seeks to assess the relator, under two distinct sections of the tax law (Laws 1896, c. 908), upon the business of the cab service thus conducted in connection with its interstate railway service. Section 182 of the tax law imposes a franchise tax on domestic corporations. At the close of this section it is provided as follows: "Every corporation, joint stock company or association organized, incorporated or formed under the laws of any other state or country, shall pay a like tax for the privilege of exercising its corporate franchise or carrying on its business in such corporate or organized capacity in this state, to be computed upon the basis of the capital employed by it within this state." Section 184 of the tax law provides for an additional franchise tax on transportation and transmission corporations and associations, which reads as follows: "Every corporation and joint stock association formed for steam surface railroad, canal, steamboat, ferry, express, navigation, pipe-line, transfer, baggage express, telegraph, telephone, palace car or sleeping car purposes, and all other transportation corporations not liable to taxes under sections one hundred and eighty-five or one hundred and eighty-six of this chapter, shall pay for the privilege of exercising its corporate franchises of carrying on its business in such corporate or organized capacity in this state, an annual excise tax or license fee which shall be equal to five-tenths of one per centum upon its gross earnings within the state, which shall include its gross earnings from its transportation or transmission business originating and

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terminating within this state, but shall not include earnings derived from business of an interstate character." The return called for was duly made to the comptroller, who assessed a tax under section 182 of \$934.07, based on the gross earnings of the cab service for the four years ending October 31, 1900; also a tax was assessed under section 184 of \$1,422.54, being equal to five-tenths of one per centum upon the gross earnings within this state. It was stipulated before the comptroller, on the application to review this assessment, that it was made solely upon the ground that the relator's cab service in the city of New York is a part of and incidental to its interstate commerce business, and therefore not taxable. The comptroller, after a hearing duly had, refused to make any revision or restatement of the assessment and tax. The appellate division having affirmed the decision of the comptroller, this court is now called upon to review the order to that effect. If the relator is legally taxable on its cab service, no question is made as to the manner in which the taxes were assessed.

The legislature has stated in express terms in section 184, in computing a tax thereunder, that earnings derived from a business of an interstate character should not be included. It is true, as suggested by counsel, that the precise point presented by this appeal has never been considered by the court. It is, however, equally true that the controlling principles involved in this case were carefully considered by the court in *People v. Wemple*, 138 N. Y. 1, 33 N. E. 720, 19 L. R. A. 694, 54 Am. & Eng. R. Cas. 1. The opinion in the case cited was written by Chief Judge Andrews, wherein is elaborately discussed the constitutional question now presented for decision. The learned judge thus states the facts in the case before him: "The relator is a Pennsylvania corporation operating a line of railroad for the transportation of freight and passengers, extending through the state of New Jersey into other states of the Union. No part of its road is within the state of New York. But it operates in connection with its road a ferry from the New Jersey shore across the Hudson river to the city of New York, where it has terminal facilities, consisting of wharves, piers, docks, and buildings connected therewith, used in the prosecution of the business of delivering freight and passengers carried over its line to that city, and of receiving freight and passengers to be carried from the city into New Jersey and other states reached by its system of roads. The only transportation over New York territory carried on by the relator is over that part of the Hudson river within the territorial boundaries of the state, by means of its ferryboats. It collects in the city of New York money due for transportation to that point and for transportation from that city, and there makes contracts for transportation of freight and passengers over its lines, and issues and sells passenger tickets. It employs in the city of New York a large number

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of agents, clerks, and laborers in the prosecution of its business. It is engaged in no business in that city except such as relates to the transportation of freight and passengers over its lines." It was claimed on behalf of the relator in the case cited that the tax imposed was upon interstate commerce in violation of the so-called "commerce clause" of the federal constitution (article 1, § 8, cl. 3). The learned judge further stated in his opinion as follows: "In determining the question now presented, two propositions must be deemed established: One is that the business in which the relator was engaged in this state was exclusively that of interstate commerce. Whatever it did here was incident to, and in aid of, the business of interstate transportation. Interstate transportation was not a part of its business only in this state. * * * The second point which must be deemed to be established is that the tax imposed upon corporations * * * is a tax upon the 'corporate franchise or business,' and is not a tax upon property. * * * We come, therefore, to the crucial question in the case: Can the state of New York tax the relator, a foreign corporation, upon its business carried on in this state, which is exclusively the business of interstate commerce? The question, stated in another form, is, may a state tax a foreign corporation whose business in such state is exclusively that of interstate commerce for the privilege of transacting that business here? because, as we have held, this is the essential nature of the tax, under the act of 1880. *People v. Wemple*, 131 N. Y. 68, 29 N. E. 1002, 27 Am. St. Rep. 542. The state may subject to a property tax, in common with other property, every description of property, real and personal, having its situs there, although used or employed exclusively in the business of foreign or interstate commerce. Ships or vessels engaged in foreign or coastwise commerce may be taxed at their home port, and the products of one state carried into another, and there held for sale by the original purchaser, and may be taxed, even before sale, in the state to which they have been taken. * * * If the tax imposed upon corporations by the act of 1880 and the subsequent statutes amending the same had been a property tax, instead of a tax on franchise or business, it would not, as we interpret the decisions of the United States supreme court, have been subject to the objection now made in behalf of the relator, nor could the relator have lawfully resisted its payment. * * * The tax against the Pennsylvania Railroad Company, involved in this case, was distinctly a tax on its business; and that business in this state, as we have said, was exclusively interstate commerce. * * * The relator is lawfully here, and, being here, it cannot, we think, under the authorities, be lawfully subjected by the state to a tax upon its business of interstate commerce, or for the privilege of conducting its business here." I have thus indicated the precise points upon which the decision in the case cited rests.

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In that case, as in this, the relator was the Pennsylvania Railroad Company. The question in that case was whether the transportation of passengers from its railway terminus in Jersey City, over certain territory of the state of New York, in ferryboats, was a continuation of its interstate commerce. In this case the question is, if the same relator continues the transportation of its passengers still further into the territory of the state of New York by cab, whether it is a continuation of its interstate business.

The only point raised by the relator in this appeal is based upon the proposition that the transportation of passengers from the New York side of the ferry to and from their residences or hotels is as much a part of its interstate business as was the transportation of its passengers by ferryboat, which was approved by this court, and held to be exclusively interstate commerce. It is uncontroverted in this record that the relator does not seek to do, and does not carry on, a general cab business in the city of New York. It further appears that these cabs are solely used for the purpose of the transportation of passengers coming from or going to the line of the relator's road. The argument on behalf of the state comptroller is that this cab service is to be regarded, necessarily, as an independent business; that it is no part of the transportation of a passenger (by way of illustration) traveling from Washington to the Fifth Avenue Hotel, in the city of New York. We are unable to see any distinction between the right of the relator to transport its passengers by ferry or by cab to or from points in the city of New York. It can be said of the relator in this case, as it was said of it in the case cited, that "it is engaged in no business in that city except such as relates to the transportation of passengers * * * over its lines." It is insisted on behalf of the state comptroller that the cab service is to be regarded as starting and terminating within the state of New York. Even if this were so, that fact alone does not characterize the cab service exclusively as a domestic business. While we are to be controlled by the decisions of the supreme court of the United States, when applicable to a case involving a federal question, I am of opinion that to extend the rule as laid down in the case involving the rights of this relator, and already cited, to the new facts now presented, is not in conflict with any decision of that court, but, on the contrary, is in harmony with a number of well-considered authorities. In the case of *The Daniel Ball*, 10 Wall. 557, 19 L. Ed. 999, the question was whether the steamboat named, which was engaged in navigating Grand river, Mich., wholly within the limits of that state, should be licensed under the United States statute. It appeared that some of the goods carried by it were destined to, and marked for, points beyond the state of Michigan. The court said (page 565, 10 Wall., 19 L. Ed. 999), referring to the question of interstate commerce: "She was employed as

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an instrument of that commerce; for, whenever a commodity has begun to move as an article of trade from one state to another, commerce in that commodity between the states has commenced. The fact that several different and independent agencies are employed in transporting the commodity, some acting entirely in one state, and some acting through two or more states, does in no respect affect the character of the transaction. To the extent in which each agency acts in that transportation, it is subject to the regulation of congress." The relator, by its cab service, simply extended its care of passengers at a loss to itself, and provided an additional means of transportation, which conveyed them for a reasonable compensation to their destinations in the city of New York. These passengers, when in the cabs of the relator, were in the process of transportation, precisely as were the goods carried by the vessel *Daniel Ball* marked for points beyond the state of Michigan. *Lord v. Steamship Co.*, 102 U. S. 541, 26 L. Ed. 224; *Foster v. Davenport*, 63 U. S. 244, 16 L. Ed. 248; *Cutting v. Navigation Co.* (C. C.) 46 Fed. 641; *Leloup v. Port of Mobile*, 127 U. S. 640, 8 Sup. Ct. 1380, 32 L. Ed. 311. In the *Leloup Case*, *Bradley, J.*, at page 647, 127 U. S., p. 1383, 8 Sup. Ct., 32 L. Ed. 311, said: "But it is urged that a portion of the telegraph company's business is internal to the state of Alabama, and therefore taxable by the state. But that fact does not remove the difficulty. The tax affects the whole business, without discrimination. There are sufficient modes in which the internal business, if not already taxed in some other way, may be subjected to taxation, without the imposition of a tax which covers the entire operations of the company." The case of *Crutcher v. Kentucky*, 141 U. S. 47, 11 Sup. Ct. 851, 35 L. Ed. 649, 46 Am. & Eng. R. Cas. 637, has a very strong bearing in principle upon the question we are now considering. That case involved the transaction of certain business in the state of Kentucky by the plaintiff as the agent of the United States Express Company. Mr. Justice *Bradley*, at page 59, 141 U. S., page 854, 11 Sup. Ct., 35 L. Ed. 649, said: "We do not think that the difficulty is at all obviated by the fact that the express company, as incidental to its main business, which is to carry goods between different states, does also some local business, by carrying goods from one point to another within the state of Kentucky. This is probably quite as much for the accommodation of the people of that state as for the advantage of the company. But whether so or not, it does not obviate the objection that the regulations as to license and capital stock are imposed as conditions on the company's carrying on the business of interstate commerce, which was manifestly the principal object of its organization. These regulations are clearly a burden and a restriction upon that commerce. Whether intended as such or not, they operate as such. But taxes or license fees in good faith imposed exclusively on express business carried on

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wholly within the state would be open to no such objection." The case of *Maine v. Grand Trunk R. Co.*, 142 U. S. 217, 12 Sup. Ct. 121, 35 L. Ed. 994, 48 Am. & Eng. R. Cas. 602, has no application to the case at bar. The defendant operated a portion of its line in the state of Maine, and a franchise tax was imposed thereon. The payment was resisted on the ground that it was a tax imposed upon interstate commerce. The supreme court of the United States sustained this tax on the ground that the defendant enjoyed a franchise granted by the state of Maine, and it was competent for the legislature to require the payment of taxes as a condition to issuing the grant. These facts clearly distinguish the case from the one now under consideration. It may be, however, remarked that the supreme court decided this case on a vote of five to four, and the opinion of the dissenting justices contains cogent reasoning in support of the proposition that the tax is imposed on the business of interstate commerce. The case of *Coe v. Town of Errol*, 116 U. S. 517, 6 Sup. Ct. 475, 29 L. Ed. 715, cited by the respondent, has no application to the case at bar. That case involved the taxation of a raft of logs which had been cut in the state of New Hampshire, and were destined for shipment to the state of Maine. Prior to the time when they were to be started on their interstate journey, a tax was imposed by the state of New Hampshire, which was sustained by the supreme court of the United States on the ground that, until the transportation was actually begun, these logs were like all other personal property in the state of New Hampshire, and liable to taxation; that the mere intention of the owner, when he cut these logs, to ship them into the state of Maine, would not be considered in determining the right of the state to tax the property. The case of *People v. Morgan*, 168 N. Y. 1, 60 N. E. 1041, has no bearing upon this controversy. In that case the comptroller sought to collect from the relator a tax, under section 184 of the tax law, for the transportation of domestic mail matter within this state. It appeared, however, that it was impossible to ascertain the proportion of mail which originated and terminated within this state, as distinguished from interstate and foreign mail matter, for the reason that the mail bags could not be inspected for any such purpose. It was held that this state of affairs prevented the assessment of any tax for the transportation of domestic mail matter.

I am of opinion that the taxes imposed upon the relator by the state comptroller are an interference with interstate commerce, and were unconstitutionally levied and void. The determination of the comptroller and the order of the appellate division should be reversed, with costs.

PARKER, C. J., and GRAY, O'BRIEN, HAIGHT, and WERNER, JJ., concur with CULLEN, J. BARTLETT, J., dissents.

Order affirmed.

MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY, Plff. in Err.,
v. STATE OF MINNESOTA *ex rel.* RAILROAD &
WAREHOUSE COMMISSION.

(Argued January 23, 24, 1902. Decided June 2, 1902.)

[22 Sup. Ct. Rep. 900.]

Constitutional Law—Reduction of Rates.*

A state legislature may authorize its railroad commission to reduce as unreasonable a joint through rate agreed upon by two or more railroads, and apportion the same among the several railroad companies interested.

Reasonableness of Rates.

A through rate is not necessarily reasonable because it does not exceed the aggregate of two reasonable local rates.

Same—Taking Property without Due Process of Law.

Through rates for hard coal in carload lots from Duluth, Minnesota, to interior points in that state, as fixed by the Minnesota Railroad and Warehouse Commission, are not so unreasonable as to amount to a taking of the property of the railroad without due process of law because, if such rates were applied to all freight, the road would not pay its operating expenses, in which are included interest upon bonds and dividends on stock, where hard coal in carload lots is a comparatively insignificant item of the total freight carried.

In Error to the Supreme Court of the State of Minnesota to review a judgment affirming a judgment of the District Court of Ramsey County of that State which confirmed an order of the Minnesota Railroad and Warehouse Commission fixing railroad rates, and directed the issue of a writ of mandamus to compel compliance with such order. Affirmed.

See same case below, 80 Minn. 191, 83 N. W. 60.

Statement by MR. JUSTICE BROWN:

This was a petition for a mandamus filed in the district court of Ramsey county by the state, upon the relation of the Railroad and Warehouse Commission, against the Minneapolis & St. Louis Railroad Company and several other railroad companies (the first of which alone answered and sued out this writ of error). to compel such companies to adopt and publish

*Powers of railroad commissioners, see generally, *Steenerson v. Great Northern Ry. Co.* (Minn.), 8 Am. & Eng. R. Cas., N. S., 559, and note, 613 et seq.; *Illinois Cent. R. Co. v. Com.* (Ky.), 22 Am. & Eng. R. Cas., N. S., 356; *Edson v. So. Pac. Co.* (Cal.), 22 Am. & Eng. R. Cas., N. S., 187; *Miss. Railroad Com. v. Gulf & S. I. R. Co.* (Miss.), 21 Am. & Eng. R. Cas., N. S., 864; *State ex rel. Railroad & Warehouse Com. v. U. S. Exp. Co.* (Minn.), 19 Am. & Eng. R. Cas., N. S., 41; *State ex rel. Railroad & Warehouse Com. v. Minn. & St. L. R. Co.* (Minn.), 17 Am. & Eng. R. Cas., N. S., 630; *State ex rel. Lamar, Atty. Gen., v. Jacksonville Term. Co.* (Fla.), 16 Am. & Eng. R. Cas., N. S., 727; *Davis v. San Antonio & G. S. Ry. Co.* (Tex.), 15 Am. & Eng. R. Cas., N. S., 449; *People ex rel. Loughran v. Board of Railroad Com. of State of New York* (N. Y.), 15 Am. & Eng. R. Cas., N. S., 441; *Louisville & N. R. Co. v. Com.* (Ky.), 15 Am. & Eng. R. Cas., N. S., 841; *Williams, State's Atty., v. New York, N. H. & H. R. Co.* (Conn.), 12 Am. & Eng. R. Cas., N. S., 860; *Town of Bristol v. New England R. Co.* (Conn.), 11 Am. & Eng. R. Cas., N. S., 674.

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a joint through rate fixed by the commission upon shipments of hard coal in carload lots, from the city of Duluth to certain points in the southern and western parts of the state of Minnesota, and to enjoin them from demanding or receiving any greater sum for such through shipments than that fixed by the commission.

The facts are substantially as follows: The St. Paul & Duluth Railroad Company, a corporation of the state of Minnesota, operates a line of railroad from Duluth upon Lake Superior to the cities of St. Paul and Minneapolis. Its local rate upon hard coal in carload lots from Duluth to these twin cities was \$1.25 per ton, the reasonableness of which local rate is conceded. The Minneapolis & St. Louis Railroad Company, also a corporation of the same state, operates a line of road from St. Paul and Minneapolis southerly through Hopkins, a station 9 miles from Minneapolis, to Albert Lea in said state, thence still southerly to Angus in Boone county, Iowa. At Albert Lea and Angus it connects with other railroads, and by virtue of traffic arrangements has access to all the principal markets. It also owns and operates a branch line extending from a connection with its main line at Hopkins, westerly 92 miles to Morton, Minnesota, at which point it connects with a railroad owned and operated by the Wisconsin, Minnesota, & Pacific Railroad Company, which extends westerly from Morton to Watertown in South Dakota. Winthrop is a station upon the line of the Minneapolis & St. Louis road between Hopkins and Morton, 60 miles west of Hopkins, and at the time the order of the commission was made the Minneapolis, New Ulm, & Southwestern Railroad had constructed and owned a short line of railroad extending south from Winthrop to New Ulm in Brown county. The capital stock of the last-named company was owned by the Minneapolis & St. Louis Railroad Company; but it was nevertheless a separate and independent corporation.

Both the St. Paul & Duluth Railroad Company and the Minneapolis & St. Louis company are fully equipped to conduct the business of common carriers, have complete track connections and transfer facilities at St. Paul and Minneapolis, and for a long time have been engaged in transporting hard coal in carload lots without change of cars from Duluth to the points upon the line of the Minneapolis and St. Louis road for a joint through rate, which had been established by the mutual agreement of the companies, and which had been divided between them according to that agreement. In dividing earnings under this joint tariff, to which not only the two principal defendants were parties, but the Minneapolis, New Ulm, & Southwestern company, and the Wisconsin, Minnesota, & Pacific company were also parties, there was first set apart to the St. Paul & Duluth company \$1 per ton for transporting the hard coal from Duluth to Minneapolis, the remainder being turned over to one or more of the other three

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companies participating in the carriage of the coal to its destination.

On September 22, 1898, the Railroad and Warehouse Commission, having resolved to investigate the reasonableness of this joint rate, made an order upon all these railroad companies to answer as to the reasonableness of such rate. The companies duly appeared and took part in the investigation, and on January 19, 1899, the commission made an order whereby it determined that the joint rate then in force for transporting hard coal from Duluth to the several stations west of the twin cities was unreasonable and unjust, and ordered a reduction to another rate found by the commission, which was published and served upon the companies, as required by the state laws, but was disregarded by the railroads interested. Under the rate so fixed the St. Paul & Duluth company was allowed \$1 per ton from Duluth to Minneapolis, which was the same price previously agreed upon between the parties, the remainder to be paid to the Minneapolis & St. Louis company, which was left to settle with the Minneapolis, New Ulm, and the Southwestern and the Wisconsin, Minnesota, & Pacific companies for services rendered by those companies in the transportation of coal to points upon their respective roads. Neither of the companies filed or posted schedules of the new tariffs as required by law, and the plaintiff in error, the Minneapolis & St. Louis Railroad Company, on March 3, 1899, and six weeks after the commission made its order, withdrew all tariffs on hard coal in carload lots which had been established under agreement with the Duluth road.

Whereupon this proceeding was taken in the district court of Ramsey county to compel the railroad companies to comply with the order of the commission. After trial, judgment was rendered by that court, confirming the order of the commission, directing the issue of a writ of mandamus as prayed; and the judgment so rendered was affirmed upon appeal by the supreme court of Minnesota in *State ex rel. Railroad & Warehouse Commission v. Minneapolis & St. L. R. R. Co.*, 80 Minn. 191, 83 N. W. 60, 17 Am. & Eng. R. Cas., N. S., 630.

Whereupon the Minneapolis & St. Louis Railroad Company, against which the full amount of the reduction by the commission was assessed, sued out this writ of error.

Mr. Albert E. Clarke for plaintiff in error.

Messrs. Thomas D. O'Brien, W. B. Douglas, and Ira B. Mills for defendant in error.

MR. JUSTICE BROWN delivered the opinion of the court:

This case raises two questions: (1) The constitutionality of an act of the legislature of Minnesota passed in 1895, creating a railroad and warehouse commission and defining its duties (the material portions of which are printed in the case of *Wisconsin, M. & P. R. Co. v. Jacobson*, 179 U. S. 287, 45 L. Ed. 194, 21 Sup. Ct. Rep. 115, 19 Am. & Eng. R. Cas., N.

S., 634), in so far as it assumes to establish joint through rates or tariffs over the lines of independent connecting railroads, and by virtue of which it assumes to arbitrarily apportion and divide joint earnings; (2) whether the tariff fixed by the commission is wholly inadequate and not compensatory.

1. The constitutionality of the act of 1895 is attacked upon the ground that it authorizes the railway commission of the state to compel two or more railroad companies to enter into a joint tariff, and to make and adopt a joint rate for the transportation of property over the lines of such companies, as well as to make a division and to apportion the joint earnings among the several companies interested. It is insisted that it is beyond the constitutional power of the legislature to compel companies to enter into involuntary, unreasonable, and unprofitable contracts with other companies at the instance of third parties, or to fix terms and conditions upon which such contracts shall be performed. This argument in its various applications is one which has been addressed to and considered by this court in nearly every case in which the power of the state to regulate railway charges has been called in question, and the answer made to it in those cases is equally pertinent here. Indeed, it is impossible for the state to exercise this power of regulation without interfering to some extent with the power of a railway to contract either with its customers or connecting lines. The power is one which was said in *Munn v. Illinois*, 94 U. S. 113, 24 L. Ed. 77, to have been customarily exercised in England from time immemorial, and in this country from its first colonization, for the regulation of ferries, common carriers, hackmen, bakers, millers, wharfingers, and innkeepers; and the whole object of this class of legislation is to curtail the power to contract by limiting the exactions of those engaged in these occupations, and providing that the rendition of such services shall not raise an implied promise to pay more than a certain fixed sum. This legislation may be justified by the fact that these various occupations are necessarily to a certain extent monopolistic in their nature, and that in dealing with customers the parties do not stand upon an equality, the latter being practically compelled to submit to such terms as the former may choose to exact, unless the state shall, acting in the interest of the public, elect to interfere and prescribe a maximum of charges.

The argument for the railroad companies in this case assumes that, while the state may interfere as between the railways and their customers, the shippers of freight, it cannot do so as between the railways themselves, by fixing joint tariffs and apportioning such tariffs among the several railways interested in the transportation. The practical result of that argument is this, that if there were within a certain state five connecting roads of 100 miles each in length, which among themselves had established a joint tariff for the whole

500 miles, the state would be powerless to interfere with such tariff, though its right to do so would be unquestioned if the whole 500 miles were owned and operated by a single company. To state such a proposition is practically to answer it. Granting that a state has no right to interfere with the internal economy of a railroad farther than to secure the safety and comfort of passengers, as, for example, to fix the wages of employees or control its contracts for construction, or the purchase of supplies, it has a clear right to pass upon the reasonableness of contracts in which the public is interested, whether such contracts be made directly with the patrons of the road, or for a joint action in the transportation of persons or property in which the public is indirectly concerned.

There is an underlying fallacy in the argument of the railroad company in this connection, that the sum of two reasonable local rates cannot be unreasonable; and, as it is admitted that \$1.25 per ton is a reasonable local rate for transporting coal from Duluth to Minneapolis over the St. Paul & Duluth road, and that the local rates for coal from Minneapolis to the designated stations westward and southward are also reasonable, it is impossible that a through rate from Duluth to the same stations which does not exceed the aggregate of these two rates can be unreasonable. We cannot assent to this proposition. The practice of railways in this country is almost universally to the contrary, and a through tariff is almost always fixed at a less sum than the aggregate of local tariffs between near-by stations upon the same road. Doubtless the fixing of a lower through tariff is dictated largely by a desire of each road to get as much mileage as possible from its patrons, as well as by an effort to meet competition over other lines doing business between the same termini; but in addition to this there is an increased cost of local business over through business in the additional fuel consumed and the increased wear upon the machinery of each train involved in stopping at every station. These facts were noticed by Mr. Justice Brewer in the opinion of the court in *Chicago, M. & St. P. R. Co. v. Tompkins*, 176 U. S. 167, 44 L. Ed. 417, 20 Sup. Ct. Rep. 336, 12 Am. & Eng. R. Cas., N. S., 70, in which he makes the following observations:

"Take a single line of 100 miles, with ten stations. One train starts from one terminus with through freight and goes to the other without stop. A second train starts with freight for each intermediate station. The mileage is the same. The amount of freight hauled per mile may be the same; but the time taken by the one is greater than that taken by the other. Additional fuel is consumed at each station where there is a stop. The wear and tear of the locomotive and cars from the increased stops and in shifting cars from main to side tracks is greater; there are the wages of the employees at the intermediate stations, the cost of insurance, and these elements are so varying and uncertain that it would seem quite out

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of reach to make any accurate comparison of the relative cost. And if this is true when there are two separate trains, it is more so when the same train carries both local and through freight."

We are bound to recognize the fact that modern commerce is largely carried on over railways owned and operated by different companies; that Congress in passing the Interstate Commerce Act assumed the power to determine the reasonableness of joint tariffs as applied to connecting lines between the several states) *Cincinnati, N. O. & T. P. R. Co. v. Interstate Commerce Commission*, 162 U. S. 184, 40 L. Ed. 935, 5 Inters. Com. Rep. 391, 16 Sup. Ct. Rep. 700, 5 Am. & Eng. R. Cas., N. S., 703), and that, if the power of the state commission were limited to the tariffs of a single road, it would be wholly inefficacious in a large number, if not in a majority, of cases,—in fact, that the whole purpose of the act might be defeated. The necessities of this case do not require us to determine whether connecting roads may be compelled to enter into contracts as between themselves and establish joint rates, but so far as applied to contracts already in existence we have no doubt of the power of the state to supervise and regulate them. Such a contract for a joint rate having been in existence when the order of the commission was made, we do not think it was affected by the subsequent withdrawal of the Minneapolis & St. Louis company. It may also be said, in this connection, that in *Wisconsin, M. & P. R. Co. v. Jacobson*, 179 U. S. 287, 45 L. Ed. 194, 21 Sup. Ct. Rep. 115, 19 Am. & Eng. R. Cas., N. S., 634, we held that, under this very act, railways in Minnesota might be compelled to make track connections at the intersections of other roads for transferring cars from the lines or tracks of one company to those of another, as well as for facilities for the interchange of cars and traffic between their respective lines. The case did not involve the right of the commission to prescribe joint through rates for the transportation of freight between points on their respective lines, but if any inferences are to be derived from the opinion, they are in favor of such right. See also *Burlington, C. R. & N. R. Co. v. Dey*, 82 Iowa, 312, 338, 12 L. R. A. 436, 3 Inters. Com. Rep. 584, 48 N. W. 98, 45 Am. & Eng. R. Cas. 391. All that we are required to hold in this case is that, where a joint tariff between two or more roads has been agreed upon, such tariff is as much within the control of the legislature as if it related only to transportation over a single line.

2. The more difficult question is that connected with the reasonableness of the rates. The presumption is that the rates fixed by the commission are reasonable, and the burden of proof is upon the railroad companies to show the contrary. *Dow v. Beidelman*, 125 U. S. 680, 31 L. Ed. 841, 2 Inters. Com. Rep. 56, 8 Sup. Ct. Rep. 1028, 34 Am. & Eng. R. Cas. 322; *Chicago, M. & St. P. R. Co. v. Tompkins*, 176 U. S. 167,

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173, 44 L. Ed. 417, 419, 20 Sup. Ct. Rep. 336, 12 Am. & Eng. R. Cas., N. S., 70. Indeed, the act itself provides, § 3, subdivision C, "the rates established by said commission shall go into effect within ten days, . . . and from and after that time the schedule of rates so established shall be prima facie evidence in all the courts of this state that such rates are reasonable through rates for transportation of freight and cars upon the railroads for which such schedule shall have been fixed."

In fixing the through rates for hard coal in carload lots from Duluth to interior points in Minnesota, the commission set apart to the St. Paul & Duluth company \$1 per ton of the joint tariff, and as this was the same amount which that road had received under the prior arrangement, no question is made as to its reasonableness, and no appeal was taken by that road. The remainder of the joint tariff is paid to the Minneapolis & St. Louis company, plaintiff in error, which was left to settle with the other roads interested in the tariff.

According to the tariff fixed by agreement between the companies prior to the action of the commission a charge was made from Duluth to Hopkins, 9 miles from Minneapolis, of \$1.75, of which \$1 was paid to the St. Paul & Duluth road (160 miles) and the remainder, 75 cents, to the Minneapolis & St. Louis road for a transportation of 9 miles. This rate was gradually increased to stations beyond Hopkins until Norwood, 40 miles from Minneapolis, was reached, where it was fixed at \$2.50. The same rate was retained to Boyd, 153 miles from Minneapolis. This rate of \$2.50 appears to have been a purely arbitrary one, and indicates pretty clearly, as observed by the supreme court, that the defendant was either carrying coal to Boyd at a loss, or was collecting too much tariff per ton on the same article transported to Norwood, although there may have been, as observed by the court, commercial conditions which made them necessary. The commission reduced the rate to Hopkins from \$1.75 to \$1.32, and to Norwood from \$2.50 to \$1.57, gradually increasing that rate to Boyd, where it was fixed at \$2.48, but 2 cents less than that fixed by the joint tariff theretofore agreed upon. The average rate allowed per ton per mile to the Minneapolis & St. Louis road under the tariff so fixed by the commission was 1.115, while the old rate charged for this service was 1.784.

This rate, fixed by the commission only upon hard coal in carload lots, was not met by any showing that at the rates fixed by the commission there would be no profit or an insufficient profit upon the coal so transported, but by evidence that upon the hard coal received from Duluth for the year ending June 30, 1899, 2,483 tons, the proportion allotted to the Minneapolis & St. Louis company would be \$3,874.50, while if the commission's rates had been in effect for the same rate this proportion would have been \$2,464.78, a loss of revenue for the

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year of \$1,409.72, as shown more clearly by the following table:

Total tons of hard coal received from Duluth for year ending June 30, 1899.....	2,583 tons
M. & St. L. R. R. proportion on old rate, 2,583 tons @ \$1.50....	\$3,874 50
Had commissioners' rates been in effect for same period, M. & St. L. R. R. proportion would be.....	2,464 78

Loss of revenue to M. & St. L. R. R. for year..... \$1,409 74

As suggested by the supreme court of the state, this loss seems to be a trifling one when we consider that the total freight earnings on the divisions affected by this order were over \$700,000 for that fiscal year.

The principal testimony, however, was intended to show that, if the rate fixed by the commission for coal in carload lots were applied to all freight, the road would not pay its operating expenses, although in making this showing the interest upon the bonded debt and the dividends were included as part of the operating expenses. But it also appears that if the old rate upon hard coal in carload lots agreed upon by the roads were adopted as an average rate for all freights, the freight earnings of the road would have been largely increased. This would indicate that the rate fixed for coal must have been above the average rate, although coal is classified as far below the average.

It is quite evident that this testimony has but a slight, if any, tendency to show that even at the rates fixed by the commission there would not still be a reasonable profit upon coal so carried. It was not even shown that the joint tariff fixed by the roads themselves upon coal was not disproportionately high as compared with rates upon other articles or as gauged by a proper classification. The difficulty with defendant's case is that it made no attempt to show the cost of carrying coal in carload lots, and that even in proving that the cost of transporting all merchandise exceeded the rate fixed by the commission on this coal, the interest upon bonds and dividends upon stock were included in operating expenses. The propriety of the first is at least doubtful, the impropriety of the second is plain. We do not intend, however, to intimate that the road is not entitled to something more than operating expenses. It was shown that coal belongs to one of the lowest classes of freight, and this is particularly true of the coal received from Duluth at Minneapolis, which was delivered at the Minneapolis & St. Louis company upon their tracks at Minneapolis. Besides this, coal in carload lots was a comparatively insignificant item of the total freight carried, being but 2,583 tons for an entire year. True, it may be difficult to segregate hard coal in carload lots from all other species of freight, and determine the exact cost to the company; but upon the other hand, the commission, in considering a proper reduction upon a certain class of freight, ought not to be

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embarrassed by any difficulties the companies may experience in proving that the rates are unreasonably low. The charges for the carriage of freight of different kind are fixed at different rates according to their classification, and this difference, presumably at least, is gauged to some extent by a difference in the cost of transportation, as well as the form, size, and value of the packages and the cost of handling them.

Notwithstanding the evidence of the defendant that, if the rates upon all merchandise were fixed at the amount imposed by the commission upon coal in carload lots, the road would not pay its operating expenses, it may well be that the existing rates upon other merchandise, which are not disturbed by the commission, may be sufficient to earn a large profit to the company, though it may earn little or nothing upon coal in carload lots. In *Smyth v. Ames*, 169 U. S. 466, 42 L. Ed. 819, 18 Sup. Ct. Rep. 418, 10 Am. & Eng. R. Cas., N. S., 1, we expressed the opinion (p. 541, L. Ed. 847, Sup. Ct. Rep. 432), that the reasonableness or unreasonableness of rates prescribed by a state for the transportation of persons or property wholly within its limits must be determined without reference to the interstate business done by the carrier, or the profits derived from it, but it by no means follows that the companies are entitled to earn the same percentage of profits upon all classes of freight carried. It often happens that, to meet competition from other roads at particular points, the companies themselves fix a disproportionately low rate upon certain classes of freight consigned to these points. The right to permit this to be done is expressly reserved to the Interstate Commerce Commission by § 4 of that act, notwithstanding the general provisions of the long and short haul clause, and has repeatedly been sanctioned by decisions of this court. While we never have decided that the commission may compel such reductions, we do not think it beyond the power of the state commission to reduce the freight upon a particular article, provided the companies are able to earn a fair profit upon their entire business, and that the burden is upon them to impeach the action of the commission in this particular. As we said in *Smyth v. Ames* (p. 547, L. Ed. 849, Sup. Ct. Rep. 434, 10 Am. & Eng. R. Cas., N. S., 1): "What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth." The very fact that the commission, while fixing the rate to Boyd at \$2.48, within 2 cents of the amount theretofore charged by the companies themselves, gradually reduced that rate in proportion to the mileage, to Norwood, where it was fixed at \$1.57, while the company charged an arbitrary rate of \$2.50 to Norwood and to all the stations between Norwood and Boyd, tends, at least, to show that the rates were fixed upon

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a more reasonable principle than that applied by the companies.

In exercising its power of supervising such rates the commission is not bound to reduce the rates upon all classes of freight, which may perhaps be reasonable, except as applied to a particular article; and if, upon examining the tariffs of a certain road, the commission is of opinion that the rate upon a particular article, or class of freight, is disproportionately or unreasonably high, it may reduce such rate, notwithstanding that it may be impossible for the company to determine with mathematical accuracy the cost of transportation of that particular article as distinguished from all others. Obviously such a reduction could not be shown to be unreasonable simply by proving that, if applied to all classes of freight, it would result in an unreasonably low rate. It sometimes happens that, for purposes of ultimate profit and of building up a future trade, railways carry both freight and passengers at a positive loss; and while it may not be within the power of the commission to compel such a tariff, it would not, upon the other hand, be claimed that the railroads could in all cases be allowed to charge grossly exorbitant rates as compared with rates paid upon other roads, in order to pay dividends to stockholders. Each case must be determined by its own considerations, and while the rule stated in *Smyth v. Ames* is undoubtedly sound as a general proposition that the railways are entitled to a fair return upon the capital invested, it might not justify them in charging an exorbitant mileage in order to pay operating expenses, if the conditions of the country did not permit it.

It is sufficient, however, for the purpose of this case, to say that the action of the commission in fixing the rate complained of as to this particular class of freight has not been shown to be so unjust or unreasonable as to amount to a taking of property without due process of law, and we therefore conclude that the judgment of the Supreme Court must be affirmed.

MEMPHIS ST. RY. CO. v. NORRIS.

(*Supreme Court of Tennessee, May 19, 1902.*)

[69 S. W. Rep. 325.]

Street Railways—Passengers—Injuries—Collision with Vehicle—Degree of Care—Instructions.*

In an action by a passenger against a street car company for injuries sustained by a collision with a dray at a cross street, the court instructed that the drayman and motorman had equal rights, and each owed the duty to approach the crossing at a speed enabling him to stop if neces-

*As to the care required of those in charge of street cars to avoid collisions with persons, animals, or vehicles, see note appended to *Robinson v. Louisville Ry. Co.* (C. C. A.), 1 R. R. R. 838, 24 Am. & Eng. R. Cas., N. S., 838.

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sary to avoid collision; that, if either failed to do so, he was guilty of negligence, and if it caused the injury plaintiff must look to such negligent party; that if the car, running at a high speed, ran into the dray as it was attempting to cross and was almost across the track, and whirled it around, so that the shafts were thrust into the car, injuring plaintiff, defendant was liable though the drayman was negligent; but if the dray dashed into the rear of the car, and the shafts protruded and injured plaintiff, then the drayman was liable, and verdict should be for the defendant: *held* that, while portions of the charge might be construed as requiring the motorman to have his car under absolute control, as a whole it was not erroneous as requiring too high a degree of care of defendant.

Appeal from circuit court, Shelby county; L. H. Estes, Judge.

Action by Henry Norris against the Memphis Street Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Hancock & Poston, for appellant.

Wright, Peters & Wright, for appellee.

WILKES, J. This is an action for damages for personal injuries. There was a trial before a jury in the court below, and verdict and judgment for \$500, and the street railway company has appealed and assigned errors.

The plaintiff was a passenger upon one of the cars of the street railway company when it collided with a dray at a street crossing, and he was quite badly injured by being struck with the shafts of the dray. The plaintiff's theory is that the car was proceeding at a rapid rate on a down grade while the dray, pulled by a mule and driven by a negro, crossed the track at the intersection of two streets. The mule, according to plaintiff's contention, was going at a slow trot, and all of the dray had cleared the tracks, which were double, except the rear or tail pieces, when the car struck it, and whirled it around in a circle, and the shafts were thus thrust into the car, striking the plaintiff where he stood, and breaking his leg. The defendant's theory is that the dray dashed into the rear of the car, and the shafts and mule's head protruded in among the passengers, and thus the injury occurred, and there is evidence tending to show that the negro was driving the dray rapidly, and some that, as he drew near the car, he increased his speed, and dashed rapidly into the car. These two theories being submitted to the jury, it found in favor of the plaintiff, and it is conceded that there is some evidence to sustain plaintiff's theory, though it is insisted, and we think very plausibly, that the weight of the evidence supports defendant's contention. In any event, it is not insisted there is no evidence to support the verdict, and unless, therefore, there is an error in the charge or admission of evidence, the verdict must stand. It will appear at a glance that the crucial question in the case is whether the car negligently ran against the dray or whether the dray was negligently driven against the car.

It is said that the charge of the court was erroneous, in that it put upon the street car company a higher degree of care and diligence than the law implies. Taking the charge as a whole, we do not think it is erroneous. The court charged as follows: "The drayman and the motorman each had equal rights to use Linden street where the other street crossed it, but, as both could not use the crossing at the same time, the law makes it the duty of the drayman, and also of the motorman, on approaching the crossing, to have their vehicles under control, and to run up to and over the crossing at such a rate of speed as to enable them to stop when necessary to do so in order to avoid a collision. If either of them neglected to do this, then the one failing to do so would be guilty of negligence; and, if the negligence was the cause of the plaintiff's injuries, then he must look to the one negligently inflicting such injuries upon him for a redress of such injuries." Again: "If you find, from a preponderance of the evidence, that the car did run into the dray as it was attempting to cross the track in front of the car, and that this was the cause of the dray being thrown against plaintiff, by which his leg was broken, the collision of the car with the dray, brought about in a way just described and as claimed by plaintiff, would be such an act of negligence on the part of the motorman as would make the railroad liable for plaintiff's injuries, although you also find the drayman was negligent in trying to cross Linden street in front of the car; and your verdict should be for the plaintiff, Norris. On the other hand, if you find from the preponderance of the evidence that the car did not collide with the dray as the driver was attempting to cross Linden street on a street crossing, but that the driver of the dray was driving north on the cross street; and, when the car had gotten on the crossing, the driver negligently drove his dray into the south side of the car, and near the rear of the car, and that this was the cause of the injuries to plaintiff, Norris,—then the driving into the car would be such an act of negligence on the part of the driver as would make him liable for plaintiff's injuries, and your verdict should be for the defendant railroad." It is proper to remark that the case has been treated as if the controversy was between the street car company and the drayman, whereas it is between the street car company and one of its own passengers, and the street car company would therefore be held to a higher degree of care and diligence than if the controversy was with the drayman crossing the street. But, while this is so, we do not think the charge as a whole is erroneous. While detached portions of it might be construed as meaning that the motorman must have his car under absolute control, so as in any event and all contingencies to prevent a collision, yet, taken as a whole, it cannot be so understood; but the contentions of both parties are put in a plain and simple manner before the jury, and they are told, in substance, that, if plaintiff's contentions are:

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correct, the road is liable, but, if the defendant's theory is correct, it is not. Clearly, under the charge as given, if the jury had credited the theory of defendant they could not have given the verdict they did, while, on the other hand, if they believed that of plaintiff there was evidence to sustain their finding, and in that event there would be liability. There is an error assigned to the rejection of certain statements by witness Armstead. We think there is no reversible error in this. The evidence was incompetent, being a surmise or opinion, merely, of the witness, and besides it was not material.

We see no reversible error in the record, and the judgment is affirmed, with costs.

UNITED RYS. & ELECTRIC CO. OF BALTIMORE v. BEIDELMAN.

(*Court of Appeals of Maryland, June 19, 1902.*)

[52 Atl. Rep. 913.]

Injury to Street Railway Passenger—Negligence—Prima Facie Case.

A prima facie case of negligence is made out by testimony of plaintiff that, being a passenger on defendant's street car, she indicated her desire to leave it, which was stopped to enable her to do so, and that while she was in the act of leaving, and before she could place herself safely on the ground, it started and threw her.

Starting Car While Passenger Is Alighting.*

Plaintiff having testified on her direct examination that on her signal the car came to a full stop, and she stepped on the footboard, and as she was about to put her left foot to the ground, while having the other on the step, the car started, and she was thrown; and on cross-examination that she got on the footboard, and as she was putting her left foot to the ground the car started off; and on redirect examination that she had hold of the car, and it started and jerked her around and threw her on her left hip,—she cannot be considered as affirming that when the car started she was in a firm and safe position on the footboard, and as matter of simple volition and from motives of saving herself inconvenience she left such place of safety and stepped from the car while it was in motion, though on cross-examination, before testifying as above, she answered "Yes" to the questions, "You got down on the footboard?" "Then the car started?" "And then you tried to step down?" and to the question, "There was no reason why you did not step back?" answered, "It was not handy for me, I being crippled;" and to the question, "You preferred to step off?" answered, "Yes;" and to the question, "You thought it was going slow enough for you to step off?" answered, "It started off fast."

Instructions.

A requested instruction that if the jury find that plaintiff signaled for the car to be stopped, and after it had stopped stepped on the footboard, but "voluntarily and without necessity" stepped to the ground while the car was in motion, verdict should be for defendant, is objectionable as leaving the jury to treat the necessity that was to govern plaintiff's conduct under the circumstances as an absolute necessity; the evidence showing she was crippled in her left limb from rheumatism, that when the car started she was in the act of putting her left foot on the ground, and that in the effort to alight she was holding to the handle bar of the

*As to the care required in setting down passengers, see foot-note appended to *Walters v. Chicago & N. W. Ry. Co.* (Wis.), 2 R. R. R. 237, 25 Am. & Eng. R. Cas., N. S., 237.

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car; she thus, by defendant's negligence, being put in a position of danger calculated to alarm and disconcert her and prevent exercise of clear judgment, and therefore being held only to ordinary care under the circumstances.

Appeal from court of common pleas; John J. Dobler, Judge.

Action by Margaret Beidelman against the United Railways & Electric Company of Baltimore. Judgment for plaintiff. Defendant appeals. Affirmed.

Argued before McSHERRY, C. J., and FOWLER, BRISCOE, BOYD, PAGE, PEARCE, SCHMUCKER, and JONES, JJ.

Fielder C. Slingluff, George Dobbin Penniman, and B. Howell Griswold, Jr., for appellant.

Augustus C. Binswanger and Meyer Rosenbush, for appellee.

JONES, J. This is an appeal from a judgment of the court of common pleas in favor of the appellee against the appellant, and rendered in a suit by the appellee to recover damages for injuries received in consequence of the negligence of the appellant while the appellee was a passenger on one of its cars. The narr. alleges the negligence to have been that the appellee, being upon the car as a passenger, and desiring to leave it at a specified point on its route, so notified the conductor in charge of the car, and the car was stopped; and while the appellee was leaving the car, and exercising due care and caution, the car was "negligently, recklessly, and carelessly caused to start and proceed" before she had alighted from the car, "so that she was hurled from said car to the ground with great force and violence," etc., and injured. The case was tried before a jury, and after the testimony was in the appellant and appellee, respectively, asked instructions to the jury upon the law applicable to the facts.

The only questions upon this appeal arise out of the action of the court below upon these instructions, and are presented by an exception taken by the appellant to the granting by the court of certain instructions on the part of the appellee, and to the rejection of certain of those asked for by the appellant. In disposing of these questions it will be necessary to have particular reference only to the action of the court in rejecting the prayers of the appellant that are embraced within the exception.

The appellant's prayers were five in number. The fourth and fifth were conceded. The first was to the effect that there was no legally sufficient evidence of any negligence on the part of the defendant. This proposition upon the evidence was clearly untenable. There was no witness that testified as to how the accident that caused the injury to the appellee happened, except the appellee herself, and her testimony was that she was a passenger on a car of the appellant corporation on the night of the 12th of September, 1900, from Druid Hill Park, in the city of Baltimore, to the intersection of Paca

and Fayette streets, where she obtained a transfer and boarded a car—an open summer car—to go to her home on Lexington street, about half a block from where Lexington and Carey streets intersect; that she rode to the corner of Lexington and Carey streets, and signaled for the car to stop; that the car came to a full stop, and she got up and stepped on the footboard, and as she was about to put her left foot to the ground the car started. A question was then put to her as follows: "You had one foot on the step and was about to put the other foot down when the car was started, and you were thrown to the ground"? to which she answered, "Yes, sir." Upon cross-examination she was asked: "You waited until that car stopped before you got up?" "Yes, sir." "Did the car start ahead?" "I stepped— I got on the footboard, and as I was putting my left foot to the ground the car started off again." Again, on redirect examination, she said: "The car was going north, and I was getting out with my face towards Lexington street, west-southeast I should say. I had hold of the car, and the car started, and it jerked me around, and threw me on my left hip." Then to the question, "It was first a jerk and then a fall?" she answered, "Yes, sir." This testimony went to show that being a passenger upon a car of the appellant the appellee indicated her desire to leave the car, which was stopped to enable her to do so; that while she was in the act of leaving the car, and before she could place herself safely upon the ground, the car was started, in consequence of which she was thrown down and injured, as the narr. had alleged. That this was evidence going to prove the allegation of the narr. in respect to the negligence of the appellant needs no argument or authority to establish. Proof of "the occurrence of an accident and injury to a passenger is prima facie evidence of negligence in the carrier, and throws upon him the onus of rebutting the presumption by proving there was no negligence on his part." *Railroad Co. v. Andrews*, 39 Md. 329 (see page 353) 17 Am. Rep. 568; *Railroad Co. v. Anderson*, 72 Md. 519, 20 Atl. 2, 8 L. R. A. 673, 20 Am. St. Rep. 483. The proof adverted to, taken by itself, making a prima facie case of negligence against the appellant, it only remains to inquire what appeared in the other facts of the case to rebut, excuse, or relieve the appellant from the consequences of such negligence, and whether, if anything, this was properly submitted to the trying tribunal.

The appellant's second prayer asserts the proposition that it appears from the evidence that there was such contributory negligence on the part of the appellee as to disentitle her to recover as a conclusion of law. The theory of the prayer, in connection with the evidence relied upon to support it, is that the appellee in proceeding to alight from the car in question stepped upon the footboard of the car, and being there in a place of safety she voluntarily stepped down from the footboard after the car had been put in motion, and thus was

thrown and injured. As an alternative to this second prayer, and based upon the same evidence, the appellant offered its third prayer, putting the question of contributory negligence to the jury, and being to the effect that if the jury found from the evidence "that the plaintiff [appellee] signaled the conductor to stop the car, and after the car had stopped stepped upon the footboard of the car, still if they find that she voluntarily and without necessity stepped from the footboard of the car to the ground while the car was in motion their verdict must be for the defendant [appellant]." These two propositions were based upon what was said by the appellee as a witness upon her cross-examination. The best way to make the full effect of this testimony appear will be to set it out as it appears in the brief of appellant's counsel. It was elicited by a course of questioning as follows: "Q. How do you account for the fact when you fell off you were in the middle of the street? A. I stepped on the footboard. Q. And then you put your foot to the ground? A. Yes, sir. Q. While the car was going? A. Yes, sir. Q. You got down on the footboard of the car? A. Yes, sir. Q. Then the car started? A. Yes, sir. Q. And then you tried to step down? A. Yes, sir. Q. And in that way you were thrown? A. Yes, sir. Q. There was no reason why you did not step back? A. It was not handy for me, I being crippled. Q. You preferred to step off? A. Yes, sir. Q. You thought it was going slow enough for you to step off? A. It started off fast. Q. You started to get off, and then the car started, and after the car started you tried to step off? A. Yes, sir; I had started to step down as the car started off. Q. You found you had gone beyond your place, had gone halfway across the street, and then you attempted to get off the car while it was going? A. Yes, sir. Q. You say you had been lame for some time before with rheumatism? A. Yes, sir. Q. In the left limb? A. Yes, sir. Q. When you got down on the footboard of the car the car started? A. Yes, sir. Q. And you attempted to step off while the car was going? A. Yes, sir. Q. And you fell in the middle of the street? A. Yes, sir." Being asked, on re-examination by her counsel, "How far had the car gone when you fell? How far do you think it went when you fell?" she answered, "It went a couple of yards at least." And, "From the time you were in the act of alighting until the time you fell it went a couple of yards? A. Yes, sir." Then she was asked, "Did you fall straight down, did you fall away from the car, or how did you fall?" and to this question she gave the answer which has already been quoted: "The car was going north, and as I was getting out with my face towards Lexington street, west-southeast I should say, I had hold of the car, and the car started, and it jerked me around, and threw me on my left hip."

To treat this evidence as supporting the theory of the two prayers in question would be to give it a forced and unnatural

effect. The matters appearing in this course of questioning relied upon to have that effect were those that were affirmed by counsel, and which were answered by the witness perhaps without attending particularly to the form of the questions. However that may be, by no sort of fairness could the appellee be supposed upon her whole testimony to have affirmed that at the time the car started she was in a firm and safe position upon the footboard of the car, and that as a matter of her simple volition, and from motives of saving herself inconvenience, she left such place of safety, and stepped from the car while it was in motion, or that she intended or understood herself as varying or contradicting the testimony already given by her upon her examination in chief, her cross-examination, her re-examination, and again in the course of the questioning which elicited the testimony to which reference is now being had, to the effect that at the time the car started she was about putting her left foot to the ground; that, as she said in the course of this very questioning, she had "started to step down as the car started off." Very clearly, the testimony which has been set out was not sufficiently clear and unequivocal to justify the conclusion of law affirmed in the appellant's second prayer. *Railway Co. v. McKewen*, 80 Md. 593, 31 Atl. 797. Nor was the appellant's third prayer proper upon the facts of the case. At best it was misleading in putting it to the jury to find that the appellee "voluntarily and without necessity stepped from the footboard of the car to the ground while the car was in motion." The jury were left to treat the necessity that was to govern the appellee's conduct under the circumstances as an absolute necessity. The evidence showed, however, that the appellee was crippled from rheumatism in her left limb, making it awkward for her to get down from the car; that at the time the car started she was in the act of putting her left foot upon the ground, about which there is no necessary or real contradiction in her testimony; and that in the effort to alight from the car she was holding by one hand to the handle bar of the car. She said the car "started off fast." If, then, the plaintiff (appellee) did not step on the ground until after the car had started off, which is the theory of this third prayer, she was from the time the car started in a position of danger calculated to alarm and disconcert her, and to prevent the exercise of clear judgment. She had either to step from the car, get back upon it, which, as she testified, was attended with difficulty on account of her lameness, or hold on in the position she was in. Whichever course she might pursue would be attended with danger and liability to accident and injury. The appellant could not by its negligence put her in this situation of danger and embarrassment, and then require as a condition for its liability for this negligence that she should show an absolute necessity for the course she pursued to extricate herself therefrom. The degree of care which the law exacts in such cases is that which might

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be expected of a person of reasonable and ordinary prudence and caution in like circumstances. In the case of Railroad Co. v. Anderson, 72 Md. 519, 20 Atl. 2, 8 L. R. A. 673, 20 Am. St. Rep. 483, this court approved an instruction given by the lower court as follows: "The degree of care required of a passenger is not the highest degree of care, but only the ordinary care which ordinarily prudent people are accustomed to exercise;" and in the case of Railway Co. v. Smith, 74 Md. 212, 21 Atl. 706, the following was approved: "By ordinary care is understood that degree of caution, attention, activity, and skill which are habitually employed by, or may reasonably be expected from, persons in the situation of the respective parties, under all the circumstances surrounding them at the time." Tested by these principles and under the circumstances of this case it would seem obvious that the standard of care which this third prayer of the appellant exacted of the appellee is not that which the law prescribes. But, apart from the evidence to which reference has been made in connection with this third prayer, the prayer itself assumes that there was negligence on the part of the appellant, and that the evidence of contributory negligence, whatever it might be, on the part of the appellee, was to be submitted to the jury. Upon that assumption the care which the appellee was bound to observe to avoid the consequences of the negligence of the appellant was not the highest degree of care, but ordinary care as the law defines it, and this latter was the standard of care which ought to have been submitted for the guidance of the jury. The prayer in question was properly refused. No specific objections have been pointed out to any of the prayers granted on behalf of the appellee, and they seem to embody correct propositions of law. Finding no error in the rulings of the trial court, the judgment of that court will be affirmed.

Judgment affirmed, with costs to the appellee.

OWEN v. WASHINGTON & C. R. RY. CO.

(*Supreme Court of Washington, July 25, 1902.*)

[69 Pac. Rep. 757.]

Passengers—Stations—Lights—Negligence of City Imputable to Railroad.

Though a railroad company had made diligent effort to have the city furnish a light for its premises where passengers got off, and the city had undertaken to do so, the company in good faith relying thereon, if the city was negligent in this respect such negligence was imputed to the company.

Contributory Negligence—Passenger Alighting on Side Opposite Platform.

Where a passenger, who knows where the platform is, alights on the opposite side for his own convenience, it is for the jury whether, under all the attending circumstances, it is negligence in the particular case.

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Same—Same.*

In an action against a railroad for personal injuries, plaintiff testified that he was 91 years old; that, when the train stopped, the conductor told him he could get off on the opposite side without fear; that it was very dark, and that after the train pulled out he attempted to find the platform; that he crawled upon what he supposed was the platform, and, in walking along it, fell off and was injured: *held*, that a nonsuit was properly denied.

Appeal from superior court, Walla Walla county; Thos. H. Brents, Judge.

Action by Admiral N. Owen against the Washington & Columbia River Railway Company. From a judgment for defendant, plaintiff appeals. Reversed.

Garrecht & Dunphy, for appellant.

B. S. Grosscup and W. T. Dovell, for respondent.

HADLEY, J. This suit was brought by appellant against respondent to recover damages for personal injuries. On the 7th day of July, 1900, appellant purchased a ticket from respondent for a round-trip passage over its railroad from Walla Walla to Waitsburg. A political meeting was held at the latter place in the evening of the same day, and appellant, together with a large number of other persons, took passage upon the same train, bound for Waitsburg, for the purpose of attending said meeting. The train carrying these passengers on the return trip reached Walla Walla near midnight of the same day, and stopped in front of respondent's passenger depot in said city. It is alleged in the complaint that the night was dark, and that appellant, not knowing upon which side of the train the depot and platform stood, alighted from the train on the side away from the depot platform, and thereafter the train moved away; that there were no lights visible in or about the depot or the platform, or the tracks in front thereof, and no person was in attendance thereabout; that appellant was unfamiliar with the premises, knowing only that there was a platform between the depot and tracks, and he was unable, on account of the extreme darkness, to locate the platform with reference to the place of his exit from the train; that by reason of the darkness he could not see the depot or platform, and supposing them to be in a certain direction, and knowing of no other way, walked carefully and at a slow gait in the supposed direction of the depot and platform, until he found a platform which surrounds the freight house, which is about 30 feet from the passenger platform, and which appellant supposed to be said platform; that he walked slowly and carefully thereon in what he supposed and believed to be the direction of the public highway, knowing of no other way, when, without notice or warning, he stepped off the platform and fell to the ground, a distance of 2½ feet,

*Duties to passengers with respect to stations and stopping places, see monograph appended to *Muhlhaue v. Monongahela St. Ry. Co.* (Pa.), 2 R. R. R. 131, 25 Am & Eng. R. Cas., N. S., 131.

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thereby sustaining great injuries, to wit, the knee cap of his left leg was broken and shattered, and his left shoulder was badly bruised. It is alleged that the injuries were due to the negligence of respondent in failing to have the depot and platform and the tracks in front thereof lighted, and also in failing to provide servants to safely guide passengers from the train to the passenger platform. The answer denies the material allegations of the complaint, and alleges contributory negligence. A trial was had before a jury, which resulted in a verdict in favor of respondent, the defendant below. Judgment was entered that appellant shall take nothing by his action, from which he has appealed.

The errors assigned are based upon the instructions of the court, and upon its refusal to grant the motion for a new trial. The court properly instructed the jury that it is the duty of a railroad company to provide safe and convenient means of approach to its stations for all persons taking passage upon or departing from its trains, and that this duty includes that of properly lighting its depot platforms at night; that the lights must not only be adequate to show the way to and from the cars and station to people already familiar with it, but such as will show it plainly to any one of ordinary eyesight, though a stranger to the surroundings, so that by the exercise of his natural faculties of vision he may see it without difficulty. In addition to the above, the court added: "But if a light had been provided which was sufficient for the purpose by the city, which, without defendant's fault, suddenly and unexpectedly went out, and the defendant was guilty of no negligence in that regard, it would not be held responsible therefor." It will be observed that the latter portion of the quoted words suggests the condition that there must be no negligence of respondent in regard to lights, in order to avoid liability; but the preceding words leave it to be inferred, at least, that if the city had provided a sufficient light, which, without respondent's fault, suddenly and unexpectedly went out, then respondent was not negligent. Again, in another instruction, the court, after observing that if appellant, in the exercise of ordinary care, received his injuries on account of the darkened condition of the premises, concluded as follows: "Unless a light was provided by the city, and that the same had suddenly and unexpectedly gone out, then I charge you that the defendant would be guilty of negligence, and your verdict must be for the plaintiff. If, however, you find from the evidence that the platform was sufficiently lighted to make it safe for the reception of passengers when the train arrived, or that the defendant exercised due care and diligence to provide a light, under the circumstances, you will find for the defendant." Thus it is left again to be inferred that, if the city's light had suddenly and unexpectedly gone out, the respondent might for that reason not be negligent. It is also left to be inferred from the last words of the instruction that the exer-

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cise of care and diligence on respondent's part to provide a light, "under the circumstances," may have been sufficient, if it relied upon the circumstance that the city was in the habit of maintaining a light there. Again, in still another instruction the court said that if the train stopped at a platform properly lighted, "or for the lighting of which defendant had done all it could, and all that a person of common prudence would have done, under the circumstances," etc. It is not contended that respondent maintained any light of its own upon the premises or in the locality, but it appears that an electric light company was at the time lighting the city, and that the apparatus for an arc light was located about 160 feet distant from the center of the depot. There is conflict in the evidence as to whether the light was burning when the train arrived on the night in question. There being no evidence that respondent had any light of its own, the words last quoted from the court's instructions would seem to leave the jury to find that if the respondent had made an effort to have the city, through its lighting agent, furnish a light, then, although there may have been no light, yet this was all that common prudence required, and that under such circumstances there was no negligence. We are unable to reconcile the above instructions upon any other theory of the law than that it was the view of the learned trial court that when respondent had made diligent effort to have the city furnish a light, and the city had undertaken to do so, the respondent in good faith depending thereon, no negligence can be imputed to it if no light was there under such circumstances. This view is in conflict with the holding of this court in *Herrman v. Railway Co.*, 68 Pac. 82, decided since the trial of this case below. It was there held that the duty devolves upon a railroad company primarily to maintain safe depot premises for the accommodation of its patrons, and that, if it delegates that duty to another, his negligence becomes the negligence of the railroad company. In view of the doctrine announced in that case, we think the foregoing instructions may have misled the jury. While the court did not directly state the law in conflict with the above case, yet the inference to that effect is so strong it seems impossible that the jury could have understood it otherwise. We are therefore impelled to hold that the giving of said instructions constituted an error.

It is also assigned that the court erred in giving the following as a portion of one of the instructions: "A passenger who knows where the platform is, and who alights on the opposite side without any other reasons than his own convenience or inclination, is guilty of negligence, and cannot recover if he is injured in consequence." This instruction seems clearly to state that, as a matter of law, it is negligence for a passenger to get off a train on the side opposite the depot platform, when he knows where the platform is, and if it is merely to suit his convenience. Such, we think, is not the

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rule; but it is a question to be left to the jury whether, under all the attending circumstances, it is negligence in the particular case. The effect of this instruction, under the facts of this case, is to practically determine the question of contributory negligence as a matter of law, and it is thus taken from the jury as a fact for their consideration. The evidence shows that appellant did alight from the train on the side opposite the platform, and in his own testimony he says the passengers "were scrambling out on both sides." We think it was for the jury to say whether it was negligence for him to alight where he did, and, further, that they may have been misled by the instruction to the belief that the mere fact of his leaving the train as he did, if it was only for his convenience, was negligence, in law, and that nothing further was left for them to consider. There is variance in the decisions of the courts upon the point here involved. The following cases hold that it is not negligence per se for one to get off a train on the side opposite the platform, but that such fact is a question for the jury, in connection with other physical conditions proven: *McQuilken v. Railroad Co.*, 64 Cal. 463, 2 Pac. 46, 16 Am. & Eng. R. Cas. 353; *Railway Co. v. Lowell*, 151 U. S. 209, 14 Sup. Ct. 281, 38 L. Ed. 131; *Robostelli v. Railroad Co.* (C. C.) 33 Fed. 796, 34 Am. & Eng. R. Cas. 515; *Plopper v. Railroad Co.*, 13 Hun, 625. The doctrine of the above cases is in harmony with the uniform holding of this court that contributory negligence is generally a question for the jury. For these reasons, we believe the giving of the instruction was error.

We do not deem it necessary to discuss other alleged errors. Respondent contends that this court should not approach the consideration of error upon the instructions, but should hold that the motion for nonsuit should have been granted under appellant's testimony. The following appears in appellant's testimony: "Q. How old are you? A. I am ninety-one. I have been in my ninety-second since the first day of July. * * * Q. When the train stopped at Walla Walla, state to the court and jury what you did in the way of getting off? A. When I got in there, there was some considerable confusion to get out of the train. They were scrambling out on both sides, so there was no show to get out from that side without standing there. I said I wanted to get out because I was old. I wanted to go so I could walk quick with the crowd, for I could not see so well as the rest. I was old and too crippled to come behind. The conductor— I suppose it was the conductor. He said, 'Walla Walla.' That is why I took him to be the conductor. He said: 'There is a place you can get out without fear.' I looked at it and went down. He helped me down. When I got down, I said: 'There is no platform here.' 'No,' he said, 'you are on the other side of the platform.' 'Well,' said I, 'I want to get on the platform. I can't see the ground. The ground looks dark to me.' It was very dark.

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He said: 'You will have to go way around and cross there,' or wait until the train went off. He showed me which way to go around the car. I started down that way, and went down, as I supposed,—down along,—when I got down opposite that thing that hauls coal. That was the car that was there. I could not see anything. It was very dark. I stood there for a minute or two. I don't know how long. The first I knowed, the train was gone. Where it had gone, I don't know. I was afeard if I took many steps I would be run over by the train. I stood for quite a bit. Then I stepped a few steps. How many, I don't know. I cannot exactly tell. But I got down below the platform, where I supposed it was. Then I turned around to go back, and I struck some kind of a platform. I crawled upon it. I hollered for help three times as hard as I could holler. I got upon the platform, and I stepped around carefully, feeling with my cane, and all at once I slipped off, and went onto my knee and elbow, and then I hollered 'Murder!' as hard as I could holler."

The court properly denied a nonsuit upon the above testimony, but, for reasons above given, the judgment is reversed and the cause remanded, with instructions to grant a new trial.

REAVIS, C. J., and FULLERTON, MOUNT, WHITE, and ANDERS, JJ., concur.

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(*Supreme Judicial Court of Massachusetts, Middlesex, May 21, 1902.*)

[64 N. E. Rep. 79.]

Injury to Passenger—Ring in Floor of Car—Notice of Defect.

Evidence is admissible in an action against a street railway company by a passenger injured by catching her foot in a ring in the floor of the car that the ring was standing erect immediately after the accident, and, on being pushed down, would rise and remain upright on the starting of the car, as such evidence tends to show that the ring was in such condition and operated in such manner when the car left the barn, some time before, which would charge the company with notice of the defect, or show negligence on the part of the conductor in failing to discover its condition.

Same—Same—Negligence.*

A street car company is negligent in allowing a ring in the floor of its car to get into and remain in such a condition that it rises when the car starts, and remains standing unless replaced, even though the builder of the car is reputable, and the ring is a usual device.

Exceptions from superior court, Middlesex county; Henry N. Sheldon, Judge.

Action by one Kingman against the Lynn & Boston Railroad Company for an injury to plaintiff while a passenger in

*As to the degree of care required of carriers of passengers, see monographic note, 1 R. R. R. 7, 24 Am. & Eng. R. Cas., N. S., 7.

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defendant's car by catching her foot in a ring in the floor of a car. Judgment for plaintiff, and defendant brings exceptions. Exceptions overruled.

F. S. Hesseltine, for plaintiff.

H. E. Hurlbut and S. B. Darling, for defendant.

BARKER, J. After a verdict for the plaintiff, the case is here upon the defendant's exceptions.

1. The first three exceptions are to the admission of the testimony of the plaintiff and two other passengers present at the accident that the ring in which the plaintiff testified that she caught her foot was standing erect immediately after the accident, and was then pushed down by another passenger with an umbrella, and that repeatedly thereafter the same ring, whenever the car started after a stop, rose and remained upright until pushed down by some passenger or by the conductor. The evidence was competent. There was no reason to infer that anything about the car was different at the time to which the testimony referred from what it had been when the car left the barn after its morning inspection. If during the time testified to the ring rose frequently as the car started, and remained up until pushed down, this tended to show that it had been doing the like since its use on that day began. Knowingly to use a car in that condition was negligence on the part of the carrier, and the evidence was competent to show that the car had been in fact in that condition for so long a time before the plaintiff became a passenger that the defendant should be charged with knowledge of the dangerous condition, or with negligence on the part of the conductor in not ascertaining the danger.

2. The fourth exception is to the refusal to strike out all the testimony of the ex-conductor, called in rebuttal. It is not contended that his evidence upon direct examination was incompetent, but that his whole testimony shows that he was speaking of occasional occurrences only, and not of a general or ruling practice. The court was right in ruling that the testimony was inconsistent with itself, and in leaving the jury to deal with it in view of the inconsistency.

3. As above stated, in the testimony of the first three witnesses as to the action of the ring at the time of and immediately after the accident there was evidence which would warrant the jury in finding that the defendant and its servants were negligent. However reputable the builder from whom the car had been bought, and however usual the particular device of the ring, if the device was allowed to get into and remain in a condition which usually raised it when the car started, it was negligence not to discover and remedy that condition.

Exceptions overruled.

ALLARDT v. PEOPLE.

(Supreme Court of Illinois, June 19, 1902.)

[64 N. E. Rep. 533.]

Passes—Constitutionality of Statute Prohibiting Sale.

Act June 10, 1897, entitled "An act to prevent buying, selling or fraudulently using passes on railroads," etc., prohibits buying or selling passes, "which, by conditions expressed thereon, are not transferable": *held* violative of Const. art. 4, § 13, providing that no act shall embrace more than one subject, to be expressed in the title, since the title of the act is to prevent buying and selling passes generally, and gives no intimation of the prohibition of the sale of a pass "which, by conditions expressed thereon, is not transferable."

Same—Same.

The act, in empowering railroads, etc., to make such buying and selling lawful by not expressing thereon nontransferable conditions, violates Const. art. 4, § 22, prohibiting the passage of any local or special law granting to any corporation or individual any special or exclusive privilege, immunity, or franchise.

Same—Same.

Act June 10, 1897, is entitled, "An act to prevent buying, selling or fraudulently using passes on railroads," etc. Section 1 prohibits the buying or selling of any pass which by conditions expressed thereon, is not transferable, and in a second clause makes it unlawful "for any person to use or attempt to use for the purpose of being transported on any railroad," etc., "any pass issued in the name of any other person": *held* that, under the rule of strict construction of penal statutes, the clauses must be construed so as to give effect to the whole, and, so construed, they would violate Const. art. 4, § 13, providing that no act shall embrace more than one subject.

Same—Whether Nontransferable.

Under Act June 10, 1897, making it unlawful to use or attempt to use any pass, "which, by conditions expressed thereon, is not transferable," a conviction could not be had for the use of a pass which contained no other restriction as to transferability than the indorsement, "if presented by any other person than the person named thereon, the conductor will take up pass and collect fare."

Error to criminal court, Cook county; Marcus Kavanagh, Judge.

L. W. Allardt was convicted of attempting to fraudulently use a railroad pass, and appeals. Reversed.

Kickham Scanlan, for plaintiff in error.

H. J. Hamlin, Atty. Gen., Charles S. Deneen, State's Atty., and John H. S. Lee, Ass't State's Atty., for the People.

WILKIN, J. In 1897 the legislature of this state passed an act which was approved June 10, 1897, in force July 1st of that year, as follows:

"Section 1. That it shall not be lawful for any person to buy, sell, give, barter, or transfer in any manner, any pass which, by conditions expressed thereon, is not transferable, or any form of free transportation which, by conditions expressed thereon, is not transferable, issued or given by any railroad company, steamboat company or owners of other public conveyances in this state. Nor shall it be lawful for any person to use or attempt to use for the purpose of being transported

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upon any railroad, steamboat or other public conveyance in this state, any pass or any form of free transportation issued in the name of any person other than the one so using or attempting to use such pass or form of free transportation.

"Sec. 2. Any person violating any of the provisions of this act shall be deemed guilty of a misdemeanor, and shall be liable to be punished by a fine not exceeding \$100, or by imprisonment not exceeding one year, or either or both, at the discretion of the court in which such person or persons shall be convicted." Hurd's Rev. St. 1899, pp. 589, 590, c. 38, §§ 125a, 125b.

At the May term, 1901, of the criminal court of Cook county, plaintiff in error was indicted under this statute. The indictment contained four counts. The first charged that on the 19th day of May, 1901, L. W. Allardt unlawfully used a certain pass, for the purpose of being then and there transported over and upon a certain railroad of the New York, Chicago & St. Louis Railroad Company, which had before then been issued in the name of a person other than the said L. W. Allardt, and the said pass was in the words and figures as follows:

"The New York, Chicago & St. Louis R. R. Co. 1901.

"Pass Mr. B. R. Burnet,

Com. & F. A. Texas-Southern Ry.

Until December 31st, unless otherwise ordered. Issued subject to conditions on back. 1064.

W. H. Kanniff, President."

"1901.

"The person accepting this free pass thereby assumes all risk of personal injury and loss or damage to property under all circumstances, whether by negligence of agents or otherwise.

"If presented by any other than the person named thereon, the conductor will take up pass and collect fare."

The above conditions were indorsed on the back of the pass. The second count is substantially the same as the first except that it charges the defendant with unlawfully attempting to use the pass described in the first count. The third and fourth counts do not materially differ from the second. At the October term, 1901, a motion to quash the indictment was overruled and the defendant entered his plea of not guilty, whereupon he was tried by a jury and found guilty in manner and form as charged in the indictment. Motions for new trial and in arrest of judgment were then overruled by the court, and he was sentenced to the county jail of Cook county. To reverse that judgment of conviction this writ of error has been sued out.

The evidence upon which plaintiff in error was convicted showed that on May 19, 1901, he boarded a passenger train on the said railroad at Chicago, and attempted to ride on the pass set forth in the indictment. He offered the pass to the

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conductor and claimed to be the person named in the same, but the conductor declined to receive it and took it up, collecting the usual fare. Afterwards he was arrested and taken back to Chicago and held until indicted by the grand jury. It is conceded that the pass was not issued in his name, and that he attempted to use it for the purpose of being transported from Chicago to Ft. Wayne, Ind. It is first insisted on behalf of plaintiff in error that the act of the legislature under which he was indicted is unconstitutional and void. Most of the argument is devoted to an attack upon the constitutionality of the act of 1875, entitled "An act to prevent frauds upon travelers, and owner or owners of any railroad, steamboat or other conveyance for the transportation of passengers" (Laws 1875, p. 81); and a criticism upon the decision of this court filed at Mt. Vernon, April 2, 1894, sustaining the validity of that act (*Burdick v. People*, 149 Ill. 600, 36 N. E. 948, 24 L. R. A. 152, 58 Am. & Eng. R. Cas. 28, 41 Am. St. Rep. 329); also of the disposition of the motion, afterwards filed, to expunge that decision from our reports (*In re Burdick*, 162 Ill. 48, 44 N. E. 413). The correctness of the decision reported in 149 Ill. 600, 36 N. E. 948, 24 L. R. A. 152, 41 Am. St. Rep. 329, has never been questioned in this court by proper parties. It is in harmony with the decisions of courts of last resort upon similar statutes, rendered both before and since its adoption. *Fry v. State*, 63 Ind. 553, 30 Am. Rep. 238; *State v. Fry*, 81 Ind. 7; *State v. Corbett*, 57 Minn. 345, 59 N. W. 317, 58 Am. & Eng. R. Cas. 35, 24 L. R. A. 498; *Jannin v. State* (Tex. Cr. App.) 51 S. W. 1126, 53 L. R. A. 349. The validity of like statutes in the state of North Carolina was recognized in *State v. Clarke*, 109 N. C. 739, 14 S. E. 84, and *State v. Ray*, 109 N. C. 736, 14 S. E. 83, 14 L. R. A. 529, 52 Am. & Eng. R. Cas. 157. But a single authoritative case has been found to the contrary (*People v. Warden of City Prison*, 157 N. Y. 116, 51 N. E. 1006, 43 L. R. A. 264, 68 Am. St. Rep. 763), in which Parker, C. J., rendered the opinion of the majority of the court of appeals of that state, holding the law unconstitutional, and to which three of the judges disagreed; elaborate dissenting opinions being filed by Justices Bartlett and Martin. But the act of 1875 and the correctness of our decision in *Burdick v. People*, supra, cannot be considered or reviewed on this record. If the constitutionality of that act should again be presented by parties not before the court in the *Burdick Case*, that decision will not preclude them except in so far as it is founded upon sound reasoning and authority, and will then be reaffirmed or overruled as shall appear right and proper.

The act of 1897, under which plaintiff in error was convicted, is an entirely different statute, and was manifestly passed for an entirely different purpose. It is entitled, "An act to prevent buying, selling or fraudulently using passes upon railroads, steamboats or other public conveyances." The

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first section is divided into two clauses, the first of which embraces the subject of buying, selling, giving, bartering or transferring, in any manner, passes, etc. Instead, however, of forbidding such buying or selling unconditionally, as expressed in the title, the prohibition is limited to any pass which, "by conditions expressed thereon, is not transferable." That clause, also, not only forbids the buying or selling of passes, but also prohibits the buying or selling "any form of free transportation which, by conditions expressed thereon, is not transferable." The title of the act is to prevent buying or selling passes generally; but this clause clearly contemplates the issuing of such passes or other forms of free transportation by railroads, steamboats, and other public conveyances, and only prohibits the buying, selling, giving, bartering, or transferring, in any manner, any pass or form of free transportation "which, by conditions expressed thereon, is not transferable" by other persons after it has been so "issued or given." It seems clear that this part of the section is violative of section 13 of article 4 of the constitution, which provides that "no act hereafter passed shall embrace more than one subject, and that shall be expressed in the title." This limitation requires all acts of the legislature to have but a single object, and requires that object to be clearly indicated by the title, and no act can be sustained the title of which does not fairly indicate the objects and purposes of the law. The framers of the constitution intended by it to prevent legislation which should not, by the title, clearly inform the legislature of its purpose and prevent the people from being misled thereby. "The generality of a title is therefore no objection to it, so long as it is not made a cover to legislation incongruous in itself, and which by no fair intendment can be considered as having a necessary or proper connection." *Cooley, Const. Lim.* 169 et seq.; *People v. Institution*, 71 Ill. 229. The title of the act of 1897 gives no information as to the purpose contained in the first clause of the first section.

But that clause is unconstitutional for the further reason that while the title of the act is "to prevent buying, selling or fraudulently using passes upon railroads," etc., this clause empowers these very companies to make such buying, selling, etc., lawful by withholding any condition expressed upon such passes making them nontransferable. There is no requirement of law compelling such companies to indorse a condition of that kind upon passes, and hence they may, by merely indorsing such a condition, make the buying or selling of them criminal or not, as they see fit. In other words, they are delegated the power by this statute, contrary to the title of the act, to make the buying or selling of passes issued by them criminal or innocent by merely placing thereon "transferable" or declining to do so. This manifestly grants to

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such companies and associations special privileges, and is violative of section 22 of article 4 of the constitution.

In *Jannin v. State*, *supra*, the act under consideration by the court contained the proviso "that the provisions of this act shall not apply to any person holding a ticket upon which is not plainly printed that it is a penal offense for him or her to sell, barter or transfer said ticket for a consideration." After sustaining the law generally, it is said: "It would have been a very easy matter for the legislature to have confined the sale of passage tickets to the agents of the railroad companies without any requirement as to the form of the ticket. But this course was not pursued. As it is, every railroad company has the option to issue a passage ticket with this proviso or not, as it may see proper. If it issues a ticket without this proviso it is not a penal offense, and in every such case scalpers and all others may deal in such passage tickets without any violation of the law. We accordingly hold that because the legislature left it optional with the railroad companies whether or not, in the issuance of tickets, they would create a penal offense, the act of the legislature is without authority of law; is violative of the law, in that it does not define with certainty an offense; does not itself create an offense, but delegates its authority to another agency to make the sale of railroad tickets a violation of the law." And so, under this statute, it is left to the companies named in the act to create an offense or not, as they shall see proper. It is difficult to see what purpose the legislature had in the passage of this statute unless it was to protect transportation companies against the violation of conditions expressed in passes issued by them,—in other words, to enact a criminal law for the sole purpose of enforcing a civil agreement. Railroad and steamboat passes are of different kinds. Some are purely gratuitous; others, such as drovers' and employees' passes or free transportation, are issued upon a good consideration. When issued in the name of a particular person they are generally held not to be transferable, and may doubtless be dishonored and taken up when presented by a person other than the one named. But that is a very different thing from making the act of buying, selling or transferring them a crime or misdemeanor. Counsel for the people do not seriously contend that the first clause of the first section is valid, but they insist that the second clause, under which they say this conviction was had, is entirely separate and distinct from the first, and therefore the latter may be sustained although the former is held to be unconstitutional. The second clause makes it unlawful "for any person to use or attempt to use for the purpose of being transported upon any railroad, steamboat or other public conveyance in this state, any pass or any form of free transportation issued in the name of any person other than the one so using or attempting to use such pass or

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form of free transportation,"—which, it is said, is without the objectionable qualification "which, by conditions expressed thereon, is not transferable;" and it is insisted that under this clause the crime consists in the use or the attempt to use, for the purpose of being transported, any pass or form of free transportation issued in the name of another, and is in no way connected with or dependent upon the first clause. We concede that where the provisions of a statute are so distinct and separate from each other as that one part in no way depends upon another, and where one part is violative of some provision of the constitution and the other is not, the latter may be sustained even though in the same section; provided, however, that the court can see that the legislature would have passed the valid part of the law without reference to the invalid. We do not agree with counsel that these clauses or sentences of the first section should be so construed. The statute is penal and must be strictly construed, one part with another, so as to give effect to the whole, if that can be done. The legislature was here dealing with the sale and use, or attempted use, of nontransferable passes or free transportation, and it cannot be said that it would have passed the last clause without reference to the first. But it seems to us that the argument of counsel inevitably leads to the destruction of the whole law. If their position is correct and if the title to the act embraces the two objections,—that is, the one named in the first clause, independent of and separate from that enacted in the second clause,—then it is clearly void because it "embraces more than one subject." "If the title to the act actually indicates, and the act itself actually embraces, two distinct objects when the constitution says it shall embrace but one, the whole act must be treated as void from the manifest impossibility in the court choosing between the two and holding the act valid as to one and void as to the other." Cooley, Const. Lim. 177. As said in the note to this text, "all the cases recognize this doctrine." We hold, then, that the act under which plaintiff in error was convicted is unconstitutional and void.

We also think there is force in the contention of counsel for plaintiff in error that the pass upon which the defendant attempted to ride is not, "by the conditions expressed thereon, not transferable." As we have already said, the statute is to be strictly construed, and to justify a conviction under its provisions the party charged must be brought clearly within its provisions. The language is "which, by conditions expressed thereon, is not transferable." It is not and cannot be claimed that the pass copied in the indictment contained any such express condition. It is true, it shows by the condition on the back of it that it was not to be used by any person other than the one named therein, because if presented by any other person the conductor was required to take it up and

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collect the fare; but it is only nontransferable by inference or by construction, and not by the express terms indorsed thereon.

We are therefore, for the two reasons stated, of the opinion that the judgment of the criminal court should be reversed, and as the law upon which the conviction is based is invalid the case will not be remanded. Judgment reversed.

WHITTLESLEY v. BURLINGTON, C. R. & N. RY. CO.

(Supreme Court of Iowa, May 10, 1902.)

[90 N. W. Rep. 516.]

Injury to Passenger—Broken Rail—Evidence of Similar Defects.

In an action for injuries to a passenger, caused by a broken rail, evidence that witnesses had seen broken rails on other sections of the road was inadmissible to show that the rail was broken before the train went on it.

Same—Same—Rebutting Testimony.

Where a passenger was injured by reason of a broken rail, evidence that witnesses had seen broken rails lying untouched in position was inadmissible to rebut defendant's testimony that its servants had passed over the track a short time before the wreck, and discovered no broken rails, and that they would have noticed a broken rail had there been one.

Same—Release of Claim—Mental Disability—Evidence.

Where, in an action for injuries to a passenger, the only evidence that plaintiff was of unsound mind when she signed a release was some evidence tending to show mental deterioration following the accident, which related to the question of damages only, and not to plaintiff's condition of mind when the settlement was made, evidence of a physician as to whether persons that are insane or have deranged minds at some times appear sane and converse in a sane manner was inadmissible.

Same—Same—Validity.

Where, in an action for injuries to a passenger, the defense was a release, and the court in a previous instruction had fully charged on the issue of plaintiff's capacity when she signed the settlement, an instruction that, if plaintiff knowingly signed the agreement, but at the time she signed it she gave little attention to its contents, or did not read it, or ask that it be read to her, then she was bound thereby, while an insufficient presentation of the question itself, was not misleading or erroneous when considered with reference to the entire charge.

Injury to Passenger—Liability—Instructions.

Where a carrier in an action for injuries to a passenger denied the extent of the injury, an instruction that, if the jury believed plaintiff was injured and suffered pain, etc., and that the injury was caused by the carelessness of the defendant in operating its train, plaintiff would be entitled to recover, in the absence of a finding of a valid settlement, was not erroneous as assuming that there was a controversy as to the fact of injury.

Same—Same—Same—Burden of Proof.

The instruction was not erroneous on the ground that it placed on plaintiff the burden of proving defendant's negligence, for, though such burden was on plaintiff, it was sustained by proof of the accident resulting from a broken rail.

Same—Newly Discovered Evidence.

A new trial of an action by a passenger for injuries will not be

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granted for newly discovered evidence relating to matters of expert knowledge of railroading which could have been furnished by other witnesses at the trial.

Appeal from district court, Dickinson county; W. B. Quarton, Judge.

Action to recover damages for personal injuries received by plaintiff while riding as a passenger on defendant's train. Verdict and judgment for defendant, from which plaintiff appeals. Affirmed.

Funk & Weed, Milt H. Allen, and J. G. Myerly, for appellant.

L. E. Francis and S. K. Tracy, for appellee.

McCLAIN, J. Numerous assignments of error are argued by appellant's counsel, but they can be satisfactorily disposed of under a few general headings. The accident happened by reason of the ditching of defendant's passenger train, due to a broken rail. Plaintiff's counsel sought to show that the rail was broken before the train went upon it, and for this purpose asked witnesses whether they had seen broken rails on other sections of the road. The court refused to receive this evidence, and, we think, properly. The fact that broken rails had been seen on other parts of the road would plainly not be material in determining whether this particular rail was broken when the train ran upon it. Other questions were asked on behalf of plaintiff with reference to whether witnesses had ever seen broken rails lying intact in position; and it is claimed that this evidence, if admitted, would have rebutted the testimony of defendant's witnesses that they had passed over the track a short time before the wreck occurred, and discovered no broken rails, and that they would have noticed a broken rail had there been one, even if it had been broken on top of the ties. But here again the difficulty is that the evidence, if admitted, would tend to show negligence by the defendant in not discovering broken rails on some other and distant part of the track. Such evidence was plainly immaterial.

Evidence was introduced in behalf of defendant tending to show a settlement with plaintiff for a consideration paid; and counsel for plaintiff, for the purpose of proving that plaintiff was out of her mind at the time of the settlement, asked a physician to testify "as to whether persons that are insane, or have deranged minds, at some times appear to be sane, and talk practically sane upon subjects, and converse in practically a sane manner." This question was objected to for the reason that there had been no evidence introduced that plaintiff was in any manner insane at the time of the settlement, and the objection was sustained. Counsel for appellant does not point out any evidence which would tend to show that plaintiff was out of her mind when the settlement was made, and

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therefore we must assume that the ruling of the court was correct. There was some evidence tending to show a mental deterioration in plaintiff following the accident, but the testimony on this point related to the measure of damage, and not to the condition of plaintiff's mind when the settlement was made, within a short time after the injury. But aside from the fact that the objection was well taken, it appears that the witness did answer the question, and no prejudice could have resulted from the ruling. This answer was followed by another question as to whether that is the rule or not with patients of unsound mind, but certainly, in the absence of some evidence that the plaintiff was of unsound mind at the time of the injury, this ruling was not erroneous.

In the same connection we may consider an exception to an instruction with reference to the effect of the settlement. Counsel for plaintiff complains because the court told the jury that, if the plaintiff "knowingly signed the agreement, but at the time she signed it she gave little attention to its contents, or did not read it, or ask that it be read to her, then she was bound thereby"; and it is contended that this was not a sufficient statement with reference to the defense of mental incapacity. Standing alone, it would, no doubt, be an insufficient presentation of the question, but in a previous instruction the court had gone at length into the matter, and the instruction complained of was a mere corollary to that already given. It was not, in itself, misleading, in view of the other instruction. The principal instruction on the subject is not open to the same objection, although it is criticised by appellant's counsel. It does set out, we think, at sufficient length and with definiteness and clearness, the effect to be given to any evidence tending to show want of mental capacity on the part of plaintiff to execute a valid settlement. The criticism that the word "knowingly" is used in this connection is not well founded, for the meaning of the court in the use of that expression is made perfectly clear by the instruction taken as a whole.

An instruction is complained of in which the jury were told that if they believed from the evidence that the "plaintiff was injured and bruised about her body and head, thereby causing the plaintiff to suffer physical pain and mental anguish," and that the injury was caused through the carelessness or negligence of the defendant or its employees in running, controlling, and operating the train on which plaintiff was a passenger, or in the construction, repair, and looking after the roadbed and tracks of the defendant's line of road, etc., then the plaintiff would be entitled to recover, unless the jury should find that there had been a valid settlement. The first objection to this instruction is that it assumes that there was a controversy as to whether plaintiff was actually injured, whereas in fact there was no controversy as to the injury to plaintiff; but it

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appears from the pleadings that while the defendant did not deny the fact of injury, it did deny that plaintiff was injured to the extent claimed, and the court was therefore justified in calling the jury's attention to the extent of the injury. But the further objection is made that this instruction threw upon the plaintiff the burden of proving that defendant was negligent. In making this objection we think counsel do not distinguish between the burden of proof under the issues and the burden of proof with reference to the weight of evidence. The plaintiff alleged negligence on the part of defendant causing the injury, and this is denied by the defendant. The burden of proof was therefore, under the issues, on the plaintiff. It is true that in an action against a railroad for injuries received by a passenger, resulting from an accident in the operation of the train, which accident is of such a nature that it would not usually happen without negligence, evidence of the happening of the accident and the injury to plaintiff resulting therefrom is generally held to be prima facie sufficient to establish negligence, and to cast on the defendant the burden of proving want of negligence on its part in connection with the accident. *Smith v. Railway Co.*, 32 Minn. 1, 18 N. W. 827, 50 Am. Rep. 550; *Spellman v. Transit Co.*, 36 Neb. 890, 55 N. W. 270, 58 Am. & Eng. R. Cas. 297, 20 L. R. A. 316, 38 Am. St. Rep. 753; *Gleeson v. Railroad Co.*, 140 U. S. 435, 11 Sup. Ct. 859, 47 Am. & Eng. R. Cas. 513, 35 L. Ed. 458. But, as said in *Pershing v. Railway Co.*, 71 Iowa, 561, 32 N. W. 488, 31 Am. & Eng. R. Cas. 405: "The rule which casts the burden of proof on the carrier is a rule of evidence, having its foundation in considerations of policy. It prescribes the quantum of proof which the passenger is required to produce in making out his case originally, and he is entitled to recover on that proof unless the carrier can overcome the presumption which arises under the rule from the facts proven." The burden of proof in this case under the issues was on the plaintiff, but that burden was sufficiently sustained when it was established by the evidence that the injury was received by reason of the derailment of the train. The presumption of negligence arising from this evidence could be overcome only by proof on the part of defendant that it was without negligence with reference to such accident. There is nothing in the instruction complained of which is inconsistent with this view of the law, and the criticism thereof is without foundation. The same suggestion disposes of objections to other instructions in which the court in a general way told the jury that the burden was on plaintiff to establish defendant's negligence.

Complaint is made of refusal to grant a new trial on account of newly discovered evidence, but it is enough to say that such evidence related to matters of expert knowledge in regard to railroading, and could have been furnished by any expert witnesses, as well as by those named in the applica-

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tion. The showing was not sufficient to entitle plaintiff to a new trial in that respect.

We have not taken the time to discuss all the assignments, but have considered all that seem to us to have any possible merit. The result is that the judgment of the lower court is affirmed.

DAVIS *v.* PADUCAH RY. & LIGHT CO.

(*Court of Appeals of Kentucky, May 7, 1902.*)

[68 S. W. Rep. 140.]

Injury to Street Railway Passenger—Inspection of Cars—Degree of Care.*

The duty of a street railroad company to a passenger to protect her from injuries from its appliances is not fulfilled by recent inspection of its cars, or by an inspection by a competent employee, but the law requires of it "the utmost care and skill which prudent men are accustomed to use under similar circumstances."

Same—Care Required of Passenger.

It was error to instruct the jury that it was the duty of plaintiff, when going upon defendant's cars, "to exercise due care and caution, use her eyes, and act with reasonable care and judgment for her own safety, more especially if she found the car unusually overcrowded with passengers," but the court should instead have instructed the jury that it was incumbent on plaintiff while on the car "to exercise such care and caution as might be reasonably expected of a person of ordinary prudence situated as she was."

Same—Negligence—Panic among Passengers Caused by Flash of Fire—Proximate Cause.

If the negligence of defendant produced a flash of fire, followed by smoke in the car, causing a panic among the passengers, whereby plaintiff was injured, that negligence was the proximate cause of the injury, provided the conduct of the passengers was such as might reasonably be expected under similar circumstances, considering the crowded condition of the car and the fact that it was moved by electricity.

Same—Prima Facie Case.†

A passenger makes out a prima facie case against the carrier when he shows an injury resulting from a defect in any of those things the carrier is bound to supply.

Same—Burden of Proof—Instructions.

It is safer to so frame instructions as to indicate the burden of proof without expressly referring to it, and therefore the court should have instructed the jury that, if plaintiff's injury was due to any defect in the car or cars on which she was riding, or the machinery or appliances connected therewith, and she did not, by her own want of ordinary care, contribute to the injury, they should find for her the damages she thereby sustained, unless they believed from the evidence defendant had exercised the utmost care and skill which prudent men are accustomed to use under similar circumstances to ascertain any defects in the car and appliances and secure their safety.

Contributory Negligence—Instructions.

When specific facts are alleged constituting contributory negligence, the instructions should be confined to those facts.

*As to the degree of care required of carriers of passengers, see monographic note, 1 R. R. R. 7, 24 Am. & Eng. R. Cas., N. S., 7.

†See *Whitney v. New York, etc., R. Co. (C. C. A.)*, 19 Am. & Eng. R. Cas., N. S., 184, and foot-note; *Doolittle v. Southern Ry. Co. (S. Car.)*, 1 R. R. R. 105, 24 Am. & Eng. R. Cas., N. S., 105.

Davis v. Paducah Ry. & Light Co

Appeal from circuit court, McCracken county.

"To be officially reported."

Action by Rachel Davis against Paducah Railway & Light Company to recover damages for personal injuries. Judgment for defendant, and plaintiff appeals. Reversed.

Hendrick & Miller, for appellant.

HOBSON, J. Appellant, Rachel Davis, was a passenger on one of the cars of the appellee, the Paducah Railway & Light Company. The car was very much crowded, and she, being unable to get a seat inside of the car, was on the front platform. As we understand the proof, she was on the front end of the front car, on which was the motor, and behind it were two other cars, called "trailers," which were pulled by it. The cars were coming into the city from the fair ground, and when they first started were moved slowly, to give the conductor time to take up the fares. When the motorman applied the full power of the current, according to the proof for appellant, the car began to slow up, and there was a flash of light. The motorman hallooed out loud enough to be heard three squares away: "Throw that trolley off back there. Don't anybody get off this car. There is no danger. Don't anybody get off." He hallooed this several times. The passengers in the car cried, "Fire! The car is on fire!" and began to jump out through the windows, and to rush out pellmeil at the doors. The appellant was holding on to the car. The heat flashed up, and burned her hand, so that she had to let go. When she did this, the crowd surging by her knocked or pushed her off the car and trampled upon her, inflicting very serious and painful injuries. She was badly bruised, externally and internally, so that blood passed from the bowels, bladder, and mouth, and her leg was seriously, if not permanently, injured. The proof for the appellee only conflicts with that of appellant as to the amount of the flash of flame which caused the stampede among the passengers. On the facts the court instructed the jury as follows: "(1) The court instructs the jury that on the occasion the plaintiff boarded the defendant's street car named in her petition, it was the duty of the defendant company to have provided safe cars in a safe condition in which for passengers to ride in so far as human foresight and judgment by recent inspection could enable the defendant company to know, or in good faith to believe, the cars in good condition by being inspected by a competent employee. The court further instructs the jury that on the occasion aforesaid it became the legal duty of the plaintiff, when going upon said cars, to exercise due care and caution, use her eyes, and act with reasonable care and judgment for her own safety, more especially if she found the car unusually overcrowded with passengers. (2) The court further instructs the jury that if you shall believe from the evidence the cars upon which plaintiff entered on the occasion

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named in instruction No. 1 were in an unsafe condition, and that said want of safety in the cars was known to the defendant or its employees, or that the same could have been discovered by the inspection of a competent person; and if you shall further believe from the evidence that by reason of such unsafety of said cars, or by the negligent operation of the same (if you believe the same was negligently operated), the plaintiff received the injuries complained of, the law is for the plaintiff, and you will so find; and if you find for the plaintiff you will find compensatory damages; that is, damages for the pain, physical and mental, which you may believe from the evidence she suffered before the bringing of this suit, for the loss of time, and for doctor's bill, and for medicine to cure her, and for any permanent injury she may have sustained, altogether not exceeding the amount claimed in plaintiff's petition. (3) The court further instructs the jury that if you shall find for the plaintiff under instruction No. 2, hereinbefore given, your finding of damages shall be limited to the amount you may believe from the evidence the plaintiff sustained alone on account of her falling or jumping from the car to the ground, which she received by her own act in so doing, excluding from your minds and estimate any and all injuries which she may have sustained by reason of other outside negroes running over her or trampling on her after she fell to the ground, as in law the defendant company would not be liable for what other persons may have injured her. (4) The court instructs the jury that, unless you shall believe from the evidence that said motor street car moving the train on the occasion aforesaid when the plaintiff entered upon the train was defective or unsafe, and that such unsafety or defectiveness could have been discovered prior thereto by a competent inspector of the same, or unless you shall believe from the evidence that said cars on said occasion were negligently operated by defendant's employee, then and in such case you cannot find for the plaintiff, but the law would be for the defendant and you will so find." Under these instructions the jury found for the defendant.

The first instruction does not correctly state the degree of care required of the car company. Its duty to its passengers is not fulfilled by recent inspection, or by an inspection by a competent employee. The rule is thus well stated in 2 *Shear. & R. Neg.* § 495: "Out of special regard for human life, and acting upon the presumption that every man who commits his person to the charge of others expects from them a higher degree of care for his bodily safety than they would bestow upon the preservation of his property, the law very wisely exacts from a common carrier of passengers for hire, in the performance of his duties as such, the utmost care and skill which prudent men are accustomed to use under similar circumstances." This rule was followed in *Railway Co. v. Weams*, 80 Ky. 420, where the court added: "The degree of

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care and skill increases with the hazards of the mode of conveyance employed by the carrier." The latter clause of the first instruction is objectionable, and in lieu of it the court should have told the jury that it was incumbent on the plaintiff while on the car to exercise such care and caution as might be reasonably expected of a person of ordinary prudence situated as she was. The second and fourth instructions are objectionable for the same reason as the first. But the most objectionable instruction is the third, by which the jury were told that the plaintiff could not recover for the injuries received by the passengers running over her after she was pushed off the car by them and fell to the ground. If the defendant's negligence caused the panic among the passengers, and their conduct was the natural result of its negligence, or was such as might reasonably be expected under the circumstances, considering the crowded condition of the car, and the fact that it was propelled by electricity, the defendant is answerable; although it would not be responsible if the panic among the passengers which caused the injury to the plaintiff was needless, and there was no apparent danger that might reasonably be expected to cause a panic among the passengers. If the defendant was negligent, and this negligence produced a flash of fire, followed by smoke in the car, and this caused the stampede of the passengers, and made them run over the plaintiff, it cannot be held as a matter of law that her injury was not the proximate and natural result of the defendant's negligence. Thus, where the defendant threw a squib into a market house, and it was knocked from one person to another in an effort to prevent its injuring him, the person who was injured at last by its explosion, it was held, could recover from the person who originally threw it. So, where, in a quarrel with a boy on the street, the defendant followed the boy, with a pickax, into another's store, and the boy, in striving to get away, knocked out a faucet from a cask of wine, and the wine was spilled, the pursuer was held liable. So, where, through the negligence of a railroad, fire fell on a horse and its driver in the street, the horse ran away with the wagon, and the driver, in attempting to stop the horse, reined it against the curbstone, and thus injured a person on the sidewalk, the railroad was held responsible to the person injured, without regard to whether or not the driver did, in the emergency, the most prudent thing. *Bish. Non-cont. Law*, §§ 45, 46. So, where the whistle of a locomotive is needlessly and wantonly sounded near a highway, causing a team of horses to run, and to kill another horse, the owner of the latter may recover of the railroad for the loss. *Id.* § 457. See, also, 1 *Sedg. Meas. Dam.* §§ 128, 129.

The plaintiff asked the court to give the jury this instruction, which was refused: "(c) The court instructs the jury that plaintiff must prove she was injured by the negligence of defendant; but, if the accident in which she was injured was caused by the act or omission of those in charge of the opera-

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tion of its cars, or by any defect in or about the car or cars on which she was riding, or the machinery or appliances connected therewith, the law presumes that same was the result of negligence on the part of the defendant, and defendant must show affirmatively that there was no negligence, and that all proper and necessary examinations had been made and precautions taken to insure the safety of the plaintiff while riding on its cars, and that the accident in which she was hurt, if she was hurt, occurred without fault on its part." The rule is settled that, where the passenger shows a break in the railroad track, or the breaking of an axle or wheel of a car, he makes out a prima facie case in a suit to recover for an injury received by reason of such defect. This rule applies to all those things which the carrier is bound to supply, and are defective, by reason of which an injury to the passenger occurs. 2 Shear. & R. Neg. § 516. But this court has in a number of cases said that it is better not to instruct the jury as to burden of proof, and it is safest to so frame the instruction as to indicate the burden of proof without expressly referring to it. Under this rule the court should have instructed the jury that, if the plaintiff's injury was due to any defect in the car or cars on which she was riding, or the machinery or appliances connected therewith, and she did not, by her own want of ordinary care, contribute to the injury, they should find for her the damages she thereby sustained, unless they believed from the evidence that the defendant had exercised the utmost care and skill which prudent men are accustomed to use under similar circumstances to ascertain any defects in the car and appliances and secure their safety. The phraseology of the second instruction should have been modified so as to convey this idea. A separate instruction is unnecessary.

We have considered the case as though the defendant had pleaded contributory negligence generally. This it did not do, but alleged certain facts. When specific facts are alleged as constituting contributory negligence, the instruction should be confined to these facts; but on the return of the case the defendant may have leave to amend its answer in this regard, if it desires to do so. The usual instruction as to contributory negligence should be given as a qualification of No. 2.

Judgment reversed, and cause remanded for further proceedings consistent with this opinion.

FLYNN *v.* CONSOLIDATED TRACTION CO.

(*Court of Errors and Appeals of New Jersey, June 16, 1902.*)

[52 Atl. Rep. 369.]

Injury to Street Car Passenger—Contributory Negligence—Protruding Head from Car Window.*

Plaintiff, while riding on defendant's street car, signaled the con-

*See *Kird v. New Orleans, etc., R. Co. (La.)*, 20 Am. & Eng. R. Cas., N. S., 930, and extensive note, 934 et seq.

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ductor to stop the car, and the speed decreased, and plaintiff got on the running board at the side of the car, when the conductor signaled to go ahead and the speed was increased. Plaintiff turned to again signal the conductor, and, leaning outward, his head struck a wagon overtaken by the car: *held*, that a nonsuit was proper, as plaintiff was guilty of contributory negligence.

Same—Same—Negligence in Failing to Stop Car—Proximate Cause.

The accident was not the natural result of the conductor's negligence, and the defendant was not liable.

Error to supreme court.

Action by Joseph B. Flynn against the Consolidated Traction Company. From a judgment directing a nonsuit, plaintiff brings error. Affirmed.

Thomas F. Noonan, for plaintiff in error.

James B. Vredenburg, for defendant in error.

GUMMERE, C. J. This is a suit to recover damages for personal injuries. The plaintiff was traveling as a passenger upon an open car of the defendant. The evidence submitted on his behalf disclosed the following state of facts: Upon approaching his destination he stood up in the car and shook his lunch basket, to notify the conductor to let him off. The conductor pulled the bell rope, and the car then began to slow down. The plaintiff then got upon the running board on the right-hand side of the car. In the meantime the car was running more and more slowly, but before it came to a stop the conductor gave the signal to go ahead, and the car immediately began to increase its speed, whereupon the plaintiff turned around and faced the rear of the car, leaning outward so that he could see the conductor, and then shook his basket at him again, and called, "Hey! Hey! I want to get off here." Just as he was turning back, so as to look toward the front of the car, it overtook a milk wagon, which was proceeding in the same direction and was quite near to the track, and his head came in contact with one of the handles upon the wagon door, receiving the injury for which he now sues. The plaintiff had not observed the wagon before he was struck, and was not conscious that it was near. Upon these facts being shown, the trial court directed a nonsuit to be entered, and the writ of error is brought to test the correctness of this instruction.

The judgment under review was directed upon the second trial of the case. At the first trial a verdict was returned for the plaintiff upon practically the same facts submitted by the plaintiff as have been herein recited. A rule to show cause was subsequently allowed, and, after hearing, was made absolute, upon the ground that the plaintiff, on taking his position on the running board, was under a duty to use his powers of observation, and notice and avoid dangers *ab extra*, and that his leaning over so far as to be carried against a passing vehicle, which he did not observe, and which, if he had used observation, he must have seen and could have avoided, established his negligence contributing to his injury. Flynn v.

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Traction Co., 64 N. J. Law, 375, 45 Atl. 799. We agree in this view expressed by the supreme court, and think the direction of a nonsuit was warranted upon the ground of the contributory negligence of the plaintiff.

But, even if we had reached an opposite conclusion, we would still feel compelled to affirm this judgment. The defendant is only responsible for the natural, as well as the proximate, effects of the wrongdoing of its employees; and by "natural" is meant such as might reasonably have been foreseen,—such as occur in the ordinary state of things. Wiley v. Railroad Co., 44 N. J. Law, 247. An accident, such as that which happened to the plaintiff, will not ordinarily result from the starting up of a car while a passenger is standing upon the running board, waiting for an opportunity to alight. In the present case it cannot be said that the conductor should have foreseen that his careless act would be harmful to the plaintiff, even if he should have anticipated that it would be likely to cause the latter to lean out from the car and look backward, unless it be assumed that his duty required him to observe the proximity of the milk wagon. But, from the standpoint from which the case is now being considered, this assumption is not tenable; for, if the plaintiff was under no duty to observe the nearness of the wagon, then the conductor was equally free from any duty in that regard. The case, then, stands thus: If the failure of the plaintiff to observe the danger which he would incur by leaning out from the car, and at the same time looking back, was negligence, he cannot recover. If it was not negligence, then neither was the failure of the conductor to observe this danger to the plaintiff negligence on his part; and, if it was not, then the accident was not the natural result of the careless act of the conductor in signaling the car to go ahead without first giving the plaintiff a chance to alight.

The judgment of nonsuit should be affirmed.

CLERC v. MORGAN'S LOUISIANA & T. R. CO.

(*Supreme Court of Louisiana, March 31, 1902.*)

[31 So. Rep. 886.]

Carriers of Passengers—Degree of Care.*

While common carriers are not absolute insurers of their passengers, it is an implied condition of railroad companies with each passenger that the latter shall not be put in jeopardy of life or limb by any fault—even the slightest—of the servants of the company. The negligence of a common carrier includes its negligence in all the departments of its undertaking.

Same—Care Required of Passenger.

The passenger is not relieved of all obligation as to his own safety.

*As to the degree of care required of carriers of passengers, see monographic note, 1 R. R. R. 7, 24 Am. & Eng. R. Cas., N. S., 7.

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but, unlike the carrier, he need not exercise the highest degree of care. He is bound to exercise only ordinary care and prudence to preserve himself from injury.

Same—Same.

The standard by which to determine whether or not an adult passenger has failed to exercise the proper degree of care is whether a person of ordinary prudence in the same situation, and having the knowledge possessed by the passenger, would have done or omitted to have done the alleged negligent act. The passenger has the right to rely confidently on the care and watchfulness of the carrier to make all things safe for his transportation, with its incidents.

Same—Negligence in Placing Car on Switch near Main Track.

A railroad company cannot be permitted to place a car on one of its tracks in the hands of parties who do not know or appreciate the danger of doing or not doing certain acts which it was the duty of the party having charge or control of the car to know, and escape liability for his negligent acts on the ground that it was not under the control of its employees. It is responsible for the negligent acts of those in whose hands it permitted the car on its tracks to pass.

Same—Same.

It is negligence on the part of a railroad company to place a freight car, with opening side doors, on a switch connecting with the main track, so near the junction that the door, when opened, would close the intervening space between the switch and the track. To leave open the door of a car so situated, or to throw it open as a train is passing, is more than carelessness and passive negligence. It is an active violation of the company's contract, against which the passengers would have a right to anticipate full protection.

Same—Same—Same—Same—Injury to Passenger's Projecting Arm.†

Where the arm of a passenger was projecting from the sill of a car window, and was injured by being struck by the open side door of a freight car of the defendant company, left at rest upon a switch connecting with the main track, and so near that the open door closed the interval between the switch and the track, it is a question to be determined from the evidence under all the circumstances of the case whether this was negligence on the part of the passenger barring recovery.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Fred D. King, Judge.

Action by Rene F. Clerc against Morgan's Louisiana & Texas Railroad Company. Judgment for plaintiff, and defendant appeals. Modified.

Denegre, Blair & Denegre, for appellant.

Dart & Kernan, for appellee.

Statement of the Case.

NICHOLLS, C. J. The plaintiff prayed for judgment against the defendant company for \$25,000, referring to it as Morgan's Louisiana & Texas Railroad Company. After alleging that it operated a line of steam railroad for the transportation of passengers, and that he had purchased a ticket from the company, and paid his fare, he averred: That he was on the 3d of August, 1900, a passenger on car No. 318 of said company, en route from New Orleans to Morgan City. That just after the train to which his car was attached had

†See *Kird v. New Orleans, etc., R. Co. (La.)*, 20 Am. & Eng. R. Cas., N. S., 930, and extensive note, 934 et seq.

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passed Gretna station, and while he was seated in the car, he was suddenly struck on the right arm by an object, which he afterwards learned was the door and the iron bolt or fastening thereof attached to a refrigerator or freight car, also the property of defendant company, or being used by it, and in its charge, care, custody, and control, and lying on an adjoining track of the defendant company, in close proximity to the track over which petitioner's train was moving or being carried. That said blow bruised, crushed, and fractured petitioner's right arm, causing him great pain and suffering. That he was attended temporarily by fellow passengers. That the train was stopped, and petitioner was removed from said car to the Charity Hospital in New Orleans, where, on the same day, about noon, petitioner's said arm was amputated at the elbow; the said fracture and injury being such that amputation was necessary. That petitioner thereby lost forever the use of his said right arm, reducing materially his capacity for making a living, besides mutilating and disfiguring his body. That at the time of said occurrence petitioner was a merchant in New Orleans, a member of the firm of Clerc Bros. & Co., in which firm he occupied the position of a traveling salesman, receiving, in addition to his salary, a share in the profits of said business. That his connection with said firm grew out of and was maintained chiefly by reason of his capacity as a traveling salesman, which occupation requires activity and physical ability to take care of one's self, especially in riding and driving in day and night through the country parishes of Louisiana, where much of petitioner's time was necessarily spent. That the loss of his right arm increases the cost or expenditure of traveling, and has reduced his earning capacity. That petitioner lost 70 days of time from his business by reason of his said injury, during which period he was unable to earn his salary, and, on the contrary, was laid up, invalided, and unable to work, and enduring constant physical and mental suffering. That he incurred expenses for physicians and medicines; and that, while he had not lost his employment, his strength had been undermined, and his capacity to earn a living had been affected, as his usefulness to his copartners or other employers had been materially reduced by the loss of his arm as aforesaid. That defendant company was responsible to petitioner for his mutilation, pain and suffering, losses and injuries, because: (1) Petitioner was without fault or carelessness, and contributed in no way to said injury. That he was a passenger on the said car, in charge of the said company, in a place which he was entitled to consider safe, and had no warning or caution of the impending accident. That petitioner was entitled to safe carriage and protection from injury from anything in, on, or near the defendant's track, in its custody and control, or operated by it under its care, or placed by it or permitted by it to be placed or to remain in a position where

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said thing could injure said defendant's passengers. That the car in which petitioner was seated and the car which caused the injury were the property of the defendant, or in its possession, and operated and controlled by it. That the accident could not occur, and would not have occurred, but for the carelessness and gross negligence of the defendant or its servants, agents, and employees, for whose acts it was responsible. (2) That the two cars in question were larger than usual, and there was no room between the two tracks for said cars to pass each other, particularly if the said freight car had its door open, or had anything projecting from the same. That the tracks at that point, namely, the track on which petitioner's train was passing and the track upon which the freight car was lying, were constructed in violation of the rules of the company as to distance between centers of tracks, and were, in any event, not placed sufficiently far from each other to provide against accidents of this kind. (3) That the freight car in question had been lying within the yard limits of said defendant company, with its door open or unsecured, in the position which caused the injury, for some hours, in full view of the defendant's employees, and was seen by or should have been seen by said employees and by the engineer and employees in charge of the train. That it was gross negligence and carelessness on the part of said employees not to have seen said car, or, having seen it, to have allowed it to remain in that position at a time when passenger trains were known to be approaching and passing; and it was gross negligence on the part of the engineer of the train to attempt to pass said obstruction under headway as he did. That for the mutilation, dismemberment, and disfigurement, his pain and sufferings, and his decreased ability to earn a living, petitioner assessed his damages at \$25,000, aforesaid. In view of the premises petitioner prayed that Morgan's Louisiana & Texas Railroad Company be cited, and, after due proceedings had, that there be judgment in petitioner's favor condemning said defendant company to pay petitioner the full sum of \$25,000, with legal interest from date of judgment, and for trial by jury, and for costs, and for all general and equitable relief.

The defendant, after stating that its real name was Morgan's Louisiana & Texas Railroad & Steamship Company, pleaded the general issue. Further answering, it specially denied that the accident referred to or intended to be referred to was due to any fault or negligence on its part, or on the part of any of its officers, agents, or employees; and it averred that said accident was contributed to by plaintiff's negligence in unnecessarily and carelessly exposing his person to injury by allowing his arm to protrude out of the window of the passenger coach in which he was riding.

Opinion.

There is no dispute between the parties as to the facts that at the time of the accident set out in plaintiff's petition he

was a passenger, seated near a window, in one of the coaches of a train of cars belonging to and operated by the defendant company; that while so seated, and the train being in motion, he was struck upon the arm by some object, which injured him to such an extent as to necessitate its amputation; that the object which struck the plaintiff was either the door, or a projecting hasp or bolt attached to the same, of one of the side doors of a freight car belonging to the defendant company, which was at rest upon a switch track, also belonging to the defendant company, which connected with the main track upon which the train was moving; that this freight car had been placed by defendant's employees upon this switch, the evening before the accident, at the point which it occupied at the moment the accident occurred, and that point was so near to the main track that, when the door of the freight car was wide open, with the hasp or bolt extended to its utmost limit, the hasp would strike the side of a passenger coach, as in motion, it passed by. The defendant denies that the plaintiff was struck by the projection of the hasp or bolt of the door into the window of the passing passenger coach at the point where plaintiff was sitting. It concedes that the bolt struck the coach, but it contends that it did so at a point several inches below the sills of the row of passenger car windows, as was shown by a defined line upon that car, showing its line of contact. In the brief filed on its behalf it is said: "It is conclusively shown by the witnesses that it was not the handle bar or hasp which struck plaintiff. If any additional evidence on this point is desired, it will be found in the evidence which the hasp itself recorded on the side of the passenger coach." Further on it is said: "Everything points to the conclusion that the door swung open or was shoved open as the train was passing, and that the hasp or bar folded back on its hinge, and, so projecting a very short distance beyond the door, came in contact with car No. 318, and made the scratch mark above described, while the outer edge or face of the heavy door passed near enough to the side of the coach to come in contact with plaintiff's arm, which must have projected out of the window. * * * The conclusion is irresistible that the edge of the door struck plaintiff's hand. It passed within two or three inches of the side of the car, and the blood stain on the door is just where contact with an arm resting on the sill, but extending out of the window, would take place." The motive of the defendant in insisting that it was the door, and not the hasp, which struck the plaintiff, was that the form of the door would prevent its projecting inside the window sill, and would place the point at which the blow was inflicted outside of the line of the side of the passenger coach. That plaintiff was struck either by the door or the hasp of the door of the freight car is beyond question. The defendant denies that the person who threw open the door of the freight car was an employee of the com-

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pany. It maintains that, if any employee had thrown the door open, it would have been in violation of his duty and the rules of the company. It urges that the freight car was loaded with moss, and consigned to one Hepting, and had been turned over to Hepting for the unloading of the moss, and the company was not responsible for Hepting's acts.

It will be well to refer to the law governing generally this class of cases before making special application of it to the case immediately before us. We think it is very generally recognized that for the safety of their passengers common carriers are required to exercise the highest degree of care reasonably to be expected from human vigilance and foresight, in view of the mode and character of the conveyance adopted, and consistent with the practical prosecution of their business. While common carriers are not absolute insurers of passengers, yet, as declared by this court in *Black v. Railroad Co.*, 10 La. Ann. 38, 63 Am. Dec. 586: "It is an implied condition of railroad companies with each passenger that the latter shall not be put in jeopardy of life or limb by any fault—even the slightest—of the servants of the company." In *Railroad Co. v. Boyd*, 65 Ind. 526, the court said: "A common carrier of passengers is not an insurer of the passenger's safety against all the accidents and vicissitudes of travel, but it is an insurer against all risks caused or increased by the negligence of the carrier where the passenger is not at fault. The negligence of a common carrier in carrying the passengers includes his negligence in all the departments of his undertaking,—the condition of the road, the character of the machinery, the quality of the cars, the insufficiency of the equipments, the skill and conduct of the agents and employees; in everything, indeed, necessary to the safety of the passenger when he himself is not at fault." While the carrier is held to very strict care, the passenger himself is not relieved of all obligation of taking care of his own safety, but, "unlike the carrier, he need not exercise the highest degree of care. He is bound to exercise only ordinary care and prudence to preserve himself from injury." *Fetter, Carr. Pass.* § 128; *Mackoy v. Railway Co.* (C. C.) 18 Fed. 236; *Smith v. Railway Co.*, 32 Minn. 1, 18 N. W. 827, 50 Am. Rep. 550; *Packet Co. v. True*, 88 Ill. 608; *Bland v. Railroad Co.*, 65 Cal. 626, 4 Pac. 672. "The standard by which to determine whether or not a normal adult passenger has failed to exercise the degree of care is whether his conduct is that of a prudent, reasonable man in possession of his ordinary senses and capacities placed in his situation." *Fetter, Carr. Pass.* § 128; *Simms v. Railway Co.*, 27 S. C. 268, 3 S. E. 301. It has been held that "whether or not the act of a person is negligent depends upon whether or not a person of ordinary prudence "would have done or omitted to do the same thing." *Galloway v. Railway Co.*, 87 Iowa, 458, 54 N. W. 447, 58 Am. & Eng. R. Cas. 245. The test of the liability of one to

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a charge of contributory negligence is whether a prudent person in the same situation, and having the knowledge possessed by the one in question, would do the alleged negligent act. *Railway Co. v. Best*, 66 Tex. 116, 18 S. W. 224, 17 Am. & Eng. R. Cas., N. S., 153. See, also, *Curtis v. Railroad Co.*, 27 Wis. 158. The passenger on a railroad train has the right to confidently rely on the care and watchfulness of the carrier to make all things safe for his transportation with its necessary incidents while passively submitting himself to the carrier's care during the journey, and he is not to be deemed guilty of negligence unless knowledge of a defect or peril is thrust upon him, and he then fails to use ordinary care to avoid injury. This right has to be exercised within reasonable limits. It stops where the situation is such that the exercise of the right in a particular case would relieve him from what, under the circumstances of that case, would have thrown upon him the obligation of taking affirmatively legal care himself in the premises. In the case of *Summers v. Railroad Co.*, 34 La. Ann. 145, 44 Am. Rep. 419, this court, referring to the defendant, said: "As a carrier of passengers, it is elementary that defendant's duty was to exercise diligence, skill, care and foresight to carry them safely. *Railroad Co. v. Roy*, 102 U. S. 451, 26 L. Ed. 141. It was bound to know that its passengers, in common with those on other street railways, were in the habit of riding with their arms resting on the window sills and projecting outside of the cars; that, under the usual conditions of construction of parallel tracks in the city, this practice was free from danger of collision with passing cars on their respective tracks; that the width between its own tracks at this curve was exceptionally narrow; that the car No. 4 used by it was exceptionally wide; that such car, in running over that curve, was liable to meet another car; that in such meeting they would, under conditions perfectly probable, pass each other so closely as, if not to collide, to come very near touching; that in such event a passenger in either car occupying the position shown to be very commonly occupied would inevitably be injured. Knowing these things, a reasonable care for the safety of others would have dictated the duty of using precautions to avoid the danger." Quoting, the court said: "As well said by an able judge: 'When we are engaged in an act which the surrounding circumstances indicate may be dangerous to others, and when the event whose occurrence is necessary to make an act injurious is one which we can readily see may occur under the circumstances, and unite with the act to commit the injury, we are culpable if we do not take all the care which prudent circumspection would suggest to avoid the injury.' *Fairbanks v. Kerr*, 70 Pa. 86, 10 Am. Rep. 664." The court decreed the defendant guilty of "negligence," as defined by itself in its decision. It then proceeded to consider whether the plaintiff was guilty of

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contributory negligence, saying: "The sole negligence charged is his act in sitting as he did with his arm resting on the window and his elbow projecting out of the car. Applying the principles already enunciated to the facts stated, we are of the opinion that there is a complete want of causal connection between the act and the injury. * * * It seems to us manifest, under the circumstances of this case, that no ordinary circumstances or foresight would have suggested to the most cautious person situated as plaintiff was the slightest probability of danger from the meeting of a car on a parallel track. Seeing a car approaching, he would have been perfectly justified (according to all common experience) in diverting his attention, and resting in the perfect confidence that it would pass without touching him. If the car had jumped the track, and had thus collided with the exposed arm of plaintiff, a different question would be presented. Quoad such a contingency, the act of plaintiff might have been judicially negligent. A prudent man might well foresee the possibility of such an occurrence, and might well be held to have taken upon himself the risk of such a peril. But, viewing the particular damage here suffered concretely, Mr. Wharton's question, 'Was it in ordinary natural sequence from the negligence?' must be answered in the negative." In *Spencer v. Railroad Co.*, 17 Wis. 487, 17 Am. & Eng. R. Cas., N. S., 163, 84 Am. Dec. 758, the court said: "It is probably the habit of every person while riding in the cars to rest the arm upon the base of the window. If the window is open, it is liable to extend slightly outside. This, we suppose, is a common habit. There is always more or less space between the outside of the car and any structure erected by the side of the track, and must necessarily be so to accommodate the motion of the train. Passengers know this, and regulate their conduct accordingly. They do not suppose that the agents and managers of the road suffer obstacles to be so placed as to barely miss the car while passing. And it seems to us almost absurd to hold that in every case, and under all circumstances, if the party injured had his arm the smallest fraction of an inch beyond the outside surface, he was wanting in order and prudence."

Coming now to the case before the court, we are of the opinion that the defendant company did not comply, as a common carrier, with its duty to the passengers on its moving train when it placed or allowed the loaded freight car, with its wide doors and bolts, to be placed as it was, on the switch connecting with the track on which it was, and in permitting that car, after it had been placed where it was, to go into the possession of a person other than one of its own employees, to be by him unloaded. It was unjustifiable in the company to place one of its cars, occupying so dangerous a place, in the hands of an irresponsible party. So far from escaping liability by reason of the fact that the car was in the posses-

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sion and under the control of Hepting, that very fact itself was an act of imprudence, carelessness, and negligence. A railroad company cannot be permitted to place a car on one of its tracks in the hands of parties who do not know or appreciate the danger of doing or not doing certain acts which it was the duty of the party having control or charge of the car to know, and escape liability for his negligent acts on the ground that the car was not under its control; and it is responsible for the faults of those into whose hands it permitted the car to pass. This freight car was on the switch so near the junction that its door, when opened, closed the intervening space between the switch and the main. To open the door of a car so placed when a passenger train is passing is more than carelessness and passive negligence. It is a positive, active violation of the company's contract. The defendant company could not with impunity throw a door open across the intervening space, taking the chance of its not hitting some one sitting in the passing car. On the other hand, the passengers in the car had the right to assume that they would be protected from any injury to themselves from the operation of any force thrown actively against them by parties for whom the company would be responsible. In this case it is not claimed that the plaintiff threw his hand or arm out of the car, and in so doing struck some object on the outside. On defendant's theory of the case, the car on which the plaintiff was a passenger was moving towards the door and the door was moving towards the car at the time of the accident, while plaintiff himself was passive. We do not think that the plaintiff, by any act of his, estopped himself from recovering damages for the injury.

What did the plaintiff do which has cut him off from his action? The defendant says, if it was guilty of negligence, so also was the plaintiff guilty of negligence. But is this true? At the utmost the plaintiff inadvertently or forgetfully permitted his elbow to project somewhat beyond the outer edge of the sill. If, in point of fact, the arm was projected, it does not appear how far beyond the sill it was so projected, nor for how long a time, nor from what cause. It can scarcely be claimed that a passenger on a train should be constantly on the alert and on guard at every moment of his trip to see that his arm does not pass a hair's breadth beyond the outer line of the sill; that he should watch every movement of his body, lest perchance in turning or stooping his arm should pass a little beyond limits. Such requirement at his hands would be utterly unreasonable. That a passenger might be guilty of negligence on some particular occasion by projecting his arm beyond the outer line of the car, so as to bar recovery of damages received as the result of that act, is beyond question true, but this barring of the remedy would depend upon the facts and circumstances of the case. Inadvertence, inattention, or forgetfulness are not per se "negligence." The time, the

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cause, the place, all the circumstances connected with the inadvertence, the forgetfulness, the inattention, are to be considered before they can be held to be of character such as, by reason of them, another person should be screened from liability and protected from the effects of an established tort. Unless the act itself in respect to which inadvertence or forgetfulness or inattention is charged to have been committed is negligence, the inadvertence or forgetfulness cannot be negligence.

What is negligence, and what is contributory negligence? This court has itself in the Case of Summers, in 34 La. Ann., 44 Am. Rep., given a definition of the word. Several other definitions given will be found in Fetter, Carr. Pass. § 3. The definition of this court referred to is as follows: "Judicial negligence is the inadvertent omission to do something which it would be the legal duty of a prudent and reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, to do, or the inadvertently doing something which it would be the legal duty of a prudent and reasonable man not to do; such act or omission being on the part of a responsible human being, and being such as in ordinary, natural sequence immediately results in the injury complained of." "This definition, though perhaps redundant, includes unequivocally all essentials, and excludes acts not properly within the domain of negligence. It excludes offenses or intentional wrongs. It excludes mere moral duties. It excludes irresponsible persons, of whom various classes are mentioned by Mr. Wharton. And it excludes all acts or omissions which, though they may be negligent, with reference to certain relations or contingencies have no causal connection with the injury complained of." Assuming that the plaintiff did in point of fact project his arm to some extent beyond the window sill of the window at which he was seated, was his doing so, under the circumstances in which this was done, and in view of the exact situation, "negligence"? We think not. The company's road is not a new one; it has been in operation for years. The situation of its tracks and the constructions along its lines are well known. No accident is shown or asserted to have occurred upon it by reason of any passenger having projected his arm beyond the window sill, and there certainly would have been accidents had that fact of itself been attendant with danger, as it is a matter of common knowledge that passengers are constantly doing this with no injurious results. The plaintiff had no reason to anticipate danger of injury to himself or to any one else by permitting his arm to pass beyond the sill. It is not pretended that there ever had been or was anything on the line of the road which would have made it at all dangerous for plaintiff's arm to have rested precisely where it was had not the special circumstances arisen from and out of which this accident occurred. They would not have occurred but for

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defendant's sudden negligence, and the plaintiffs had no reason to anticipate, prepare for, and guard against such negligence. If plaintiff had had reason to anticipate that which happened, a very different case would have been presented.

Defendant's counsel urges that the injury in the Summers Case was one in which a street railway, and not a steam railroad, was the defendant. It may be, and doubtless is, true, that the legal situation in a case of this kind may be varied by the fact that the company involved is a railroad instead of a railway company. If there be a difference, we will give heed to and act upon it when it is shown in any particular case; but we cannot arbitrarily declare that, as a matter of law, passengers in a railroad car are prohibited from projecting to the least extent their arms beyond the side of the coaches, while the fact is open to inquiry in the case of a street railway company. In the Summers Case the court said "that in determining what constitutes negligence precisely the same rules must be applied to the acts of defendant charged with negligence as to the acts of plaintiff charged with contributory negligence." We have repeatedly relieved defendants from the charge of negligence where the act done was one which the party committing it had no reasonable ground to know or believe, or could not reasonably be held to foresee, in the light of attending circumstances, and which he did not know, or have reasonable grounds to know, would carry with it injury as its natural and probable sequence. Mere temporary inadvertence on the part of a plaintiff under such conditions and in reference to a matter of that kind would not be contributory negligence barring recovery for damages. We deal with this matter not from the standpoint of comparative negligence, but from that of absence of negligence in its legal sense on the part of the plaintiff. If the arm of the plaintiff projected beyond the window sill, as defendant says it did, it does not show how far it projected, or for how long a time it did so. It may have been there for only a second of time in his act of moving or turning. In *Patton v. Pickles*, 50 La. Ann. 864, 24 South. 290, referring to the relations between a common carrier and its passengers, we said: "The contract between the parties is one which, from time immemorial, has imposed upon the obligor exceptionally severe obligations. Safe carriage is not merely an incident of the contract, but it is its very direct object." We do not think that a railroad company can by its own act or that of one for whose acts it is responsible itself injure one of its passengers, and then throw upon him the obligation of disproving contributory negligence. In such a case the carrier must establish affirmatively the acts on the part of the passenger which it claims bring him under the operation of the rule of contributory negligence, barring him from recovery of damages. *Kennon v. Railroad Co.*, 51 La. Ann. 1604, 26 South. 466. The views herein expressed are substantially held in *Summers*

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v. Railroad Co., Lampkin v. McCormick, 105 La. 418, 29 South. 952, and Kird v. Railroad Co., 105 La. 226, 29 South. 729, 20 Am. & Eng. R. Cas., N. S., 930. See Chaffee v. Railroad Corp., 104 Mass. 108; Hempenstall v. Railroad Co., 82 Hun, 285, 31 N. Y. Supp. 479; Archer v. Railroad Co., 106 N. Y. 589, 13 N. E. 318; Fett. Carr. Pass. §§ 127, 130, 131.

We think the judgment is for too large an amount. It is hereby reduced and amended to \$7,500, and, as so amended and reduced, it is hereby affirmed.

O'DONNELL v. CHICAGO, R. I. & P. R. CO.

(*Supreme Court of Nebraska, July 22, 1902.*)

[91 N. W. Rep. 566.]

Negligence—Instructions.

An instruction confining the plaintiff's recovery to the results of negligence in the specific acts alleged, and directing the jury to consider other acts at other times and places only as bearing upon the acts and injury complained of, *held*, in connection with the other instructions, not to narrow unduly the issues, nor to prevent the showing of any negligence directly connected with and tending to cause the injury.

Injury to Boy Playing on Side of Stationary Car—Failure to Stop Train—Instructions.*

Whether or not it is negligence on the part of a locomotive engineer to fail to stop his train, moving at not exceeding three miles an hour, on seeing a boy of eight years jumping on and off a ladder at the side of a freight car, is a question to be determined by the jury in view of all the circumstances.

Instructions.

To instruct the jury that all material allegations of plaintiff's petition must be established by a preponderance of the evidence is erroneous where material allegations are admitted, but prejudice will not be presumed where it is hardly possible the jury were misled.

Same.

To instruct the jury that all material allegations must be proved, without indicating what they are, is error; but, to be available to the losing party, a more specific instruction must have been requested, or there must have been in the case a distinct failure of justice.

Evidence.

Acts of a witness merely going to show how he knows that a train stood on a crossing 30 minutes or more, which are otherwise immaterial, should generally be admitted, at least in outline, but it is not error to strike them out as unresponsive, when volunteered in detail in answering a question as to the time of the train's standing there.

Witnesses.

In the absence of a distinct admission of the precise statement tendered to be proved, a party who has laid the proper foundation may prove a previous statement made by a witness materially contradicting his testimony.

(Syllabus by the Court.)

*As to the duty of railroad companies to infant trespassers, see *Tully v. Philadelphia, W. & B. R. Co.* (Del.), 20 Am. & Eng. R. Cas., N. S., 322, and note, 327 et seq.; *Flores v. Atchison, etc., R. Co.* (Tex.), 1 R. R. R. 709, 24 Am. & Eng. R. Cas., N. S., 709.

Tabello v. Delaware, L. & W. R. Co

Commissioners' opinion. Department No. 1. Error to district court, Lancaster county; Frost, Judge.

Action by Murty D. O'Donnell, by his next friend, Mary O'Donnell, against the Chicago, Rock Island & Pacific Railroad Company. Judgment for defendant, and plaintiff brings error. Reversed.

Geo. A. Adams, for plaintiff in error.

T. J. Doyle and Billingsley & Greene, for defendant in error.

TABELLO *v.* DELAWARE, L. & W. R. CO.

(*Court of Errors and Appeals of New Jersey, June 16, 1902.*)

[52 Atl. Rep. 561.]

Railroad Crossing—Negligence of Gateman—Question for Jury.

Whether a gateman, by raising the safety gates at a railroad crossing, permitted an infant of 6½ years to pass on to the tracks at a time when the approach of a locomotive was concealed by a passing train, and whether such act, if proved, was, under the circumstances, an exercise of reasonable care, are questions that call for the verdict of a jury. (Syllabus by the Court.)

Error to circuit court, Essex county.

Action by Rafello Tabello, administrator, against the Delaware, Lackawanna & Western Railroad Company. Judgment for plaintiff. Defendant brings error. Affirmed.

McGee & Bedle, for plaintiff in error.

Samuel Kalisch, for defendant in error.

GARRISON, J. The plaintiff's intestate, a boy 6½ years of age, while crossing the tracks of the defendant, was struck by a locomotive engine and killed. In an action for damages for causing the infant's death, it was incumbent upon the plaintiff to point out and to prove some act of the defendant's servants that was at once negligent and the cause of the infant's death. The act ascribed to the defendant by the plaintiff's pleadings and proofs in the present case was the raising of its safety gates at a time when the infant was waiting to cross its tracks, and when an approaching locomotive rendered the crossing of the tracks by an infant palpably dangerous. The jury found that the gates were in point of fact raised by the gateman. To render the raising of the gates actionable negligence, the age and situation of the infant and the circumstances of the particular case must be taken into consideration. The boy lacked some months of being seven years old, and he was, in company with his mother, awaiting the raising of the gates in order to pass on to and over the tracks. Other circumstances were that a train which had just passed partly hid an approaching locomotive, and also by its noise tended to obscure it. Whether, under these circumstances, all of which were within the obser-

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vation of the gateman, the raising of the gates was an exercise of reasonable care upon his part, was a question of fact that called for the verdict of a jury.

Whether the infant himself was negligent was also a jury question. The motion to nonsuit the plaintiff and the motion to direct a verdict for the defendant were each properly refused. These being the only points presented on behalf of the defendant in error, the judgment will be affirmed.

INDIANA, D. & W. RY. CO. v. DITTO.

(*Supreme Court of Indiana, May 27, 1902.*)

[64 N. E. Rep. 222.]

Forcible Ejection of Passenger.

Where a railroad conductor told a passenger he would not be carried, and that if he did not get off he would be thrown off, and followed the passenger onto the platform, and, standing over him, threatened to throw him off if he did not alight, there was, in law, a forcible ejection, though the conductor did not touch the passenger.

Same—Riding on Freight Train—Representations of Ticket Agent—Rules of Company.*

Where plaintiff, having a ticket to a certain point, boarded a freight train, which the ticket agent had told him would carry him, and the conductor refused to carry him, and compelled him to jump in the dark from the train while it was in motion, whereby plaintiff was injured, the company was liable, though, under the rules of the company, the train was not one that carried passengers.

Appeal from circuit court, Vermilion county; A. F. White, Judge.

Action by Robert R. Ditto against the Indiana, Decatur & Western Railway Company. From a judgment for plaintiff, defendant appeals. Transferred from the appellate court under section 1337u, Burns' Rev. St. 1901 (Acts 1901, p. 590). Affirmed.

F. F. James and R. D. Marshall, for appellant.
Conley & Conley, for appellee.

MONKS, J. This action was brought by appellee against appellant to recover damages for personal injuries alleged to have been received by appellee while riding upon a freight train on appellant's railroad. A trial resulted in a verdict in favor of appellee, and, over a motion for a new trial, judgment was rendered thereon against appellant. The assignment of errors calls in question the action of the court in overruling appellant's demurrer to the complaint, in sustaining appellee's demurrer to the second and third paragraphs of appellant's answer, and in overruling appellant's motion for a new trial.

It is insisted by appellant that the complaint is not suffi-

*See *Birmingham Ry. & Electric Co. v. Baird* (Ala.), 22 Am & Eng. R. Cas., N. S., 909, and monograph, 924 et seq.

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cient, because it is not alleged that said freight train was one which, under the rules and regulations of the company, carried passengers between the stations named on appellee's ticket. *Railroad Co. v. Bills*, 104 Ind. 13, 17, 3 N. E. 611; *White v. Railroad Co.*, 133 Ind. 480, 486, 487, 33 N. E. 273, 58 Am. & Eng. R. Cas. 479; *Railroad Co. v. Kennedy*, 77 Ind. 507, 510; *Railroad Co. v. Lightcap*, 7 Ind. App. 249, 34 N. E. 243; *Railroad Co. v. Field*, 7 Ind. App. 172, 34 N. E. 406, 52 Am. St. Rep. 444. Appellee, however, contends that it is not material whether or not he was in fact a passenger, or whether said freight train carried passengers, for the reason that the complaint charges an injury for which appellant was liable even if said train, under the rules of the company, did not carry passengers; citing *Railroad Co. v. Bills*, 118 Ind. 222, 20 N. E. 775; *Railroad Co. v. Willoeby*, 134 Ind. 563, 565, 566, 33 N. E. 627; *Railroad Co. v. Matthews*, 13 Ind. App. 355, 41 N. E. 842. The complaint is not a model of good pleading, and it is somewhat difficult to determine the theory upon which it was drawn. We think, however, after a careful examination of its allegations, that it charged an injury for which appellant was liable, although said train did not carry passengers. It appears from the complaint: That appellee had a ticket which entitled him to be carried on appellant's railroad from Hume to Dana. That he was informed by appellant's ticket agent that a certain freight train would stop at Dana, and that it carried passengers to that point when it was required to stop for other purposes, and directed him where to board said freight train. That appellee entered the caboose of said freight train, and, after the same had gone about three miles, the conductor in charge of said train refused to take his ticket, and ordered him to get off the train at once; using the most vile and insulting language, and applying to appellee the most opprobrious and insulting epithets. The conductor continued his abusive language, demanding that appellee get off the train. Appellee protested, and declared he could not get off when the train was running at that rate of speed. The conductor had the train "slowed down," but declared it would not stop, and that appellee must get off, or he would throw him off. That appellee, to avoid being assaulted and thrown from the train, went onto the steps of the caboose, and the conductor followed him out, and stood over him and ordered him to get off, or he would throw him off. That to save himself from assault and injury, appellee attempted to get off the train while it was moving, and was injured. It was so dark when appellee attempted to get off the train that he could not see. It is true that it is not alleged that the conductor touched appellee, but it is clear that appellee was compelled by the order and demonstrations of the conductor to attempt to get off the train while it was moving, when it was so dark appellee could not see,—the conductor refusing to stop the train,—and that appellee was

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injured thereby. Appellee did not attempt to get off merely because the conductor ordered him to do so, but the acts and conduct of the conductor in following him out of the caboose and standing over him while he was on the step, threatening to throw him off unless he got off while the train was moving, were equivalent, under the circumstances, to actual force. If a person not entitled to be carried as a passenger is injured by being ejected while the car is in motion or in a dangerous and improper place, where he is exposed to unnecessary peril, the railroad company is liable for such injury. 4 Elliott R. R. p. 2575. The second and third paragraphs of answer allege facts showing that said freight train did not carry passengers, except on a permit issued by the superintendent of said railroad. As the complaint charges an injury for which appellant was liable even if said train did not carry passengers, it is clear that the facts alleged in said paragraphs were not a defense to such action.

A number of causes assigned for a new trial call in question rulings of the court in the admission and exclusion of evidence. Appellant has not called our attention to the page and line of the record showing the rulings of the court in admitting and excluding such evidence. Clause 5 of rule 22 of this court (55 N. E. vi) requires that a party asserting that a ruling of the trial court is erroneous must refer to the page and line of the transcript where the same may be found. It has been uniformly held that this court will not search the record for errors, and unless such rule is complied with they will not be considered. *Board v. Gibson* (this term) 63 N. E. 982; *Packet Co. v. Pikey*, 142 Ind. 304, 317, 40 N. E. 527; *Harlan v. State*, 134 Ind. 339, 342, 33 N. E. 1102; *Railroad Co. v. Donnegan*, 111 Ind. 179, 190, 12 N. E. 153; *Brunner v. Brennan*, 49 Ind. 98, 101; *State v. Winstandley*, 151 Ind. 495, 501, 502, 51 N. E. 1054, and authorities cited.

It is insisted that the verdict is contrary to law, and not sustained by sufficient evidence. These causes for a new trial, as well as the other causes assigned, depend for their determination on the evidence; and will not be considered, on account of a failure of appellant to comply with that part of rule 3 which requires that "the name of each witness and whether the examination is direct, cross or re-direct, shall be stated on the margin of each page and shall prepare an index referring to the initial page of the direct, cross and re-examination of each witness, * * * such index to form the first page of the transcript," and that part of clause 5 of rule 22 which provides that "if the insufficiency of the evidence to sustain the verdict, in fact or in law, is assigned, the statement shall contain a condensed recital of the evidence in narrative form so as to present the substance clearly and concisely." 55 N. E. vi.

Judgment affirmed.

ARMSTRONG v. WILMINGTON & W. R. Co.*(Supreme Court of North Carolina, March 11, 1902.)*

[40 S. E. Rep. 856.]

Railroads—Starting Fire—Negligence—Evidence—Sufficiency.*

Evidence that a fire started some distance from a railroad right of way, and not on land adjacent thereto, and that a passing engine, claimed to have caused the same, threw out a spark or cinder which ignited some rotten shingles just off the right of way, about two miles away from where the fire in question started, does not establish negligence, or show that the fire was caused by the engine in question.

Appeal from superior court, Pender county; Moore, Judge.

Action by D. H. Armstrong against the Wilmington & Weldon Railroad Company. From a judgment in favor of plaintiff, both parties appeal. Reversed.

J. T. Bland, for plaintiff.

Junius Davis and H. L. Stevens, for defendant.

COOK, J. This action was brought to recover damages to plaintiff's land alleged to have been caused by defendant company on the 14th day of February, 1898, which, "in running one of its trains, negligently and carelessly threw out and scattered from its steam engine coal cinders and burning substances along its right of way and on the lands adjacent thereto, * * * and ignited and set fire to the straw, grass, and other combustible material along said right of way and adjacent lands; * * * and, by carelessly and negligently throwing out and scattering the fire as aforesaid, caused the same to spread and burn over a large area of plaintiff's land." The jury returned a verdict in favor of plaintiff for damages done by the fire which occurred on the 14th only, while plaintiff claimed damages for fires which sprung up on each of the two succeeding days in addition to that done on the first day, —the 14th,—and moved for a new trial on the ground of errors assigned to the charge of the court as to the damages caused by fire on those two days, which motion was overruled, and plaintiff excepted and appealed. Upon the close of plaintiff's evidence, the defendant moved, under the statute,

*As to sufficiency of evidence of origin of fire, see *Cox v. Vermont Cent. R. Co.* (Mass.), 9 Am. & Eng. R. Cas., N. S., 591; *Brown v. Benson* (Ga.), 5 Am. & Eng. R. Cas., N. S., 316; *Finkelston v. Chicago, etc., R. Co.* (Wis.), 6 Am. & Eng. R. Cas., N. S., 193; *Osborne v. Chicago, etc., Ry. Co.* (Mich.), 8 Am. & Eng. R. Cas., N. S., 297; *Bowen v. Boston & A. R. Co.* (Mass.), 23 Am. & Eng. R. Cas., N. S., 267; *Peck v. New York Cent. & H. R. R. Co.* (N. Y.), 22 Am. & Eng. R. Cas., N. S., 808; *Southern Ry. Co. v. Williams* (Ga.), 22 Am. & Eng. R. Cas., N. S., 415; *Minneapolis Sash & Door Co. v. Great Northern Ry. Co.* (Minn.), 21 Am. & Eng. R. Cas., N. S., 750; *Alabama G. S. R. Co. v. Johnston* (Ala.), 20 Am. & Eng. R. Cas., N. S., 909; *McGinn v. Platt* (Mass.), 19 Am. & Eng. R. Cas., N. S., 245; *McCullen v. Chicago & N. W. Ry. Co.* (C. C. A.), 18 Am. & Eng. R. Cas., N. S., 500; *Southern Ry. Co. v. Myers* (Ga.), 16 Am. & Eng. R. Cas., N. S., 672; *McTavish v. Great Northern Ry. Co.* (N. Dak.), 14 Am. & Eng. R. Cas., N. S., 59; *Galveston, H. & S. A. Ry. Co. v. Hertzog* (Tex.), 12 Am. & Eng. R. Cas., N. S., 846; *Patteson v. C. & O. R. Co.* (Va.), 6 Am. & Eng. R. Cas., N. S., 389.

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to nonsuit plaintiff upon the ground that there was not sufficient evidence of negligence on the part of the defendant to go to the jury, which motion was overruled, and defendant excepted. Defendant then offered its evidence, and at the close thereof renewed its motion, which was again overruled, and defendant again excepted, and assigned the same as error, and appealed.

The question first requiring our consideration is, was there evidence to show negligence on the part of defendant company sufficient to be submitted to the jury? And, failing to find such, it is not necessary to consider the exceptions taken in plaintiff's appeal. And we think his honor erred in not allowing defendant's motion. There is no evidence that the fire originated upon defendant company's right of way, or that it originated on land immediately adjacent thereto. Plaintiff testified that it originated on his land, and when he reached the fire it was burning at Walker's fence, three-fourths of a mile from the railroad. His witness Black testified that when he got to the fire it was one-half mile from the railroad, and, in a direct line, about one-quarter of a mile. Witness Bowden testified that, "where he first struck it, it was one-half to three-fourths of a mile from the railroad." Plaintiff's evidence failing to connect the origin of the fire with the engine, we have searched the evidence of defendant to ascertain the exact point at which the fire originated, and find that Hearn and Hayes seem to have been among the first who discovered the fire from the smoke, who went immediately to it. They were at Ashton, two miles away, and testified that they saw the smoke "rise up way in the woods," and, when they reached it, it was 300 yards, as estimated by Hearn, and 150 yards, as estimated by Hayes, from the right of way. It appears from the testimony that plaintiff's land lies east from the railroad, and the wind was blowing from the northwest to the southeast, driving the fire in a southeasterly direction, and also burning back against the wind, as to which one of plaintiff's witnesses (Bowden) testified: "The wind was blowing about northwest, and it shifted about a mighty heap that day,—turned every which way." And it further appears that later in the day the fire burned back to and upon the right of way. But none of the evidence connects the origin of the fire with any sparks or cinders emitted from the engine. The fact that the engine threw out a spark or cinder at Ashton, about two miles away, which ignited some rotten shingles just off the right of way at that place, and was there throwing out "more than common," as testified to by plaintiff's witness Batson, cannot be evidence to establish negligence against the defendant, when it is shown by plaintiff's own testimony that the fire "broke out" on his land, not the defendant's right of way.

Therefore the judgment rendered against defendant must be set aside, and for the error pointed out a new trial must be had. New trial.

MEMPHIS ST. RY. CO. v. WILSON.*(Supreme Court of Tennessee, May 19, 1902.)*

[69 S. W. Rep. 265.]

Accident at Street Crossing—Contributory Negligence.

An action against a street railroad company for injuries received by plaintiff in a collision between his wagon and defendant's car at a street crossing cannot be maintained if plaintiff's own negligence proximately contributed to his injuries.

Same—Duty of Motorman—Assumption That Persons Approaching Will Use Ordinary Care.*

In an action for injuries received in a collision between a wagon and a street car at a street crossing, the court instructed that it was the duty of defendant's motorman, on approaching the crossing, to have his car under such reasonable control as to be able to avoid colliding with persons using the crossing; that it was his duty to be on the lookout, and to have seen what any ordinarily careful motorman would have seen, but that, if no one was near enough to make a collision probable, he had the right to assume that persons approaching would use ordinary care to avoid a collision; that no mistake in regard to these assumptions would be negligence; and that, if the motorman complied with the law as charged, he was not guilty of negligence, unless he was running his car at an excessive rate of speed, so that he could not stop when danger became apparent: *held* not erroneous, as placing on defendant the responsibility of an insurer.

Error to circuit court, Shelby county; L. H. Estes, Judge.

Action by Ed. Wilson against the Memphis Street Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Wright, Peters & Wright, for plaintiff in error.

Jerre Horne and Gantt & Patterson, for defendant in error.

CALDWELL, J. This is an appeal in error prosecuted by the Memphis Street Railway Company from a judgment for \$2,250 obtained against it by Ed. Wilson as damages for personal injuries received by him in a collision of one of the company's electric cars with his horse and wagon and himself at the crossing of streets on which he and the car were traveling, respectively. The controlling facts of this record are to be found in an opinion delivered by Judge McAlister on a former appearance of the case in this court, and reported in 105 Tenn. 74-85, 58 S. W. 334.

The fourth and fifth assignments of error now made assail the charge to the jury for the reason, as assigned, that it ignored the doctrine of mutual negligence, and authorized a recovery on condition of proximate negligence on the part of the defendant, without reference to the presence or absence of negligence on the part of the plaintiff. If this criticism be just, the charge is fatally erroneous. For it is well settled that no right of action accrues at common law for an injury

*As to the care required of those in charge of street cars to avoid collisions with persons, animals, or vehicles, see note appended to *Robinson v. Louisville Ry. Co.* (C. C. A.), 1 R. R. R. 838, 24 Am. & Eng. R. Cas., N. S., 838.

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resulting proximately from the mutual negligence of the injured person and another, and consequently that in a common-law action, as this is, a defendant whose negligence contributed proximately to the plaintiff's hurt is not legally responsible therefor, if the plaintiff was also guilty of proximate negligence. Proximate contributory negligence on the part of the plaintiff in such a case bars his action. *Saunders v. Railroad Co.*, 99 Tenn. 135, 41 S. W. 1031; *Barr v. Railroad Co.*, 105 Tenn. 547, 58 S. W. 849, 19 Am. & Eng. R. Cas., N. S., 261; *Railway v. Norman*, 107 Tenn.—, 67 S. W. 481, 482, and authorities cited in those cases. But the charge, when considered as an entirety, as it must be (*State v. Cagle*, 2 Humph. 416; *Clark v. Thomas*, 4 Heisk. 419; *Railroad Co. v. Humphreys*, 12 Lea, 205; *Railroad Co. v. Pugh*, 97 Tenn. 624, 37 S. W. 555, 8 Am. & Eng. R. Cas., N. S., 756; *Railroad Co. v. Wyrick*, 99 Tenn. 505, 42 S. W. 434), is not properly subject to the objection urged against it. The charge, in fact, states more than once, in substance and effect, that no recovery can be had against the defendant unless it shall be found to have made some omission of duty, and thereby been guilty of negligence that proximately contributed to the collision, and, further, that such negligence on its part will not render it liable for the injury resulting to the plaintiff, if he shall be found to have been also guilty of proximate contributory negligence, because such negligence on his part bars his action.

The sixth assignment of error makes the objection that the trial judge, in another part of his charge, imposed upon the company the burden of an insurer against all injuries resulting from collisions at street crossings. This criticism, like that just considered, is fatal, if justified by the record; for no company can legally be held to so high a responsibility as that indicated in this assignment. However, in this instance, as in that, the court's instruction on the point in question, considered as a whole, will not admit of the construction placed on it by the company. The first sentence of this particular instruction, and that upon which the assignment is based, is in this language: "It was the duty of the motorman, Sturdevant, on approaching the crossing, * * * to have his car under such reasonable control as to be able to stop it, and avoid colliding with any one who was using the crossing." This sentence is immediately followed by a farther direction that is substantially the same as that given on the former trial, with the qualification suggested by this court on the former appeal in error (105 Tenn. 80, 81, 58 S. W. 334), namely: "It was also the duty of the motorman to be on the lookout ahead as he approached the Macon road, and to have seen what any ordinarily careful, prudent motorman would have seen of vehicles and persons using the Macon road, and about to use the crossing in a way that would make the danger of a collision probable. If no one was in range of his

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vision, or if no one was near enough to and approaching the track to make the danger of a collision probable, he had the right to proceed on his way across the Macon road, and to assume that, if any one was approaching the crossing, that they would have their vehicle under proper control, and would exercise ordinary care to avoid a collision; and no mistake that Sturdevant made in regard to these two rightful assumptions, as to how Wilson or any one else would act in approaching the railway crossing, could be charged as negligence; so that if he complied with the requirements of law, as just charged, he was not guilty of negligence, unless you find from the evidence that the motorman was running his car at an unreasonable rate of speed, in view of the nearness to the Macon road crossing, and that by reason of the speed at which he was running he put it beyond his power to control his car and stop when the danger of a collision became apparent." And the instruction in relation to the motorman's control of his car concludes with these words: "It was the duty of the motorman to have his car under such reasonable control as he approached the crossing at the Macon road as to be able to stop, if necessary, and to allow persons who were exercising ordinary and reasonable care, and were driving at a reasonable rate of speed, and had reached the crossing before he did, to pass over in safety." Thus it is seen that the charge falls far short of placing on the company the unwarranted and extreme measure of responsibility that would attach to one occupying the position of an insurer. On the contrary, it comes within the rule heretofore announced in this case, in *Rapid Transit Co. v. Seigrist*, 96 Tenn. 119, 33 S. W. 920, and in *Saunders v. Railroad Co.*, 99 Tenn. 130, 41 S. W. 1031.

Of the other assignments of error, it is sufficient to say that all of them have undergone critical examination by the court, and that none of them have been found to present any ground for reversal.

Let the judgment be affirmed.

COTTER v. LYNN & B. R. R.

(*Supreme Judicial Court of Massachusetts, Essex, Nov. 26, 1901.*)

[61 N. E. Rep. 818.]

Street Railroads—Negligence—Injury to Children—Child Non Sui Juris—Imputed Negligence—Evidence.*

Where, in an action for the injury of a child of three years and ten

*See generally, note appended to *Dan v. Citizens' St. R. Co.* (Tenn.), 10 Am. & Eng. R. Cas., N. S., 880 et seq.; *Thomas v. Chicago, M. & St. P. Ry. Co.* (Iowa), 21 Am. & Eng. R. Cas., N. S., 586; *Daubert v. Delaware, L. & W. R. Co.* (Pa.), 21 Am. & Eng. R. Cas., N. S., 456; *Garner v. Trumbull* (C. C. A.), 15 Am. & Eng. R. Cas., N. S., 589; *Gunn v. Ohio River R. Co.* (W. Va.), 6 Am. & Eng. R. Cas., N. S., 275; *Cunningham v. Los Angeles Ry. Co.* (Cal.), 7 Am. & Eng. R. Cas., N. S., 783.

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months by being run over by one of defendant's street cars while trying to run across the street in front of the car, it appeared that the child's parents lived on a street in which defendant's line lay, and that about an hour before the accident the child's mother saw her in the yard of the house unattended, and that the yard had a gate which was always open, the evidence showed negligence on the part of the parent, precluding recovery.

Exceptions from superior court, Essex county; Elisha B. Maynard, Judge.

Action by one Cotter against the Lynn & Boston Railroad. There was judgment in favor of defendant, and plaintiff brings exceptions. Exceptions overruled.

Wm. A. Kelley, for plaintiff.

H. F. Hurlburt and D. E. Hall, for defendant.

HOLMES, C. J. This is an action for personal injuries caused by an electric car. The plaintiff was three years and ten months old at the time of the accident, and was trying to run across the street directly in front of the car when she was run down. There is no evidence that she used the care that would be expected of an adult, and therefore if there was negligence on the part of her parents in allowing her to be where she was she cannot recover. *Collins v. Railroad Co.*, 142 Mass. 301, 313, 7 N. E. 856, 56 Am. Rep. 675; *Butler v. Railroad Co.*, 177 Mass. 191, 193, 58 N. E. 592. With regard to the latter question, while, as was said in the case last cited, the limited powers of the poor must be taken into account as a general fact in drawing the line at which the defendant's responsibility shall begin, still, the other side must be considered also before a third person is made responsible for an accident, and this responsibility does not follow of necessity from the fact that the parents did the best they could. There is a certain minimum of precaution against the dangers into which infants will wander, which must be taken if another is to be made to pay.

The plaintiff's parents lived in a tenement on a busy street in Lynn, where, as the plaintiff's father testified, there was considerable teaming and a line of electric cars. There were other busy streets hard by. The plaintiff had been left in charge of her mother who had been up from a confinement only about a week and was not very strong. The mother allowed the plaintiff to go downstairs and play in the yard of the house, with a boy of five. At about half-past eight she looked out of the window, sent the boy on an errand, and saw the plaintiff, thus left unattended, for the last time before the accident, which seems to have happened between half-past nine and ten. The size of the yard does not appear, but it had a gate which was always open, and the plaintiff had strayed out and was trying to return when she ran into the car. It is obvious on these facts that the happening or not happening of such an accident as was likely to happen to a child of three, alone in a busy street, was left by the mother wholly to chance

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and the instincts of the child. Exactly what view she commanded from her window does not appear. If we assume that she could have kept her eye on the movements of her child as long as she was in the yard, she did not do so. What she could see beyond we do not know.

Of course when the case gets near the line which divides those instances in which it can be ruled as matter of law that the parent was negligent from those in which it can be ruled that due care was shown, it is left to the jury. But in the cases most like this in which a jury has been called in, the precautions taken were greater, or the danger was less obvious and not so great, and the time shorter during which the child was left to itself. *Creed v. Kendall*, 156 Mass. 291, 31 N. E. 6, and cases cited; *Powers v. Railway Co.*, 163 Mass. 5, 39 N. E. 345; *Hewitt v. Railway Co.*, 167 Mass. 483, 46 N. E. 107; *McNeil v. Ice Co.*, 173 Mass. 570, 54 N. E. 257; *Butler v. Railroad Co.*, 177 Mass. 191, 58 N. E. 592; *Walsh v. Loorem (Mass.)* 61 N. E. 222. The present case seems to us to fall on the same side of the line with *Casey v. Smith*, 152 Mass. 294, 25 N. E. 734, 9 L. R. A. 259, 23 Am. St. Rep. 842; *Grant v. City of Fitchburg*, 160 Mass. 16, 35 N. E. 84, 39 Am. St. Rep. 449; and *Hayes v. Norcross*, 162 Mass. 546, 39 N. E. 282. As we have intimated there can be no pretense that the plaintiff herself was using the care of a prudent adult. *Grant v. City of Fitchburg*; *Hayes v. Norcross*, *ubi supra*.

Exceptions overruled.

MEXICAN NAT. R. CO. v. SLATER *et al.*

(*Circuit Court of Appeals, Fifth Circuit, April 22, 1902.*)

[115 Fed. Rep. 593.]

Wrongful Death—Right of Action under Mexican Laws—Enforcement in United States.

The statutes of Mexico giving a civil right of action to recover damages for wrongful death through negligence, although it bases such right of action on the fact that defendant's negligent acts or omissions constitute crimes, do not for that reason belong to the class of criminal laws which can be enforced only in the courts of the country where the offense was committed.

Same—Jurisdiction.

The laws of Mexico giving a right of action to recover damages for a wrongful death occurring in that country are not contrary to the public policy of Texas, nor to natural justice or good morals, nor is their enforcement in that state calculated to injure the state or its citizens, and an action to enforce the right so given may be maintained therein in a state or federal court having jurisdiction of the parties, in which the established forms of procedure are such that substantial justice can be done between the parties.

Evidence—Proof of Law of Foreign Country—Expert Testimony.

In an action based on a statute of a foreign country, which must be proved, while the statute itself must ordinarily be proved by a duly authenticated copy, the introduction of such copy does not render inadmissible parol testimony of persons learned in the law of such country to prove the construction placed on the statute by its courts or the

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unwritten law of the country affecting the right of recovery, to aid the court in correctly construing and applying the statute; and such testimony is peculiarly appropriate and should be received where the statute is written in a foreign language, and the copy introduced is a translation.

Wrongful Death—Right of Action under Mexican Laws—Enforcement in United States.

Under Rev. St. Tex. 1895, art. 3027, in an action for wrongful death "the jury may give such damages as they may think proportioned to the injury resulting from such death, and the amount so recovered shall be divided among the persons entitled to the benefit of the action * * * in such shares as the jury shall find by their verdict." As construed by the courts of the state, while such damages are limited to compensation for pecuniary loss, they are not confined to such sum as can be exactly proved, but may include a further element of damages where the person killed stood in the relation of husband, wife, or parent to the beneficiaries; also to be fixed by the jury in the exercise of "their own knowledge, experience, and sense of justice," and the right to such damages is not affected by the remarriage of the surviving wife or husband. The statute also requires that the rights of all entitled to damages shall be determined and settled in one action. Under the laws of Mexico the liability of the defendant in such case is limited to the furnishing of a continuing support to the legal dependents of the deceased during the periods of time that such support would have been due from him, and in the amounts that it would have been due, proportioned to his ability to give it and the necessities of those entitled to receive it, which questions are required to be determined by the judge. The recovery in such case is in the nature of alimony or pension awarded by the court to each beneficiary, payable in monthly installments, which cease in the case of a widow or daughters on their marriage, and in the case of sons on their attaining majority: *held*, that the right of recovery given by such laws, at least in a case where the wife and daughters of the deceased are beneficiaries, is so dissimilar to that given by the laws of Texas, and so incapable of enforcement through any procedure provided for trials at law by the statutes of Texas or by the common law, with due regard to the rights of the defendant, that a circuit court of the United States in that state should decline jurisdiction of an action at law for its enforcement.

In Error to the Circuit Court of the United States for the Western District of Texas.

This was an action by the defendants in error, Lena M. Slater, and William F. Slater, Jesse R. Slater, Annie E. Slater, and Henry G. Slater, minors, surviving wife and children of William H. Slater, deceased, against the Mexican National Railroad Company (the plaintiff in error), to recover damages for the death of the deceased. The petition is in the usual form until it reaches the ninth paragraph, and then it is in the words and figures following:

"(9) Plaintiffs further allege that by the laws of Mexico which now exist and existed and were in force at the time and place of the happening of the killing of William H. Slater through the defendant's negligence as aforesaid, they, the plaintiffs, have had the right of action against the defendant for their damages, and they say that the following were, and are now, the laws of Mexico applicable to this case, out of which the said right of action grew, and by virtue of which the same now exists in the said republic of Mexico, to wit:

"From the Federal Constitution of the Mexican United States:

"Art. 72. Congress has power: * * * (22) To enact laws governing the general lines of communication, and governing postoffices and mails.'

"Art. 97. The federal court has jurisdiction: (1) Of all questions growing out of the execution and application of the federal laws, except when the application of the law only affects interests of individuals, in which case the local judges and tribunals of the state shall entertain jurisdiction.'

"From the Penal Code of Mexico:

"Art. 4. A crime is a voluntary infraction of a penal law, doing that which it prohibits, or neglecting to do that which it commands.

"Art. 5. A misdemeanor is the infraction of police regulations or proclamations and good government.

"Art. 6. There are intentional crimes, and crimes resulting from neglect.'

"Art. 11. Negligent crimes exist: (1) Where an act is done, or a duty omitted, which, although lawful in itself, is not so by reason of its consequences, if the accused fails to provide against the consequences, through negligence, want of reflection or care, by not making proper investigations, by not taking necessary precautions or through unskillfulness in any art or science, the knowledge of which is necessary in order that the act done may not result in injury. Unskillfulness is not punishable when he who does the act does not profess the art or science necessary to be known, and acts when impelled by the gravity and urgency of the case. * * *

(3) Where the question relates to an act which is punishable solely by reason of the circumstances under which it is done, or by reason of a circumstance personal to the party aggrieved; if the accused is ignorant of such circumstance, through not having previously made the investigation which the duty of his profession or the importance of his case demands.'

"Pen. Code, bk. 2. 'Civil Liability in Criminal Matters':

"Art. 301. The civil liability arising from an act or omission contrary to a penal law consists in the obligation imposed on the party liable, to make (1) restitution, (2) reparation, (3) indemnization, and (4) payment of judicial expenses.'

"Art. 304. Reparation comprehends: Payment of all damages caused to the injured party, his family or a third person for the violation of a right which is formal, existing and not simply possible, if such damages are actual, and arise directly and immediately from the act or omission complained of, or there be a certainty that such act or omission must necessarily cause, a proximate and inevitable consequence.

"Art. 305. Indemnization imports: The payment of damages, that is, of that which the injured party fails to enjoy as

a direct and immediate consequence of an act of omission by which a formal, existing and not merely possible right is attacked, and for the value of the fruits of the thing usurped and already consumed, in the cases in which the same should be done conformably with civil right.

“‘Art. 306. The condition required by the two preceding articles, that the damages and injuries should be actual, shall not prevent that the indemnization of subsequent damages and injuries be exacted by a new suit, when they shall have accrued; if they proceed directly from, and a necessary consequence of, the same act or omission from which resulted the previous damages or injuries.

“‘Art. 307. The payment of judicial expenses solely embraces those absolutely necessary, which the injured party incurs for the purpose of investigating the act or omission which causes the criminal proceeding and to avail himself of his rights in such proceeding or in the civil suit.

“‘Art. 308. The civil responsibility cannot be declared except at the instance of the party entitled to recover.

“‘Art. 309. The judges who adjudicate upon the civil responsibility shall be controlled by the provisions of this title, so far as its provisions extend; on other questions, they shall follow, according to the nature of the suit, the provisions of the civil or of the commercial laws which may be in effect at the time of the happening of the act or omission causing the civil responsibility.

“‘Art. 310. The right to civil responsibility forms a part of the estate of a decedent and descends to his heirs and successors, provided it be not the case of the following article, or that it arise from injury or defamation, and that, the offending person having been able in the life-time to bring his suit, he neither did so nor directed his heirs to sue; in such case the offense shall be understood as remitted.

“‘Art. 311. The action to enforce civil responsibility demanding support of a person guilty of homicide is personal, and belongs exclusively to the persons named at the end of article 318 as directly damaged. Consequently such action forms no part of the estate of the deceased, nor is it extinguished, although the latter pardon the offense in life.’

“‘Art. 318. The civil responsibility that grows out of a homicide done without right (or justification) comprehends the payment of the indispensable expenses of the burial of the body, the expenses and necessary charges made for the cure of the deceased, the damages that the homicide causes to the property of the deceased, and of the support not only of the widow, descendants and ascendants of the deceased, who were being supported by him, he being under legal obligations to do so, but also to the posthumous descendants that he may leave.

“‘Art. 319. The obligation to furnish support shall last during all the time that the deceased might have lived if the

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homicide had not killed him, and that time shall be calculated by the judges according to the table at the end of this chapter, but taking into consideration the state of the health of the deceased before the homicide was committed. As limitation of this rule the obligation shall cease: (1) At whatever time it shall not be absolutely necessary for the subsistence of those entitled to receive it. (2) When those beneficiaries get married. (3) When the minor children become of age. (4) In any other case in which, according to law, the deceased, if alive, would not be required to continue the support.

“‘Art. 320. In order to fix the amount which should be given as the measure of support, the ability of the party responsible for the killing shall be taken into consideration and the necessities and circumstances of the persons entitled to receive it.’

“‘Art. 325. * * * Table of mortality and expectancy of life:

A 10.....	Corresponded.....	40.80
“ 15.....	“	37.40
“ 20.....	“	34.26
“ 25.....	“	31.34
“ 30.....	“	28.52
“ 35.....	“	25.72
“ 40.....	“	22.89
“ 45.....	“	20.05
“ 50.....	“	17.23
“ 55.....	“	14.51
“ 60.....	“	11.05
“ 65.....	“	09.63
“ 70.....	“	07.58
“ 75.....	“	05.87
“ 80.....	“	04.60
“ 85.....	“	02.00’

“‘Federal Civil Code, chap. iv:

“‘Art. 205. The obligation to give support is reciprocal; he that gives support has at the same time the right to ask it.

“‘Art. 206. Married people in addition to the general obligation imposed by matrimony, have that of giving support in cases of divorce and others designated by law.

“‘Art. 207. Fathers are obliged to support their children. If it should be impossible for parents to do so, or should they be unable to do so, the obligation falls upon other ascendants by both lines of ascendancy who are nearest of kin.

“‘Art. 208. The children are obliged to give support to their parents. If it is impossible for the children to do so, or they are unable to do so, then those descendants next in kin are obliged to do so.’

“‘Art. 211. The support comprehends eating, dress, habitation and assistance in case of sickness.

“‘Art. 212. In regard to minor's support it comprehends in addition to the necessary expenses for the primary education of the party entitled to support, and to furnish him some calling, art or profession, honest and adequate to his sex and personal circumstances.’

“‘Art. 214. The support should be proportioned according to the abilities of those who have to give it, and the necessities of those who have to receive it.’

“‘Art. 220. The assurance of the support may consist in a mortgage, bond or deposit of sufficient amount to cover the support.’

“‘Art. 225. The right to receive cannot be renounced nor is it an object of transfer or assignment.’

“Pen. Code, bk. 2:

“‘Art. 313. The judges who take cognizance of suit based upon civil responsibility shall endeavor that the amount and terms of payment be fixed by agreement of the parties. Failing in this, the provisions of the following article shall be observed. * * *

“‘Art. 321. In cases of blows or wounds, from which the injured party does not remain crippled, lamed or deformed, he shall have the right that the responsible party pay all his expenses of cure, the damage he may have suffered, and that which he may fail to gain during the time which, in the opinion of competent persons, he may not be able to do the work by which he subsists. But it is essential that the inability to work should be the direct result of the wounds or blows, or be a cause which is the immediate effect of such blows or wounds.

“‘Art. 322. If the inability of the injured party to devote himself to his accustomed work be permanent, from the moment in which he shall recover, and can properly devote himself to other and different work, which may be lucrative and appropriate to his education, habits, social position and physical constitution, the civil responsibility shall be reduced to paying him the sum which his ability to earn in his new employment falls short of his daily earnings in his former occupation.

“‘Art. 323. If the blows or wounds cause the loss of any member, not indispensable for work, or the person wounded or struck remain otherwise crippled, lame or deformed, by that circumstance he shall have the right not only to the damages and injuries, but also to the sum which the judge may determine as extraordinary indemnity, considering the social position and sex of the person and part of the body remaining crippled, lamed or deformed.

“‘Art. 324. The gain which the injured party fails to earn during his inability to work shall be computed by multiplying the sum which he formerly earned per day by the number of days of his disability.

“‘Art. 325. The provisions of the foregoing articles for computing the civil responsibility for wounds or blows shall be applied to all other cases where, in the violation of a penal law, a person may cause the illness of another, or may have placed him under a disability to work.

“‘Art. 326. No person shall be charged upon a civil lia-

bility upon an act or omission contrary to a penal law unless it be proven; that the party sought to be charged usurped the property of another; that without right he caused, by himself or by means of another, damages or injuries to the plaintiff; or that, the party sought to be charged being able to avoid the damages, they were caused by a person under his authority.

“‘Art. 327. Whenever any of the conditions of the preceding articles are established, the defendant shall be civilly liable, without regard to whether he be absolved or condemned to criminal liability.’

“‘Art. 330. In order that masters may be held civilly liable through their clerks and servants, according to the provisions of articles 326 and 327, it is an indispensable condition that the act or omission of the clerks or servants causing the liability shall occur in the service for which they were employed.

“‘Art. 331. Under the conditions of the preceding article, those liable are * * * railroad companies.’

“‘Art. 363. Limitations: The various actions by which civil responsibility may be demanded, or the execution of a final judgment declaring that such responsibility has been incurred by the accused may be asked shall be extinguished according to the terms and in the manner provided by the Civil Code of the Commercial Code, according to the nature of the demand and the subject-matter treated of.

“‘Art. 364. Amnesty shall not extinguish the civil responsibility, nor the actions to exact it, nor the legal rights which third persons may have acquired. Nevertheless, when the responsibility may not yet have been made effective, and the demand is not for restitution, but for reparation of damages, for indemnity for injuries, or for the payment of judicial expenses, the guilty person shall remain free from such obligations only when it is so declared in the amnesty and they are expressly left to the charge of the public treasury.

“‘Art. 365. A pardon shall in no case extinguish civil responsibility nor the actions to enforce it, nor the legal rights which third persons may have acquired.

“‘Art. 366. Limitation is interrupted by criminal proceeding until final judgment is pronounced. This done the term of limitation commences to run anew.’

“Transitory Law, Pen. Code:

“‘Art. 26. Until it is determined in the new Code of Procedure what judges shall have jurisdiction and the mode of proceeding, in suits to enforce civil liability, the following rules shall be observed: * * * (5) Actions to enforce the civil liability may be brought before the court of civil jurisdiction, whether or not the criminal proceeding has been commenced; but while the latter is pending the proceeding in the former shall be stayed.’

“From the Federal Civil Code:

“‘Art. 9. Against the observance of the law, disuse, custom or practice to the contrary cannot be alleged.’

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“‘Art. 20. When a judicial controversy can be decided neither by the text nor the natural meaning or spirit of the law, it must be decided according to the general principles of right, taking into consideration all the circumstances of the case.

“‘Art. 21. In cases of conflict of rights and the absence of express law for the special case, the controversy shall be decided in favor of him who seeks to avoid damages, and not in favor of him who seeks to obtain profit. If the conflict should be between equal rights, or rights of the same specie, it shall be decided by observing the greatest equality possible between the parties.’

“‘Art. 1095. Limitation bars in three years: * * * (8) Civil responsibility for injuries, whether done by word or by writing, and that which arises from damage caused by persons or animals, and which the law imposes upon the representatives of such persons or the owners of the animals.’

“‘Acts of congress of December 15, 1881:

“‘Art. 1. The executive shall regulate the service of railroads, telegraphs and telephones constructed, or which may in the future be constructed, upon Mexican territory, according to the following basis: (1) Railroads, telegraphs and telephones which in the federal district and territory of Lower California unite together two municipalities, or federal district and territory of Lower California with one or more states; those which communicate two or more states with each other; those which touch any point in the territorial boundary line of the republic and foreign countries, or run parallel therewith within a region of twenty leagues, are known as general lines of communication within the meaning of section 22 of article 72 of the constitution. (2) These general lines of communication and their branches shall be subject exclusively to the federal legislature, executive and judicial powers, in their respective spheres, in all cases where any of the following matters are involved: * * * (g) Construction and repair of the works. Crimes committed against the security or integrity of the works or against the operation of the lines. (h) Security of the same works for which the companies, through delays or obstructions, carelessness or fault in the service or for accidents or mishaps in the operation.’

“‘From the regulations for the construction, maintenance, and operation of railroads:

“‘Art. 52. The coaches and cars which enter into the make-up of a train shall have the draw-heads of the same height, so that their centers will be opposite to each other.

“‘Art. 53. No car of whatever kind shall form a part of the make-up of a train, unless the same shall have been previously inspected very carefully.’

“‘Art. 99. The company shall be responsible for the moving of all trains on its road.’

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“‘Art. 184. Companies (railroad) are liable for all faults and accidents which occur through tardiness, negligence, imprudence or want of capacity of their employees.’”

“‘Art. 208. ‘All violations of this law which companies (railroad) commit shall be subject to punishment by the administration of a fine up to five hundred dollars, which the department of public works shall assess, reserving always the right of individuals through indemnity and the liabilities which the companies may incur through criminal acts or omissions committed by them.’”

“Plaintiffs further allege that by reason of the general statutes of the state of Texas and by virtue of general principles of right and justice and of the laws of Mexico hereinbefore mentioned, they had, and now have, a right of action for their damages against defendant in the republic of Mexico, and the same now exists in said country as well as in the state of Texas and in the United States of America. And they say that the acts of negligence upon the part of the defendant, its agent, servant, and employees, were wrongful and actionable, as has been hereinbefore shown by the plaintiffs, in the republic of Mexico at the time of the killing complained of, and are now so; and they say that the same were then and are now wrongful and actionable in the United States of America and in the state of Texas. And plaintiffs say that by reason of the negligent killing of the said William H. Slater they have suffered damages in the sum of thirty thousand dollars (\$30,000.00). Wherefore, premises considered, plaintiffs pray that defendant be cited to answer this petition, and that they have judgment for their said damages, and that said damages be apportioned among the plaintiffs as they may be found to share therein, and that they have judgment for all costs of suit, and for general and special relief.”

The petition was filed on November 17, 1900. On December 4, 1900, the defendant (the plaintiff in error) answered by demurrer in substance as follows: That the petition shows no cause of action: (1) Because it appears that the wrong which resulted in the death of William H. Slater occurred in the republic of Mexico. (2) The laws of Mexico are not similar or analogous to the laws of Texas (designating the points of dissimilarity). (3) It appears that the plaintiffs' right to recover damages in Mexico, if any, depends wholly upon the infraction of a penal statute of the republic of Mexico, which has no extraterritorial effect, and the court has no jurisdiction to determine such matters, or to adjudge damages based upon a penal statute of a foreign government. (4) It does not appear that all the parties authorized under the Mexican law to maintain an action for the recovery of damages are parties to this action. The action is therefore not authorized by the Texas statute, and, if entertained, will subject the defendant to a multiplicity of suits, contrary to the well-established policy of Texas. (5) The laws of Mexico as

pleaded are so unlike and dissimilar to the laws of Texas that this court should not undertake to administer the same under the doctrine of national or interstate comity. These demurrers were all overruled. On March 18, 1901, the defendant, by leave of the court, amended its answer, by which it excepted further, and submitted that it affirmatively appears from the plaintiffs' petition that the right of survivors to recover damages for personal injuries resulting in death is alimony or pension, payable in installments, and is therefore so dissimilar from the laws of Texas and the common law that this court cannot administer or enforce said laws and rights. And not waiving its plea to the jurisdiction, but specially urging the same, as well as its general and special exceptions, the defendant pleaded: (1) that the right secured under the laws of Mexico to certain representatives of deceased persons to recover damages, to wit, of surviving husbands, wives, mothers, fathers, and children, is the right of alimony or pension, to be paid monthly and by installments, which right ceases whenever the necessity for alimony or support no longer exists, such as a change of fortune, marriage of the surviving wife and daughters, and when the boys arrive at the age of 21 years; which right and cause of action secured under the laws of Mexico is contrary to the public policy of Texas, as the laws of Texas have provided no remedy for the enforcement of such a right, and the courts, neither in law nor in equity, have power or authority to create a remedy for such enforcement; that the laws of Mexico, as pleaded by the plaintiffs, when construed in connection with other provisions of the Mexican laws securing the right of recovery in surviving wives, mothers, fathers, husbands, and children for personal injuries resulting in death, to wit, articles 211, 212, 213, 214, 217, 221, and 224 of the Civil Code of the federal district, and with articles 1376 and 1377 of the Code of Civil Procedure; the laws of Mexico that govern, secure a right of alimony or in the nature of a pension, and therefore secure a right of recovery unknown to the laws of Texas, and for the enforcement of which no law of Texas or of the United States has been provided, and the court has no jurisdiction to grant the relief prayed. To this amended answer the plaintiffs filed their first supplemental petition, and demurred to the matters pleaded in the defendant's answer, because the same constitute no defense to the cause of action, and especially because the laws referred to relating to alimony and pension, namely, the articles of the Civil Code mentioned, are provisions of the laws of Mexico regulating matters growing out of the marriage relation, and involving the duties and obligations of parties to the marriage contract and of parents and children; and such provisions do not show a material or substantive difference, or any difference, between the laws of Texas and of the United States and Mexico as to the nature of the right of action claimed by the plaintiffs to exist under the laws of Mexico;

nor do such provisions show or tend to show that the laws of Mexico on the subject of damages for injuries resulting in death are contrary to the public policy of Texas or of the United States. And, further, because the provisions of the laws referred to, namely, articles 1376 and 1377, Code of Procedure, relate to a proceeding for the purpose of obtaining a decree for temporary alimony, and in no sense can they be the foundation for a defense to the action. In aid of which exceptions the plaintiffs filed with their replication as Exhibits A and B, and made a part thereof, the following, namely: A translation of chapter IV of Book I, title V, of the Civil Code of Mexico, which treats of alimony (*de los alimentos*), which chapter includes the articles mentioned in the amended answer; also a translation of certain articles of chapter II of book III, tit. I, of Mexico Code of Procedure, relating to temporary alimony, including the articles mentioned in the amended answer.

"Exhibit A.

"Chapter IV, of Book I, Title V—Concerning Alimony.

"Art. 205. The obligation to furnish alimony is reciprocal, the one who furnishes alimony has in his turn the right to demand it.

"Art. 206. Parties to the marriage contract, in addition to the general obligation which the marriage imposes, are bound for alimony in cases of divorce and in other cases provided by law.

"Art. 207. Parents are bound to give alimony to their children. If there be no parents, or they be not able to give alimony, the obligation falls on the other relations on both sides in the nearest ascending grade.

"Art. 208. Children are bound to give alimony to their parents. If there be no children, or if they are not able to give alimony, the nearest relations in the descending grade are bound.

"Art. 209. If there be no relations in the ascending or descending grade, or if they are not able to give alimony, the obligation falls on the brothers and sisters of both parents; on those of the mother alone, if there be none of the father, and on those of the father if there be none of the mother.

"Art. 210. Brothers and sisters are bound to give alimony to their younger brothers and sisters only until they are 18 years of age.

"Art. 211. Alimony comprehends food, clothing, dwelling place and attendance in sickness.

"Art. 212. Respecting minors, alimony includes in addition, the expenses necessary for the primary education of the dependent, and to prepare him for some occupation, art or profession, honest and suitable to his sex and personal circumstances.

"Art. 213. The one bound to supply alimony fulfills his obligation by assigning a pension sufficient to support the dependent, or by taking him into his family.

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"Art. 214. Alimony should be in proportion to the estate of the one bound, and to the necessities of the one who receives it.

"Art. 215. If the obligation to receive alimony falls upon several, and all are able to give, the judge shall apportion the amount among them according to their means.

"Art. 216. If only some of these are able, the amount of alimony shall be apportioned among them; and if one only shall have the means he alone shall comply with the obligation.

"Art. 217. The obligation of supplying alimony does not include that of endowing the children, nor that of providing them with capital to prosecute the business, art or profession for which they may have been fitted.

"Art. 218. The right to demand that alimony be made secure exists in favor of: I. The person entitled to alimony. II. The relative in ascending grade who may have him (the person entitled thereto) under his parental control. III. The guardian. IV. The brothers and sisters. V. The public department.

"Art. 219. If the person who demands security of alimony in the name of the minor, cannot and does not wish to represent him in court, the judge shall appoint a temporary guardian.

"Art. 220. The security may consist of a mortgage, bond or deposit of an amount sufficient to cover the alimony.

"Art. 221. The temporary guardian shall give security for the annual value of the alimony. If he should control any fund designated for that purpose he must give legal security for it.

"Art. 222. Where the father enjoys the use of the property of the child, the value of the alimony shall be deducted from it (the income) if it is sufficient to cover it (the alimony). On the contrary, where the income is not sufficient the difference shall be (a charge) on account of the father.

"Art. 223. If the necessity of the dependent proceeds from bad conduct, the judge, having knowledge of the cause, may diminish the sum fixed as alimony, placing the one at fault, if necessary, under care of competent authority.

"Art. 224. The obligation to supply alimony ceases: I. When the one bound lacks the means of compliance. II. When the dependent is no longer in need of alimony.

"Art. 225. The right to receive alimony cannot be renounced, nor can it be subject to compromise between the parties."

"Exhibit B.

"Chapter 11, of Book 111, Title 1—Civil Procedure
—Temporary Alimony."

"Art. 1372. In order to decree temporary alimony to one who has the right to exact it, it is necessary: I. To make complete proof of the right under which it is asked. II. To

prove proximately at least, the means of the one who should give alimony. III. To make sufficient proof of the urgent necessity for temporary alimony.

"Art. 1373. The proof required under paragraph 1 of the preceding article shall be the last will, the contract or executory instrument which contains the obligation to give alimony; the contract will have to be in form of a public writing.

"Art. 1374. When alimony is asked on the ground of consanguinity, the documents should be presented which prove the interested party to be within the cases provided in articles 207 to 210 and 3324 and articles of the Civil Code relating thereto.

"Art. 1375. When husband or wife asks alimony, the act or certificate of marriage must be presented.

"Art. 1376. After compliance with the provisions of the preceding articles, the judge, if he believes the right has been established, shall designate the amount of alimony and shall adjudge it, directing it to be secured months in advance in all cases.

"Art. 1377. Immediately on adjudging temporary alimony, the first monthly payment shall be exacted of the one liable for it." The counsel for the respective parties agreed in open court as follows: "It is agreed by counsel upon both sides that the translation of the laws of Mexico, as set up in plaintiffs' petition, and which translations are herewith filed, and marked Exhibits 'A' and 'B,' for identification with the records in this case, are correct translations of the laws they purport to be translations of, taken from the respective codes in said petition mentioned. And it is further agreed that the laws described in defendant's original answer and plaintiffs' supplemental petition are the laws of Mexico, having application to this case." Thereupon the court overruled the demurrer of the defendant, and sustained the demurrers of the plaintiffs, to which ruling the defendant duly excepted. The trial proceeded, and, after the evidence, including proof of the laws of Mexico had been closed, the judge, on his own motion, charged the jury in part as follows: "The damages, then, must be measured by the pecuniary—money—injury to the respective plaintiffs. * * * In cases of this kind the damages * * * must be measured by the pecuniary standard,—that is, the money value, of the life of the deceased to the surviving wife and children; and the jury, acting upon their sound and deliberate judgment, based upon facts and circumstances in evidence, and their knowledge, experience, and sense of justice, may give such damages to the plaintiffs as they may think proportionate to the injury resulting to them from the death of the deceased. See *Railway Co. v. Lehmberg*, 75 Tex. 67, 69, 12 S. W. 838." The jury returned the following verdict: "We, the jury, find in favor of the plaintiffs, and assess their damages at seven (\$7,000) thousand dollars. Of the amount of damages so found we award to the

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plaintiff Lena M. Slater the sum of \$2,691.00, to the plaintiff William F. Slater \$453.00, to plaintiff Jesse R. Slater \$717.00, to plaintiff Annie E. Slater \$1,346.00, to plaintiff Henry G. Slater \$1,793.00;" on which it was "ordered, adjudged, and decreed by the court that the plaintiffs do have and recover of and from the defendant, the Mexican National Railroad Company, the full sum of seven thousand dollars, with interest thereon from this date at the rate of six (6) per cent. per annum. It is further ordered, adjudged, and decreed by the court that of the said sum of seven thousand dollars the plaintiff Lena M. Slater do have and recover the sum of two thousand six hundred and ninety-one dollars (\$2,691.00), the plaintiff William F. Slater the sum of four hundred and fifty-three dollars (\$453.00), the plaintiff Jesse R. Slater the sum of seven hundred and seventeen dollars (\$717.00), the plaintiff Annie E. Slater one thousand three hundred and forty-six dollars (\$1,346), and the plaintiff Henry G. Slater one thousand seven hundred and ninety-three dollars (\$1,793.00), with interest on the said sums, respectively, from this day, at the rate of six (6) per cent. per annum."

Thos. W. Dodd and Leroy G. Denman, for plaintiff in error.

C. A. Keller and E. A. Atlee, for defendants in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

McCORMICK, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The grounds of the defendant's demurrers and of its special plea are these: (1) That the death occurred in the republic of Mexico, and not within the jurisdiction of the circuit court. (2) That under the Mexican laws the parties who may prosecute the suit are different from the parties who may prosecute a like suit in the state of Texas, and that the laws of Mexico pleaded and relied upon by the plaintiffs are so far different in other particulars from the laws of Texas as to put the case outside of the jurisdiction of the circuit court. (3) That the right of the plaintiffs to recover depends solely upon the construction of a penal statute of Mexico, which has no extra-territorial effect. (4) That under the laws of Mexico the right of survivors to recover damages for personal injuries resulting in death is alimony or pension, payable in installments, and is therefore so dissimilar from the laws of Texas or the common law that this court cannot administer or enforce those laws and the plaintiffs' rights thereunder. The parties to this suit are citizens of the United States, and all of the plaintiffs are citizens of Texas, and inhabitants of the district in which the suit was brought, while the sole defendant is a corporation organized under the laws of the state of Colorado, and has constructed and operates a line of railroad to the city of Laredo, in the district and at a point where the circuit

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court is held, and where also the defendant has a duly authorized and recognized agent upon whom process may be served; and the defendant, being thus an inhabitant of the district, has duly appeared.

The statutes of Mexico creating the plaintiffs' right place the acts and omissions charged against the defendant to support their claim of right in the class of negligent crimes; but it cannot be contended that the act belongs to that class of criminal laws which can only be enforced by the courts of the country where the offense was committed, for it gives a civil action to recover damages for a civil injury. It is such an injury as would not have supported an action at common law, for it was early held, and has become settled law, that at common law the death of a human being could not be complained of as an injury in a civil court. As the right to compensation in such cases is one of recent creation, it is dependent solely upon the statute of the country where the injury is inflicted from which the death results. But when an act is done for which the law says the person shall be liable, and the action by which the remedy is to be enforced is a personal, and not a real, action, and is of that character which the law recognizes as transitory, and not local, the wrongdoer may be held liable in any court to whose jurisdiction he can be subjected by personal process or by voluntary appearance. Wherever, by either common law or the statute law of the country, a right of action has become fixed, and a legal liability incurred, that liability may be enforced and the right of action pursued in any court which has jurisdiction of such matters and can obtain jurisdiction of the parties. *Dennick v. Railroad Co.*, 103 U. S. 11, 26 L. Ed. 439, 1 Am. & Eng. R. Cas. 309. We have seen that the foreign law here involved does not belong to the class of criminal laws which can only be enforced by the courts of the foreign country. The right created by those laws is not contrary to the public policy in the state of Texas, in which state the circuit court to which this writ of error issued is held. *Rev. St. Tex.* 1895, arts. 3017, 3027. It is not contrary to abstract justice, or to pure morals, nor calculated to injure the state of Texas or the United States or their citizens. We have already shown that the circuit court has jurisdiction of all of the parties to this action.

What we have said sufficiently disposes of the first and third of the grounds of error as stated in the opening of this opinion. The first clause of the second ground becomes immaterial in view of our conclusion as to the fourth ground, which substantially includes the last clause of the second, and hence there remains for discussion only the fourth ground of error, assigned as numbered in our opening statement. On the subject of jurisdiction, therefore, it remains to inquire only whether, consistently with our own forms of procedure and law of trials, we can do substantial justice between the parties. From the nature of our system of national judicature,

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and from the nature of the case, there is no general law or statute of the United States prescribing the forms of procedure and the law of the trial in such cases in the circuit court other than the statute which requires that the forms and modes of procedure in civil causes in the circuit court shall conform as nearly as may be to the forms and modes of procedure existing at the time in like cases in the courts of record of the state within which the circuit court is held. Rev. St. § 914. As we have seen, "in cases of other than penal actions, the foreign law, if not contrary to our public policy, or to abstract justice, or pure morals, or calculated to injure the state or its citizens, shall be recognized and enforced here, if we have jurisdiction of all necessary parties, and if we can see that, consistently with our own forms of procedure and law of trials, we can do substantial justice between the parties. If the foreign law is a penal statute, or if it offends our own policy, or is repugnant to justice or to good morals, or is calculated to injure the state or its citizens, or if we have not jurisdiction of the parties who must be brought in to enable us to give a statutory remedy, or if, under our forms of procedure, an action here cannot give a substantial remedy, we are at liberty to decline jurisdiction." *Higgins v. Railroad Co.*, 155 Mass. 176, 180, 29 N. E. 534, 535, 31 Am. St. Rep. 544, 48 Am. & Eng. R. Cas. 512, quoted with approval in *Huntington v. Attrill*, 146 U. S. 657, 13 Sup. Ct. 224, 36 L. Ed. 1123. We must, therefore, look somewhat closely to the Texas law and practice thereunder preparatory to a comparison of that law with the laws of Mexico, to determine whether the circuit court, in an action at law, can give a substantial remedy and do substantial justice between the parties in this cause.

Article 3027 of the Revised Statutes of Texas of 1895 provides:

"The jury may give such damages as they may think proportioned to the injury resulting from such death, and the amount so recovered shall be divided among the persons entitled to the benefit of the action, or such of them as shall then be alive, in such shares as the jury shall find by their verdict."

The learned judge of the circuit court who presided on the trial of this case sat in the case of *Hall v. Railroad Co.*, 39 Fed. 21, and in his instruction to the jury in that case stated the Texas law thus:

"It is necessary for the plaintiff, in cases of this kind, to show a damage of a pecuniary nature. Yet such damages are not to be given merely in reference to the loss of a legal right, but may be calculated with reference to the reasonable expectation which the plaintiff had, resulting from his condition, and the disposition and ability of his son, during his life, to bestow upon him pecuniary benefit as of right, or in obedience to the dictates of filial duty without legal claim."

In *Railway Co. v. Lehmberg*, 75 Tex. 67, 68, 12 S. W. 838,

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840, which the trial judge cites in his charge in the instant case, we find the Texas law announced thus:

"While the law does not, in this character of action, intend to give compensation for anything but pecuniary loss by estimating the money value of the life of the relative; and while it necessarily results that regard must in each instance be paid to such facts and conditions as cast light upon the subject, it yet must be admitted that the inquiry is not intended to be narrowed down by the law to a result that can be exactly accounted for by the facts in evidence. Every parent and husband has for his wife and children a pecuniary value beyond the amount of his earnings by his labor or vocation. That value may to some, but not to every, extent be susceptible of allegation and proof, and to the extent that it can be alleged and proved it ought to be done. The difficulties of proof are known to the lawmaker. In some states an attempt has been made to remove them to some extent by placing limits to the amount that may be recovered. In establishing such rules the idea of making compensation in each instance for the pecuniary value of the lost life is necessarily abandoned. When no amount is fixed by law, and no rule is prescribed for making the calculation upon facts capable of exact ascertainment, it necessarily follows, we think, that the lawmaker intended that, having reference as far as practicable to conditions existing at the time of the death, juries from their own knowledge, experience, and sense of justice should fix and assess the proper sum."

In an earlier case (*Railroad Co. v. Kuehn*, 70 Tex. 582, 8 S. W. 484), it is paid at page 587, 70 Tex., page 485, 8 S. W.: "That pending the suit the widow married again does not preclude her right of action." And in *Railway Co. v. Younger*, 90 Tex. 387, 38 S. W. 1121, 8 Am. & Eng. R. Cas., N. S., 84, on certified questions duly propounded to the supreme court to obtain its rulings on the points stated, that court answered: "To the first question we answer that evidence of the marriage of plaintiff, Younger, after the death of his wife, on account of which he sought to recover damages, was properly rejected by the court." And in the argument in the opinion it is stated: "If the plaintiff's wife was killed through the negligence of the defendant, he then lost the value of her life as a wife; and the fact that her place has been supplied by a subsequent marriage does not in any manner operate to mitigate the damages for which the wrongdoer was responsible."

Looking only to the sections of the statutes put in evidence, we see that the civil liability imposed by the Mexican law obliges the wrongdoer to indemnify the injured party "for the violation of a right which is 'formal, existing, and not simply possible,' and this imports the payment of damages; that is, of that which the injured party fails to enjoy as a direct and immediate consequence of an act or omission by which a

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formal, existing, and not merely possible right is attacked." Arts. 301, 304, 305, Pen. Code, bk. 2, "Civil Liability in Criminal Matters." "The civil responsibility that grows out of a homicide done without right (or justification) comprehends * * * the support not only of the widow, descendants and ascendants of the deceased, who were being supported by him, he being under legal obligations to do so, but also the post-humous descendants that he may leave. The obligation to furnish support shall last during all the time that the deceased might have lived if the homicide had not killed him, and that time shall be calculated by the judges according to the table at the end of this chapter, but taking into consideration the state of the health of the deceased before the homicide was committed. As limitation of this rule, the obligation shall cease, (1) at whatever time it shall not be absolutely necessary for the subsistence of those entitled to receive it; (2) when those beneficiaries get married; (3) when the minor children become of age; (4) in any other case in which, according to law, the deceased, if alive, would not be required to continue the support." Articles 318, 319, Id. The articles of the statute law of Mexico put in evidence in this case appear to stand together, and, though taken from different books and different chapters of the law as passed and published, to have a direct relation to the same general subject, and to define and limit the rights which they create. Counsel for the plaintiff in error contend that the general and special demurrers and exceptions to the respective pleadings of the parties necessarily involve and require: (1) The proper construction of the laws of Mexico touching the nature of the right and damages secured to surviving widows and children; (2) the power and authority of the circuit courts of the United States to administer these laws and enforce the right secured by them to the plaintiffs; and (3), as practically preliminary to the other two, the manner of proving and construing the laws of a foreign country. The law of Mexico being that of a foreign country, of which our courts do not take judicial notice, could only be proved as a fact, and, if not proved in the trial court, cannot be taken judicial notice of by this court on this writ of error. *Huntington v. Attrill*, 146 U. S. 657, 13 Sup. Ct. 224, 36 L. Ed. 1123. The plaintiff in error contends that under the agreement of counsel the translations of the statutes as set out in the plaintiffs' petition and in Exhibits A and B, constituting, as it does, all of the testimony in relation to the laws of Mexico which was admitted by the trial judge, in no manner negatives or tends to negative the existence of other written or unwritten laws of Mexico having application to the issues in this case, and that, in future proof of the laws of Mexico as practically construed and enforced in that republic, it tendered the testimony of Emilio Velasco, a man learned in the laws of Mexico, taken by deposition, duly verified and authenticated and returned into court, which testimony was as follows:

“(1) That the said Emilio Velasco was a native citizen of Mexico. (2) That he was a lawyer in Mexico by profession, and had been since January, 1860. (3) That he was a graduate of the Law School of the City of Mexico, graduating in January, 1860. (4) That he was familiar with the laws of Mexico and the states of Nueva Leon and Tamaulipas in force now and that were in force for two years past, touching the right of the surviving wife and children to recover damages for personal injuries resulting in the death of the husband and father. (6) That the right in a surviving wife and children in a civil suit for damages, where no criminal proceedings had been had, and defendant had been absolved, it was necessary, as a precedent to a recovery, that the court trying the civil cause find that the killing or injury was a crime as defined by the Penal Code. (7) That the right was in the nature of alimony or pension to be paid in installments monthly for periods of time fixed by the court. That obligation to pay alimony to the wife and children does not imply that of giving a sum larger or smaller at once, but of giving a pension. Alimony comprises meals, dress, habitation, and assistance in case of sickness; and, as regards minors, besides the necessary expenses for the education of the party supported, and for furnishing him a trade, art, or profession, honest and suitable to sex and personal circumstances. (8) That the party obliged to give alimony complies with this obligation by assigning a competent pension, or by incorporating him into his family. (9) That the obligation to furnish alimony or support as a consequence of civil responsibility lasts all the time that the deceased ought to have lived, calculating the time according to the table of probabilities, which is a continuance of article 325 of the Penal Code, bearing in mind, however, the condition of the health of the deceased; but that this obligation would cease at any time when it is not absolutely necessary to the subsistence of the parties who receive it. Therefore the obligation ceases from the moment in which the condition of fortune of the parties who receive alimony vary allowing them to subsist without the necessity of the alimony. It ceases with the wife and daughter when they marry, and with sons when they become twenty-one years of age; and it ceases when circumstances are produced that, according to law, the obligation of giving would have ceased on part of deceased if he had lived. (10) That civil responsibility is based upon infraction of the Penal Code. It is the infraction of the Penal Code that gives or engenders civil responsibility. (11) In case the injured party has contributed to the deed, or fault, or negligence, or to the omissions which caused the injury, he is co-author of the offense or fault, and his representatives cannot recover. (12) That the wife and children have no right to any indemnification against a railway company on account of injuries from which resulted the death of the husband or father when the accident in which the

said injury occurred was caused by the fault or negligence or omission of the one who suffered the injury, or if he contributed in any way with his fault, negligence, or omission to the accident."

To the reading of this deposition counsel for the plaintiffs (the defendants in error) objected on the ground that the statutory law of Mexico as pleaded is best proved by the statutes themselves, and that, the statutes having been offered in evidence, the deposition of witnesses as to what is the law is inadmissible, which objection the court sustained, and the defendant duly excepted. Counsel for the plaintiff in error contend that this ruling assumes that the statutory law of Mexico is all of the law in cases of the character of the action at bar affecting the right of recovery, in that it assumes that it is incompetent to offer testimony of one learned in the laws of a foreign country as to what the law is, whether written or unwritten; and that it assumes that it is incompetent to offer testimony in the nature of expert evidence as to the proper construction of a statute of a foreign country and written in a foreign tongue. Undoubtedly, the usual and better mode of authenticating foreign written laws is by a copy proved to be a true copy. But unwritten laws must ordinarily be proved by parol evidence. Greenl. Ev. § 488. Counsel further insist that the trial court, in admitting only the copies of the certain statutes offered, and refusing the aid of parol evidence, fell into a mistake as to the laws of Mexico which determined the rights of the plaintiffs and the defendants in this case. In support of this contention they refer to the instruction of the trial judge to the jury, in which he uses this language:

"In cases of this kind the damages are measured solely by the pecuniary injury to which the respective parties are entitled, including the loss of prospective damages."

And this language he reiterated as follows:

"In cases of this kind the damages, as before stated, must be measured by the pecuniary standard,—that is, the money value of the life of the deceased to the surviving wife and children; and the jury, acting upon their sound and deliberate judgment, based upon facts and circumstances in evidence and their knowledge, experience, and sense of justice, may give such damages to the plaintiffs as they may think proportionate to the injury resulting to them from the death of the deceased."

A most eminent text writer, in a work of standard authority, has said:

"No tribunal on earth, however learned, could hope by any degree of diligence to master the laws and processes and remedies of all other nations, and the qualifications and limitations properly belonging thereto."

The same writer has said:

"In regard to the merits and rights involved in actions, the law of the place where they originated is to govern. But the forms of remedies and the order of judicial proceedings are

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to be according to the law of the place where the action is instituted, without any regard to the domicile of the parties, the origin of the right, or the country of the act." And, again: "There are many questions, however, which may arise as to what are and what are not matters properly belonging to the remedy, and what are and what are not matters properly belonging to the merits. Many cases of this sort may be found collected and discussed by foreign jurists upon the peculiarities of their own jurisprudence. But they could not be made intelligible to a lawyer under the common law without occupying a space in explanations wholly disproportionate to their importance in a treatise like the present." Story, *Conf. Laws*, §§ 557, 558, 563.

The statutes of Mexico were conceived and are expressed in the Spanish language, which is the vernacular tongue in Mexico. They are addressed to those having full knowledge of the Spanish idiom. They are addressed also to persons instructed in or charged with a knowledge of the unwritten laws, customs, and usages of that people; and, like the cases referred to by Mr. Story which could not be made intelligible to a lawyer under the common law, without laborious explanations, these statutes, thus conceived and addressed, while they must be construed by whatever court is charged with the duty of executing them, may be more rightly and safely construed with the aid of the testimony of competent witnesses instructed in these laws, customs, and usages, the idiom of the language, and the unreported decisions of their enlightened domestic courts, which, we are informed, do not accompany their decisions by the announcement of judicial opinions, if they are not, as is probably the case, forbidden by law to do so. The deposition of the witness having been offered to prove as a fact the law of the foreign country, was addressed to the judge to aid him in his rulings during the progress of the trial, and in giving his instruction to the jury; and, if he erroneously refused to receive and consider it, it is still such proof of the foreign law offered in the trial court that it can be taken judicial notice of by this court on writ of error. Without the aid of this testimony, we would find it difficult to construe the limitations expressed in the latter part of article 319, above quoted, and especially the second one of those limitations; and while we probably would, from the nature of the case, and from a careful consideration of the statutes pleaded and proved, have reached the conclusion that limitation 2 must relate to female beneficiaries, whether minors or not, and that limitation 3 relates to minor children of a male sex, we should have felt the need of the further proof which is offered to be supplied by the deposition of the learned Mexican lawyer. We conclude that the learned trial judge erred in sustaining the objection to the introduction of this proof, and, for the reason already given, we will take judicial notice of it on this writ of error. Without requoteing here or attempting further

to analyze the provisions of the statute law of Mexico set out in the statement of the case and to some extent considered in the foregoing part of this opinion, it appears clear to us from a careful comparison of the different sections of the statute and a careful consideration of the deposition of the Mexican lawyer that the right created by the Mexican laws is the right to a continuing support during the periods of time that support would have been due from the deceased, and in the amount that it would have been due, proportioned to his ability to give it and the necessities of those who had the right to receive it. Any judgment that may be rendered against the defendant must as studiously respect and enforce its right as it does the rights of the plaintiffs. Limitations placed on the right of the plaintiff are for the protection and just treatment of the party bound. The provisions of the Mexican law which we are considering seem to regard and relate to not only the paramount interest of the individual parties to the transactions, liabilities, and reparations, but also to the interest of the public in having the support due to the beneficiaries so extended that it will continue through the period for which it is provided. The provisions of the Mexican statute on this subject have in view the declaring and conserving the interest of Mexican citizens; and where, as in this particular case, the beneficiaries are citizens of the United States, our laws, state and national, as administered in our courts, may be deemed adequate to authorize and secure the preservation of the rights of the beneficiaries and the protection of the interest of the public, and may yet be not adequate to the due enforcement of the limitations put upon the plaintiff's right for the just protection of the party charged. Possibly in the Texas state courts, where the distinction between law and equity does not exist, or at equity in the courts of the United States, a decree might be passed fixing the liability of the defendant, and retaining control of the parties to the suit and of the subject-matter so as to enforce that liability, with the limitations provided in the interest of the defendant. It is difficult to conceive what judgment at law the circuit court could render that would protect that interest of the defendant in the limitations put by the Mexican law on the plaintiff's right. It may be that, under our system of judicature, the jury, taking the place of the judges in the Mexican system, might, under proper instructions, on full proof, and aided, as Mexican trial judges are aided, by their own experience and knowledge of affairs, be able fairly and justly to assess in a lump sum the value of the right secured to the male beneficiaries (the case before us does not require that question to be decided now, and on it we express no opinion); but if in a case where only male beneficiaries are parties there may be no insuperable difficulty in the way of our enforcement of the right secured by the Mexican law, it is difficult to conceive how the most learned trial judge could instruct a jury so as to

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enable them, on any possible condition of proof, to fix a present sum which would give female beneficiaries their due, and give them only their due. Before the fact of their marriage shall have occurred, on what basis established by law or by human experience can the proximate date when those beneficiaries will get married be fixed by the jury, or by any other human intelligence? The Texas law provides that "an action for actual damages on account of injuries causing the death of any person may be brought by all of the parties entitled thereto, or by any one or more of them for the benefit of all." Rev. St. 1895, arts. 3017, 3022. It is clear, therefore, that the rights of all entitled to damages on account of injuries causing the death of any person must be considered and settled in one action against the wrongdoer, and that in the case where some of the beneficiaries are males and some of them females the same difficulty is presented as occurs in a case where female beneficiaries alone are interested and are parties plaintiff. The learned and distinguished counsel who appeared in this court for the defendants in error, and who submitted an oral argument and a printed brief, presents in his second proposition in his printed brief "that conditions which may arise, and under which, according to the law of Mexico, civil liabilities for damages for injuries resulting in death will cease, may constitute defensive matter, the effect of which is to bar the remedy rather than to extinguish the right of action. But no such contingencies have been pleaded. The court is not called upon to construe the law relating thereto." This proposition, in our opinion, is not sound. The limitations we have been considering relating to the female beneficiaries directly affect the plaintiffs' right, and are not merely defensive matter to be availed of by the one bound after the marriage of the female beneficiaries shall have occurred.

We therefore conclude that the right of the survivors (the plaintiffs) to recover damages for personal injuries resulting in the death of William H. Slater is alimony, or pension, payable in installments for uncertain and indeterminate periods, dependent upon conduct of beneficiaries and conditions impossible to forecast, and is therefore so dissimilar from the laws of Texas and the common law that the circuit court in an action at law cannot administer the same and enforce the rights of the plaintiffs so as to do substantial justice between the parties.

It is unnecessary to notice any of the other questions presented by the assignment of errors. The view we have taken of the case requires that the judgment of the circuit court shall be reversed, and the cause remanded, with direction to that court to sustain special exception No. 2, filed by the defendant on March 18, 1901, and to dismiss the plaintiffs' action.

WALKER *et ux.* v. WILMINGTON STEAMBOAT CO.*(Circuit Court, E. D. Pennsylvania, August 22, 1902.)*

[117 Fed. Rep. 784.]

Injury to Passenger—Means of Conveyance—Inspection.*

In an action for an injury to a passenger on a steamboat, resulting from its running into the dock through the refusal of the port reversing engine to act, evidence examined, and *held* not to so far sustain the burden cast on the carrier of explaining the accident and relieving itself of the imputation of negligence as to require the setting aside of a verdict for plaintiff and the granting of a new trial.

Rule for New Trial.

Action at law for damages brought by Andrew C. Walker and Martha, his wife, against the Wilmington Steamboat Company for injuries received by the wife while a passenger on board one of the boats of the said company. The plaintiffs were returning from an excursion on board the City of Trenton, a steamboat operated by the defendant company between Trenton and Philadelphia; and as the boat was about to make a landing at the dock in the latter place, instead of stopping as it should, it ran into the bulkhead on shore with such severity as to stove in the bow of the boat. Mrs. Walker at the time was descending the main stairway from the upper deck, and was thrown violently forward by the shock, causing, as it was claimed, severe and more or less permanent bodily injuries. It was shown on behalf of the defendant that the City of Trenton was a new boat, built and equipped by builders of the best reputation, and fully provided with all the best-known machinery and appliances, and that before being put in commission, but a short time previous, it had been thoroughly inspected and tried. When the accident occurred the boat was in charge of a skillful pilot, who gave the proper directions and signals in order to make a safe landing. The engineer testified that the boat did not stop because the port reversing engine refused to act when he gave it steam. Anxious to know what was the difficulty, he said that he examined the engine immediately afterwards, and upon taking a part the choke or cushion valve, through which the steam from the cylinder exhausted, he found a small piece of soft-rubber packing clogging the valve and preventing the exhaust. To this he attributed the refusal of the engine to respond. Upon cross-examination he further testified, however, that he found one of the jam nuts on the piston rod slack; it was not enough to notice with the eye; he detected it with his fingers, and tightened it with a slight turn of the wrench. It was not sufficient, according to his statement, to have interfered with the working of the machine. It was further shown that the rod or link was lengthened or shortened by a sleeve nut which

*See note to next case, post, 738.

Walker et ux. v. Wilmington Steamboat Co

was held in place by a jam nut above and below; if, after the rod was properly adjusted, it was lengthened or shortened, the operation of the engine would be interfered with. But it was testified by other witnesses, who were expert engineers, that one jam nut was sufficient to hold the sleeve nut in place, the second nut being merely for additional security. The jury found a verdict in favor of the husband for \$1,000, and \$3,000 for the wife, and, in response to questions submitted by the court, made answer as follows: "Q. 1. What was the cause of the accident complained of in this case? A. Failure of the port reversing cylinder to reverse the port engine. Q. 2. Was the accident due to any want of care on the part of the defendant? A. Yes. Q. 3. If you answer 'Yes' to the last question, what want of care was there? A. As a skillful and competent engineer, lack of proper attention to careful examination of the engines, appliances, and operation of the same, under his charge. Q. 4. Was the accident caused by anything which could have been foreseen and prevented by the defendant by the exercise of due care? A. Yes." Defendant moved for a new trial on the ground that the verdict was not consistent with the evidence.

J. H. Backes and Alfred E. Peterson, for the rule.
Eugene Raymond, opposed.

ARCHBALD, District Judge (after stating the facts as above). Although the defendant company was not an insurer of the safety of its passengers, the burden of explaining the accident and relieving itself from the imputation of negligence was necessarily upon it, and it was for the jury to say whether it had done so. According to the testimony of the engineer, the immediate cause of the accident was the refusal of the port reversing engine to act when he gave it steam in response to the signal from the pilot as the boat approached the dock. This, as he claimed, was due to a small piece of soft-rubber packing, which, upon examination immediately afterwards, he found lodged in the choke or cushion valve, choking the exhaust. He admitted, however, that in the course of the same examination he discovered a jam nut slack, which he said he tightened with a slight turn. The purpose of these jam nuts is to prevent the loosening of the sleeve nut which regulates the length of the links or rods. If the links are too long or too short, the engine will not work; and it was the theory of the plaintiffs' counsel that that was the cause of the accident, and not what the engineer attributed it to. It was testified by the engineer that jam nuts may be loosened from vibration, and have to be examined from time to time. But there are two of them,—one above and one below the sleeve nut; and it was contended on the part of the defendant that, as testified by some of the witnesses, the loosening of a single one would have no possible effect. On the other hand, if

I understood it aright, there was a physical demonstration to the contrary in the presence of the jury, with a link or rod produced from a similar engine. The jury, in answer to a special question put them by the court as to what want of care there was, if there was any, substantially found that there was a lack of proper attention on the part of the engineer to carefully examine the appliances and operation of the engines under his charge. This necessarily negated the theory that a piece of packing got caught in the choke valve, because admittedly that was not a matter that could have been discovered by any outward inspection, however complete. The jury plainly did not believe the testimony of the engineer to that effect, and it must be confessed that there was considerable to discredit it. The only question, then, is whether the cause of the accident as given by the jury was consistent with the evidence, and warrants the verdict which they have rendered. It is said that there were several practical engineers in that body, and one member who was in the rubber-packing business, and that they were therefore peculiarly fitted to dispose of the case. But be that as it may, I am not prepared to disturb the result. It was not for the plaintiffs to furnish a theory that would account for the accident, but for the defendant to show that it came from something which could not reasonably have been prevented. Even if there was nothing to contradict the evidence produced by the company to show that it had performed its duty, it would still have been for the jury to say whether they were satisfied with it; and there can be no just cause for complaint if they have rejected some of the facts testified to, and given a significance to others which fails to exonerate the company, provided only that it is consistent and warranted. While it is true that the engineer said the jam nut was not loose, but only slack, and was tightened with a slight turn, it may be fairly questioned whether, in the effort to clear himself from blame, he did not very much minimize the matter. These nuts, as he said, needed to be examined once or twice a day; and, if so, there would also seem to be a much greater importance in keeping them tight than the defendant's witnesses are inclined to concede. And if to this we add the demonstration in the presence of the jury, to which I have referred,—that a single jam nut will not keep the sleeve nut in place,—and the undoubted effect on the working of the engine from the lengthening or shortening of a link, we have not a little to sustain the conclusion reached by the jury that the loose jam nut was the source of the accident, and not a piece of loose packing in the choke valve, in which they did not believe.

The rule for a new trial is discharged.

LA FOND v. DETROIT CITIZENS' ST. RY. CO.*(Supreme Court of Michigan, Nov. 11, 1902.)*

[92 N. W. Rep. 99.]

Carriers—Injury to Passenger—Acts of Trespassers—Inspection of Means of Conveyance.*

Plaintiff, a passenger on defendant's street car, while passing around the car after alighting, was injured by catching her foot in a rope attached to the rear of the car by a trespasser. The rope had been on the car for some minutes, while the car was traveling about a mile and a half, but, on account of the darkness, was not discovered: *held*, that the company was not guilty of negligence in failing by inspection to ascertain the presence of and remove the rope.

Error to circuit court, Wayne county; William L. Carpenter, Judge.

Action by Marie La Fond against the Detroit Citizens' Street Railway Company. From a judgment in favor of defendant, plaintiff brings error. Affirmed.

Ira A. Lieghley and William W. Ferguson, for appellant.
Brennan, Donnelly & Van De Mark, for appellee.

MONTGOMERY, J. The facts appearing on the trial are summarized by the circuit judge as follows: Plaintiff, a passenger on defendant's street car, alighted from that car at the intersection of Congress street and Jos. Campau avenue, and, as she passed around the car after alighting, her foot caught in a rope that was dragging, and she was seriously injured. The testimony abundantly proves that some boy who was in the habit of hitching sleds or cans or something of the sort—at least, that is the natural and necessary inference from this testimony—had left that rope attached there. Now, the question is whether there is any evidence of negligence on the part of the street car company. The question is whether there is any evidence from which it can be inferred that they were negligent in not discovering the rope and removing it. Bear in mind to what part of this car the rope was attached. It was not attached above, but below, the projection, which is practically level with the platform. Bear in mind that it was after dark; between 6:20 and 6:30 on the evening of January 12th; some time after dark. Of course, the only way a rope of this sort could be discovered would be by close examination. None of the men on the back of that car saw the rope until some one was struck by it, except the one who passed around it when he alighted. I think you would be justified in inferring from the testimony of Reid, who got on at the corner of Woodward avenue and Congress street, that the rope was on from Woodward avenue, from a mile and a quarter to a mile and a half; that it took $7\frac{1}{2}$ minutes to go from Woodward avenue to this place; and, if it was on there, perhaps it was on some time longer. Now, the other suggestion is that,

*See note at end of case, especially section II, B, 2.

Notes

inasmuch as it has been shown to be a custom on the part of the boys on Congress and Baker streets, and upon the other streets upon which this car line is operated, to hitch on, that precaution ought to have been taken. The testimony shows, from all the witnesses except two, that, as soon as the conductors discovered boys were hitching on, they stopped them. There is no custom, in other words, that permitted this to be done. It is true, two witnesses testified that they had seen boys hitching there without the conductor stopping them, while half a dozen or more witnesses testified that the conductor always stopped them. The only inference I can draw from the testimony, then, is that it was the custom not to permit them. The circuit judge was of the opinion that no actionable negligence was shown, and directed a verdict for defendant. In this opinion we concur. The rope was no part of the equipment of the car, and was placed there by a trespasser. The only fault which the plaintiff's counsel attributes to the defendant is the failure to discover the fact of the trespass and remove the rope. As pertinently suggested by the trial judge, if it was incumbent upon the defendant's employees to make an inspection every few blocks, or as often as every 7½ minutes, it is difficult to see why such inspection should not have been continuous. The testimony does not show that the conductor in charge of the car in question had any reason to expect that such a rope had been left dangling in the rear of this car. True, there was testimony that on one occasion a rope had been found attached to another car of defendant company, and was cut off, but the conductor of this car is not shown to have had any knowledge of it. And it was a circumstance so unusual that it cannot be held that its occurrence entailed upon the company the duty of providing for a special and continuous inspection to prevent a repetition of such a trespass. A similar question was considered in *McCaffrey v. Railroad Co.*, 47 Hun, 404, which was ruled against the plaintiff. See, also, *Fredericks v. Railroad*, 157 Pa. 103, 27 Atl. 689, 22 L. R. A. 306; *Jakoboski v. Railroad Co.*, 106 Mich. 440, 64 N. W. 461.

The judgment is affirmed. The other justices concurred.

NOTES.

CARRIERS OF PASSENGERS—DUTIES AS TO THE MEANS OF CONVEYANCE.

- I. Scope of Note.
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I. SCOPE OF NOTE.

The duty of carriers of passengers by rail to provide a safe roadbed and track is discussed in the note to *Whipple v. Michigan, etc., R. Co.*, 2 R. R. R. 774, 25 Am. & Eng. R. Cas., N. S., 774, while the duty of carriers to provide safe vehicles or vessels for the transportation of passengers is discussed in a note to *Herbert v. St. Paul, etc., R. Co.*, 3 R. R. R. 152, 26 Am. & Eng. R. Cas., N. S., 152. The object of this note is to supplement these notes, and to complete the discussion of the duties of passenger carriers as to their means of conveyance.

II. INSPECTION AND REPAIR.

A. GENERAL RULE.

The duty of a carrier to exercise care to provide safe and suitable means of conveyance is, of course, a continuing obligation, and necessarily includes the duty of exercising care to discover defects therein by reasonable and proper inspection, and to make the necessary repairs.

Arkansas.—*St. Louis, etc., R. Co. v. Mitchell*, 57 Ark. 418, 21 S. W. 883.

Illinois.—*Chicago, etc., R. Co. v. Lewis*, 145 Ill. 67, 33 N. E. 960, 58 Am. & Eng. R. Cas. 126.

Indiana.—*Louisville, etc., R. Co. v. Snider*, 117 Ind. 435, 20 N. E. 284, 37 Am. & Eng. R. Cas. 137, 10 Am. R. St. Rep. 60, 3 L. R. A. 434.

Michigan.—*Keating v. Detroit, etc., R. Co.*, 104 Mich. 418, 62 N. W. 575.

Minnesota.—*Goodsell v. Taylor*, 41 Minn. 207, 42 N. W. 873, 16 Am. St. Rep. 700, 4 L. R. A. 673.

Texas.—*Houston, etc., R. Co. v. Summers* (Tex. Civ. App. 1899), 49 S. W. 1106, affirmed in 92 Tex. 621, 51 S. W. 324.

Virginia.—*Farish v. Reigle*, 11 Gratt. (Va.) 697, 62 Am. Dec. 666.

Washington.—*Cogswell v. West Street, etc., R. Co.*, 5 Wash. 46, 31 Pac. 411, 52 Am. & Eng. R. Cas. 500.

B. SUFFICIENCY OF THE INSPECTION.

1. In General.

In the statement of this duty, the authorities show a great want of harmony, and it is not yet possible to formulate any rule which will even substantially express the result of the authorities. There is as great a variance in the statement of the carrier's duty of inspection as has been shown to exist (see note to *West Chicago, etc., R. Co. v. Tuerk*, 1 R. R. R. 1, 24 Am. & Eng. R. Cas., N. S., 1) in the statements of the degree of care imposed upon passenger carriers. In line with the view that these carriers are bound to exercise the "highest," "greatest," or "most exact" care, it has been said, in effect, that the carrier is responsible for the consequences of accidents which happen because of defects which are discoverable upon the most careful and thorough examination. *Ingalls v. Bills*, 9 Met. (Mass.) 1, 43 Am. Dec. 346. On the other hand some of the statements of the duty of inspection, are in line with the cases which reject the expressions quoted on the ground that they require a higher degree of care than is imposed by law. Thus it has been said that, in the performance of the duty of inspection, the carrier is chargeable with any omission of the "highest practicable care of capable and faithful railroad men in the circumstances." *Furnish v. Missouri, etc., R. Co.*, 102 Mo. 438, 13 S. W. 1044, 22 Am. St. Rep. 781. Again, it has been said that it is the duty of the carrier to make as frequent and careful examinations and inspections as can be done consistently with the practical operation of the business. *Libby v. Maine, etc., R. Co.*, 85 Me. 34, 26 Atl. 943, 58 Am. & Eng. R. Cas. 81, 20 L. R. A. 812. Basing a statement of the carrier's duty upon the statement of the rule of care which is approved in an earlier note (see note to *West Chicago, etc., R. Co. v. Tuerk*, 1 R. R. R. 1, 24 Am. & Eng. R. Cas., N. S., 1), it might be said that a carrier of passengers is bound to make as frequent and careful inspection of the means of conveyance as can be done consistently with the practical operation of

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the business, taking into consideration the mode of conveyance employed.

Some of the courts have attempted to state the duty of inspection with reference to the tests and precautions which are to be employed. Thus, it has been said that, while it is not the duty of the carrier to adopt every test known to, or such speculative and theoretical precautions as might be thought necessary by, experts, it is the carrier's duty to apply all tests recognized as necessary by experts. *Robinson v. New York, etc., R. Co.*, 20 Blatchf. (U. S.) 338, 9 Fed. 877. There should, it has been said, be a reasonable and careful inspection, according to the best known tests reasonably practicable. *Treadwell v. Whittier*, 80 Cal. 574, 22 Pac. 266, 13 Am. St. Rep. 175, 5 L. R. A. 498. In the inspection of the means of conveyance, any certain or satisfactory test, which is known, and is within reach of the carrier, should be applied. *Texas, etc., R. Co. v. Hamilton*, 66 Tex. 92, 17 S. W. 406, 26 Am. & Eng. R. Cas. 182. It has even been declared, in effect, that, while the carrier is not bound to adopt unknown and untested precautions, he must employ such means as science has furnished or disclosed, although not generally used. *Caldwell v. New Jersey Steamboat Co.*, 47 N. Y. 282.

2. Inspection by Employees in Charge of Train or Car.

It cannot be said that a carrier of passengers by rail, who causes its cars to be inspected at certain places on its line by persons who are employed for that express purpose, thereby uses all the care which the law imposes on it for the safety of passengers, and wholly relieves those engaged in operating the trains from the duty of examining them in any respect between regular inspection stations. *Texas, etc., R. Co. v. Suggs*, 62 Tex. 323, 21 Am. & Eng. R. Cas. 475. But, while the employees in charge of the operation of a train may properly be required to have an eye to their surroundings as they go about their business, the observation which these employees may reasonably be relied on to make, being incidental to the performance of other duties, is necessarily cursory and more or less casual. They cannot be expected to keep up a careful inspection continuously, or to know at each moment the condition of every part of a train or car. *Proud v. Philadelphia, etc., R. Co.*, 64 N. J. L. 702, 46 Atl. 710, 18 Am. & Eng. R. Cas., N. S., 633, 50 L. R. A. 468. See also, the principal case. A conductor, who is told by an ordinary passenger that he has heard an unusual loud noise, and felt a jolt which has made the coach jump and aroused him, and who, after reasonable inspection, inside and outside of the car, does not become conscious of a cause of alarm and danger, is not bound to stop the train for an inspection. *Irelson v. Southern, etc., Ry. Co.*, 42 La. Ann. 673, 7 So. 800. But where the driver of a street car knew that the rear door of the car was out of order, in consequence of the efforts of a drunken man to open it, a passenger who was injured by the falling upon him of glass from the door was permitted to recover damages, on the ground that the driver was guilty of negligence in not examining the door when he learned of its disabled condition. *Allen v. Dry-Dock, etc., R. Co.*, 2 N. Y. Supp. 738.

3. Inspection of Road after Extraordinary Floods or Storms.

While a carrier is not liable for the act of God or the public enemy (see section I of note to *West Chicago, etc., R. Co. v. Tuerk*, 1 R. R. R. 1, 24 Am. & Eng. R. Cas., N. S., 1), they are nevertheless under the obligation of exercising care to avoid the consequences of these occurrences. This obligation may sometimes be discharged by a railroad company, which knows, or has reason to believe, that its roadbed and track has been made unsafe by one of these causes, as tempests or floods, by running its trains with a care proportionate to the known or apprehended danger. See section IV of note appended to *Frohriep v. Lake Shore, etc., R. Co.*, 4 R. R. R. 532, 27 Am. & Eng. R. Cas., N. S., 532. Thus, it has been said, in effect, that when the roadbed and track is weakened by a sudden and unprecedented flood or similar cause, and there is no time or opportunity for inspecting and ascertaining their condition, the carrier is not responsible for an injury resulting from

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the track giving way beneath a train run with proper care and skill. But if there is time and opportunity for inspecting and discovering the unsafe condition of the roadbed and track, and the care and prudence which the law exacts of carriers requires the inspection, then the duty rests upon the carrier of making the inspection, and effecting the necessary repairs or warning approaching trains, if the inspection reveals the unsafe condition of the track. *Louisville, etc., R. Co. v. Thompson*, 107 Ind. 442, 8 N. E. 18, 9 N. E. 357, 27 Am. & Eng. R. Cas. 88, 57 Am. Rep. 120. Under circumstances of more than ordinary peril, as in case of violent storms, the carrier should inspect its lines with more than ordinary promptitude, particularly those portions which are the most liable to injury by storm or flood. The greater the danger, the greater the vigilance demanded. *Libby v. Maine, etc., R. Co.*, 85 Me. 34, 26 Atl. 943, 58 Am. & Eng. R. Cas. 81, 20 L. R. A. 812. And there may be circumstances, such, for example, as the carrier knowing that there has been a great rise in a stream at a point where it is spanned by a bridge of doubtful strength, which may charge the carrier with negligence in running a train over the point of probable danger, without first making an examination. *Cobb v. St. Louis, etc., R. Co.*, 149 Mo. 609, 50 S. W. 894, 13 Am. & Eng. R. Cas., N. S., 632.

4. Sufficiency of Inspection a Question of Fact.

The question of the sufficiency of the inspection, both as to manner and frequency, is nearly always to be decided by the jury, under proper instructions as to the degree of care required. In an action by a passenger against a street railway company to recover damages for injuries received in an accident resulting from the fracture of a brake chain, it was held that, in view of expert testimony to the effect that a flaw in a wrought iron chain would be apparent at the surface, it was for the jury to decide whether looking the whole chain over, and testing its strength by winding it up several times, without examining each link, was a sufficient inspection. *Wynn v. Central Park, etc., R. Co.*, 133 N. Y. 575, 30 N. E. 721, reversing 14 N. Y. Supp. 172. In an action to recover for injuries sustained by a passenger in consequence of the breaking of the spindle of the drawbar on one of the cars, it was proved that the spindle, when on the car, was not accessible to observation or inspection, and the defendant gave evidence tending to prove that, for the purpose of its examination, it was necessary to put the car into the shop, and take out the drawbar, which it was not customary to do very frequently, and that the spindles and drawheads of this car were renewed two years before the accident. The evidence warranted the conclusion that the broken appliance which was the cause of the injury complained of, was defective, and that, if it did not become so by its use upon the car, it was so when put on it. It was held that the jury was properly allowed to decide whether the carrier had applied the proper tests, when the bar was put in, to ascertain whether it was in all respects fit for the purpose it was intended to serve, and whether the defendant had failed to perform its duty in not taking the bar out of the car, and by proper means inspecting it, with a view to ascertain whether it was or remained in suitable condition for use. *Palmer v. Delaware, etc., Canal Co.*, 120 N. Y. 170, 24 N. E. 302, 44 Am. & Eng. R. Cas. 298, 30 N. Y. S. R. 817, 17 Am. St. Rep. 629, affirming 46 Hun (N. Y.) 486, 11 N. Y. S. R. 872. In an action to recover for injuries received in an accident claimed to have been caused by defective insulation of defendant's electric street car, it was held that, in view of the evidence, it was for the jury to decide whether defendant was chargeable with negligence in failing to make frequent application of the magnometer or voltameter test. *Leonard v. Brooklyn Heights R. Co.*, 67 N. Y. Supp. 985. In an action for damages by a passenger, it appeared that the accident in which he received his injuries resulted from the breaking of a car wheel, in which there was a flaw or crack. The wheel had been inspected a short time before the accident, but the only test which the inspectors made was to look over the wheel very carefully. It was not separated from contact with the track, and tested with a hammer. A judgment for plaintiff was sus-

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tained. *Texas, etc., R. Co. v. Hamilton*, 66 Tex. 92, 17 S. W. 406, 26 Am. & Eng. R. Cas. 182. But in a case in which it appeared that, half an hour before the time when the train on which plaintiff was a passenger arrived at the point where it was derailed, that section of the road had been inspected and found in good condition, and, so far as could be seen, was still in good condition at the time when the wrecked train ran upon it, a judgment for plaintiff was reversed. *International, etc., R. Co. v. Halloren*, 53 Tex. 46, 3 Am. & Eng. R. Cas. 343, 37 Am. Rep. 744.

III. LIABILITY FOR LATENT DEFECTS.

In line with the assumption in a few early cases that the common-law liability of carriers of passengers is the same as that of carriers of goods (see section II of note appended to *West Chicago, etc., R. Co. v. Tuerk*, 1 R. R. R. 1, 24 Am. & Eng. R. Cas., N. S., 1), it has sometimes been contended that a carrier of passengers is bound at his peril to supply a vehicle in fact reasonably sufficient for the purpose, and is responsible for the consequences of his failure to do so, though occasioned by latent defects. This proposition, holding the carrier responsible for the consequences of latent defects in the vehicle used to carry passengers, finds some slight support in several early English cases (*Bremner v. Williams*, 1 C. & P. 414; *Israel v. Clark*, 4 Esp. 259), especially in *Sharp v. Grey*, 9 Bing. 457, 2 M. & Scott 621, 23 E. C. L. 331. In the United States it seems to have been fully accepted in the case of *Alden v. New York, etc., R. Co.*, 26 N. Y. 102, 82 Am. Dec. 401, since overruled. *McPadden v. New York, etc., R. Co.*, 44 N. Y. 478, 4 Am. Rep. 705. Perhaps the best argument in favor of this view is that made by Blackburn, J., in delivering a dissenting opinion in the leading case of *Redhead v. Midland R. Co.*, L. R., 22 Q. B. 412, 36 L. J. Q. B. 181, affirmed in L. R., 4 Q. B. 379, 38 L. J. Q. B. 169, 5 Eng. Rul. Cas. 436, when the case was before the court of queen's bench. The learned judge did not contend that the carrier of passengers is, like the carrier of goods, an insurer, but that his duty to provide reasonably safe vehicles is an absolute obligation, which arises from an implied warranty. He said: "I quite agree that the carrier of passengers is not, like the carrier of goods, an insurer, who undertakes to carry safely, at all events, unless prevented by excepted perils. The carrier has not the control of the human beings whom he carries to the same extent as he has the control of goods, and therefore it would be unjust to impose on him the same responsibility for their safe conveyance. In order, therefore, to render the carrier of passengers liable for an accident, it is necessary to allege and prove that the accident arose from some neglect of duty on the carrier's part; but, if the obligation on the carrier to provide a vehicle reasonably fit for the journey is absolute, a failure on his part to fulfil that obligation is quite enough to make him liable for all the consequences. And I own I see nothing to diminish the obligation to provide a reasonably safe vehicle in the fact that it is to be provided for the safety of life and limb, and not merely of property. The carrier supplies and selects the carriage for the purpose of conveying the passenger, who is obliged to trust entirely to the carrier; the passenger having no means of examining the carriage, and no voice in the selection of it. Now, it has been decided that one who contracts to supply articles for a particular purpose, does impliedly warrant that the articles he supplies are fit for that purpose. *Brown v. Edington*, 2 M. & G. 279, 293, 10 L. J. C. P. 66. The principle of that case, as I understand it, is that expressed by Maule, J., who says that the defendant having accepted an order for a rope for a particular purpose, which rope he was to select and procure, did undertake to furnish one fit for that purpose; and was therefore liable as on a breach of his contract if he furnished one unfit for that purpose, though that unfitness arose from a latent defect; and this principle would seem to apply to the carrier of passengers who supplies a vehicle. On the same principle, I think, it is that a shipowner warrants to the person who ships goods, that his vessel is seaworthy." * * * "I am cer-

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tainly not aware of any case in which the question has arisen, whether there is a similar warranty between a shipowner and a passenger; but it seems to me that every reason that can be urged in favor of the warranty applies as much to the one case as to the other. The passenger trusts to the shipowner to select a proper ship as much as the shipper of goods does." * * * "Indeed, in the very probable case of a person shipping merchandise by the same vessel in which he himself takes his passage, it would seem rather extraordinary if the law were to hold that, as far as the goods were concerned, there was an implied undertaking to furnish a seaworthy ship, but as regarded the personal safety of the passenger there was none." After an argument to the effect that such a warranty, if it is implied where the carriage is to be by water, must also be implied when the carriage is by land, the opinion closes with a review, among others, of the cases cited above. But the theory of the existence of an implied warranty, on the part of a passenger carrier, of the soundness of the vehicle employed in the transportation of passengers, was rejected when the case came before the court of exchequer chamber. Mr. Justice Smith, who wrote the opinion of the court, after declaring that it is extremely doubtful whether such warranty can be predicated to exist in the contract of a common carrier of goods, said: "But, however that may be, it is difficult to see upon what principle the contract of the carrier of goods, which on the hypothesis does not apply in its entirety to carriers of passengers, is to be dissected and a particular part of it severed and attached to what, on the hypothesis, is another and different contract. It was contended that the reason which made it the policy of the law to impose the wider obligation on the carriers of goods applied with equal force to impose the limited warranty of the soundness of the carriage in favor of the passenger. The reason suggested was, as we understood it, that a passenger when placed in a carriage was as helpless as a bale of goods, and therefore entitled to have for his personal safety a warranty that the carriage was sound, but this is not the reason or anything like the reason given by Lord Holt for the liability of the carrier of goods. The argument founded on this reason, however, would obviously carry the liability of the carrier far beyond the limited warranty of the roadworthiness of the carriage in which the passenger happened to travel. His safety is no doubt dependent on the soundness of the carriage in which he travels, but in the case of a passenger on a railway it is no less dependent on the roadworthiness of the other carriages in the same train and of the engine drawing them, on the soundness of the rails, of the points, of the signals, of the masonry, in fact of all the different parts of the system employed and used in his transport, and he is equally helpless as regards them all. If then there is force in the above reason, why stop short at the carriage in which the passenger happens to travel? It surely has equal force as to all these things, and, if so, it must follow as a consequence of the argument that there is a warranty that all these things should be and remain absolutely sound and free from defects." As a result of these views, the judgment of the court of queen's bench was sustained, and it was finally settled that a carrier of passengers is not liable for the consequences of latent defects in his vehicle which are not discoverable by the exercise of the high degree of care exacted of passenger carriers. A similar result had been reached in the earlier American case of *Ingalls v. Bills*, 9 Metc. (Mass.) 1, 43 Am. Dec. 346, wherein Hubbard, J., who delivered the opinion of the court, after controverting the theory of an implied warranty as to the safety of a carrier's vehicle in a very convincing manner, comes to the conclusion that when an accident arises from a hidden and internal defect, which a careful and thorough examination would not disclose, and which could not be guarded against by the exercise of a sound judgment and the most vigilant oversight, then the carrier is not liable for the injury, but the misfortune must be borne by the sufferer, as one of that class of injuries for which the law can afford no redress in the form of a pecuniary recompense. These cases have been consistently followed in the late

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English and American cases, so that the law is now well settled that carriers of passengers are not responsible for latent defects in either the vehicle or any of the component parts of the means of conveyance.

United States.—*Carter v. Kansas City, etc., R. Co.*, 42 Fed. 37; *Anthony v. Louisville, etc., R. Co.*, 27 Fed. 724; *The Nederland*, 14 Fed. 63, affirming 7 Fed. 926.

Alabama.—*Western Ry. of Alabama v. Walker*, 113 Ala. 267, 22 So. 182.

Louisiana.—*Irelson v. Southern, etc., R. Co.*, 42 La. Ann. 673, 7 So. 800, 44 Am. & Eng. R. Cas. 319.

Maryland.—*Baltimore City, etc., R. Co. v. Nugent*, 86 Md. 349, 38 Atl. 779, 39 L. R. A. 161.

New York.—See *Carroll v. Staten Island R. Co.*, 58 N. Y. 126, affirming 65 Barb. (N. Y.) 32, 17 Am. Rep. 221.

Pennsylvania.—*Meier v. Pennsylvania R. Co.*, 64 Pa. St. 225, 3 Am. Rep. 581.

Texas.—*Texas, etc., R. Co. v. Hardin*, 62 Tex. 367, 21 Am. & Eng. R. Cas. 460; *Houston, etc., R. Co. v. Greer*, 22 Tex. Civ. App. 5, 53 S. W. 58; *Houston, etc., R. Co. v. Richards*, 20 Tex. Civ. App. 203, 49 S. W. 687; *Gulf, etc., R. Co. v. Smith*, 10 Tex. Civ. App. 338, 30 S. W. 361.

Vermont.—*Hadley v. Cross*, 34 Vt. 586, 80 Am. Dec. 699.

But most of the authorities fail to define the term latent defect or otherwise state the rule governing the carrier's exemption from liability. It is, however, apparent that the latent defects for which the carrier is not responsible, are such defects as are not discoverable by the exercise of the high degree of care imposed upon the carrier by law. *Texas, etc., R. Co. v. Buckalew* (Tex. Civ. App. 1896), 34 S. W. 165. It may, therefore be said that the carrier is not responsible for defects in the means of conveyance which are not discoverable by the exercise of the highest degree of care and diligence consistent with the practical operation of the business, taking into consideration the mode of conveyance employed. See section VI, D, 11, of the note appended to *West Chicago, etc., R. Co. v. Tuerk*, 1 R. R. R. 1, 24 Am. & Eng. R. Cas., N. S., 1. Other statements of the rule are as follows: A latent defect which will relieve the carrier from responsibility is such only as no reasonable degree of human skill and foresight could guard against. *Palmer v. Delaware, etc., Canal Co.*, 120 N. Y. 170, 24 N. E. 302, 44 Am. & Eng. R. Cas. 298, 17 Am. St. Rep. 629, affirming 46 Hun (N. Y.) 486. The carrier is not responsible for the consequences of an accident caused by a latent defect which no reasonable degree of human skill and foresight could guard against. See *Curtis v. Rochester, etc., R. Co.*, 18 N. Y. 534, 75 Am. Dec. 258. A carrier of passengers, while bound to use the utmost care consistent with the nature and extent of its business, is not responsible for hidden defects, which could not have been discovered by the most careful inspection. *Buckland v. New York, etc., R. Co.* (Mass. 1902), 62 N. E. 955. It has been held that a jury is properly instructed that an elevator carrier of passengers is not liable for the consequences of an accident caused by a defect or flaw in the elevator apparatus which could not be discovered on a reasonable and careful examination, according to the best known tests reasonably practicable. *Treadwell v. Whittier*, 80 Cal. 574, 22 Pac. 266, 13 Am. St. Rep. 175, 5 L. R. A. 498. Of course the mere fact that the defect is not open to observation is not alone sufficient to relieve the carrier from liability. *Miller v. Ocean Steamship Co.*, 118 N. Y. 200, 23 N. E. 462.

IV. LIABILITY FOR NEGLIGENCE OF MANUFACTURER OR BUILDER.

Naturally the duty of a carrier of passengers is not discharged by placing the manufacture or construction of the means of conveyance in the hands of, or purchasing the materials, machinery and appliances from, competent and reliable persons; the carrier must himself make a careful inspection of every part of the mechanical instrumentalities employed in the transportation of persons, and apply proper tests to

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discover the existence of defects therein, and will be responsible for the consequences of accidents caused by defects which he could have discovered by the exercise of the high degree of care which the law imposes upon him. *Louisville, etc., R. Co. v. Snider*, 117 Ind. 435, 20 N. E. 284, 37 Am. & Eng. R. Cas. 137, 10 Am. St. Rep. 60, 3 L. R. A. 434. This, however, merely amounts to holding the carrier liable for the consequences of his own negligent discharge of the duty of inspection. There arises the further question as to whether the carrier is responsible for defects in the means of conveyance which could not have been discovered by him after the vehicle, road, or appliance came into his possession, but could have been discovered by the application of proper tests during the course of the manufacture or construction. Upon this question there is some slight conflict of opinion. According to one view the carrier who purchases the conveying instrumentalities from, or procures their construction by, competent and reliable persons, is not liable for defects therein which he cannot discover by a proper inspection, although they might have been discovered by the manufacturer or builder, by the exercise of due care during the course of the manufacture or construction. Some of the cases which are occasionally cited in support of this view do not go to that extent. For example, the early Massachusetts case of *Ingalls v. Bills*, 9 Metc. (Mass.) 1, 43 Am. Dec. 346, has sometimes been understood as deciding that the carrier is not responsible for defects in the vehicle which could have been discovered in the course of manufacture, if they were not discoverable by proper examination on the part of the carrier. Some slight support is afforded to that view by one of the arguments employed by the court, but it can hardly be said that the case so holds. It does not appear from the report of the case that the point was urged upon the court. All that the case really holds is that the carrier does not warrant the safety or roadworthiness of the vehicle employed to carry passengers. However, the view finds some support in a dictum by the supreme court of Tennessee. The Tennessee case (*Nashville, etc., R. Co. v. Jones*, 9 Heisk. [Tenn.] 27, overruling *Nashville, etc., R. Co. v. Elliott*, 1 Coldw. [Tenn.] 616, 78 Am. Dec. 506) was really an action by an employee of defendant railroad company. But, in delivering the opinion of the court, *Nicholson, C. J.*, criticised the earlier New York case of *Hegeman v. Western R. Corp.*, 13 N. Y. 9, 64 Am. Dec. 517, affirming 16 Barb. (N. Y.) 353, which affirmed the liability of the carrier for the manufacturer's negligence, in the following language; "We are of opinion that the doctrine of the case of *Hegeman* is justly obnoxious to the exceptions taken to it. The legitimate obligation imposed upon the company by its contract with a passenger or employee is, that its engine and apparatus are then suitable, sufficient, and as safe as care and skill can make them, and that the company will be responsible for any injury resulting from defects therein, which might have been discovered by the company or its agents, by the proper care and skill in the application of the ordinary and approved tests. If the defects are such that they could not be discovered by the company or agents after a careful and skillful application of the ordinary and approved tests, then the company cannot be held responsible, although it may appear that the defects might have been discovered by the manufacturers, by applying the proper tests. We hold it unreasonable to assume that the company not only contract to be responsible for its own negligence, but also for that of the manufacturers." This case has been subsequently referred to, without either approving or disaffirming its doctrine, in the following cases: *Knoxville Iron Co. v. Dobson*, 7 Lea (Tenn.) 367; *Guthrie v. Louisville, etc., R. Co.*, 11 Lea (Tenn.) 372, 15 Am. & Eng. R. Cas. 209, 47 Am. Rep. 286. The view was distinctly recognized and the point actually decided, by the supreme court of Michigan, in *Grand Rapids, etc., R. Co. v. Huntley*, 38 Mich. 537, 31 Am. Rep. 321. In that case, the accident in which plaintiff was injured was caused by the breaking of an axle containing a large flaw, within the wheel or near its edge. There was evidence

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that the flaw was entirely within the axle, and that it was covered by a small thickness of sound metal. In reversing the court below, which had held that no diligence or care on the part of the railroad company could exempt it from want of care on the part of the manufacturers of the cars and axles, Campbell, C. J., in delivering the opinion of the court, said: "This general doctrine the court below laid down very clearly, but qualified it so as to make them absolutely responsible for the omissions or lack of skill or attention of the manufacturers from whom they made their purchases of stock, however high in standing and reputation as reliable persons. There is no principle of law which places such manufacturers in the position of agents or servants of their customers. The law does not contemplate that railroad companies will in general make their own cars or engines, and they purchase them in the market, of persons supposed to be competent dealers, just as they buy their other articles. All that they can reasonably be expected to do is to purchase such cars and other necessities as they have reason to believe will be safe and proper, giving them such inspection as is usual and practicable as they buy them. When they make such an examination, and discover no defects, they do all that is practicable, and it is no neglect to omit attempting what is impracticable. They have a right to assume that a dealer of good repute has also used such care as was incumbent on him, and that the articles purchased of him which seem right are right in fact. Any other rule would make them liable for what is not negligence, and put them practically on the footing of insurers." But the rule favored in these cases is rejected by the decided weight of authority and cannot be supported upon principle. It ignores the nature of the positive duty imposed upon the carriers to exercise a high degree of care in providing his passengers with a safe means of conveyance, and permits him, in a measure, to rid himself of responsibility for the due performance of that duty by assigning it to another. If the carrier should take upon himself the manufacture or construction of any of the instrumentalities employed in the transportation of passengers, he would certainly be responsible for the exercise of a high degree of care, while, by the operation of this rule, he materially lessens his responsibility by having the work done by a competent independent contractor, and the passengers are deprived of the guaranties for their safety which it is the policy and intent of the law to give them. In this connection the remarks of Hannen, J., in *Francis v. Cockrell*, L. R. 52, B. 184, are instructive. That was a case in which plaintiff sued to recover for an injury occasioned by the fall of a grand stand at a race course. The stand fell because of defects in its construction, attributable to the negligence of the contractor who had built it for defendant. The learned judge, likening defendant's position to that of a carrier of passengers, said: "In the ordinary course of things, the passenger does not know whether the carrier has himself manufactured the means of carriage, or contracted with some one else for its manufacture. If the carrier has contracted with some one else, the passenger does not usually know who that person is, and in no case has he any share in the selection. The liability of the manufacturer must depend on the terms of the contract between him and the carrier, of which the passenger has no knowledge, and over which he can have no control; while the carrier can introduce what stipulations and take what sureties he may think proper. For injury resulting to the carrier himself by the manufacturer's want of care the carrier has a remedy against the manufacturer; but the passenger has no remedy against the manufacturer for damage arising from a mere breach of contract with the carrier. *Longmeid v. Holliday*, 6 Exch. 761, 20 Law J. Exch. 430. See *George v. Skivington*, L. R. 5 Exch. 1. Unless, therefore, the presumed intentions of the parties be that the passenger should, in the event of his being injured by the breach of the manufacturer's contract, of which he has no knowledge, be without remedy, the only way effect can be given to a different intention is by supposing that the carrier is to be responsible to the passen-

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ger, and to look for his indemnity to the person whom he selected, and whose breach of contract has caused the mischief." The true rule, then, is that, so far as passengers are concerned, the carrier is responsible for the negligence of the manufacturer; he is responsible for the consequences of accidents caused by defects in the means of conveyance which might have been discovered by the exercise of due care and the application of reasonable tests during the course of the manufacture or construction, even though they are not discoverable by the carrier's reasonable and usual inspection. *Burns v. Cork, etc., R. Co.*, 13 Ir. C. L. 543; *Siemens v. Oakland, etc., Electric Ry.*, 134 Cal. 494, 66 Pac. 672, 23 Am. & Eng. R. Cas., N. S., 564; *Treadwell v. Whittier*, 80 Cal. 574, 22 Pac. 266, 13 Am. St. Rep. 175, 5 L. R. A. 498; *Hegeman v. Western R. Corp.*, 13 N. Y. 9, 64 Am. Dec. 517, affirming 16 Barb. (N. Y.) 353. See also, *Palmer v. Delaware, etc. Canal Co.*, 120 N. Y. 170, 24 N. E. 302, 44 Am. & Eng. R. Cas. 298, 30 N. Y. S. R. 817, 17 Am. St. Rep. 629, affirming 46 Hun (N. Y.) 486, 11 N. Y. S. R. 872; *Caldwell v. New Jersey Steamboat Co.*, 47 N. Y. 287, affirming 56 Barb. (N. Y.) 425; *Bissell v. New York, etc., R. Co.*, 25 N. Y. 442, 82 Am. Dec. 369, reversing 29 Barb. (N. Y.) 602. Thus, it has been held that a carrier by elevator is not released from responsibility for defects in the apparatus merely by the fact that the elevator in use was constructed by a competent and skilled manufacturer. *Treadwell v. Whittier*, 80 Cal. 574, 22 Pac. 266, 13 Am. St. Rep. 175, 5 L. R. A. 498. And it has been held that a street railway company whose road crosses a bridge, constructed and owned by the state, and which forms a part of the highway, by using the bridge makes it a part of the superstructure of the road, and becomes responsible for defects therein which could have been discovered by the exercise of proper care during the construction of the bridge, even though they were not discoverable after the bridge was erected and in operation. *Birmingham v. Rochester, etc., R. Co.*, 59 Hun (N. Y.) 583, 14 N. Y. Supp. 13. A railroad company is not relieved of responsibility for the consequences of an accident caused by the washing away of a defective embankment, simply because the embankment was constructed by a competent engineer. *Philadelphia, etc., R. Co. v. Anderson*, 94 Pa. St. 351, 6 Am. & Eng. R. Cas. 407, 39 Am. Rep. 787. Similarly, in an action by a passenger against a railroad company for damages resulting from the breaking down of a bridge whilst the train was passing over it, it was held that, whilst it was a question for the jury whether the defendant had engaged competent engineers who had adopted the best method and used the best materials in the construction of the bridge, yet the mere fact of its having engaged such persons would not relieve it from the consequences of an accident arising from a deficiency in the work. *Grote v. Chester, etc., R. Co.*, 2 Exch. 251.

THEODOR MEGAARDEN.

*BISHOP et al. v. SOUTHERN RY. (two cases).**(Supreme Court of South Carolina, April 16, 1902.)*

[41 S. E. Rep. 808.]

Accident at Crossing—Burden of Proof Where Failure to Give Signals.

Where plaintiff sues for injuries at a railroad crossing, and proves a failure to give statutory signals, the burden of proof is on the railroad company to show want of care.

Accident near Crossing—Failure to Give Signals.*

Plaintiff drove onto a public crossing in a town where a gate was maintained by the railroad company. The gate was up, and a train

* See note, 16 Am. & Eng. R. Cas., N. S., 631; *Louisville & N. R. Co. v. Penrod* (Ky.), 1 R. R. R. 887, 24 Am. & Eng. R. Cas., N. S., 887.

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approached without giving the statutory signals. In order to avoid a collision, he drove down the track, and his horse ran away and was injured: *held*, that the railroad company was liable as if the accident had occurred at the crossing.

Appeals from common pleas circuit court of Greenville county; Benet, Judge.

Actions by J. W. Bishop and by Mary J. and J. W. Bishop against the Southern Railway. Judgments for plaintiffs, and defendant appeals. Affirmed.

T. P. Cothran, for appellant.

C. J. Hunt and B. A. Morgan, for respondents.

POPE, J. We make this quotation from the case for appeal: "Actions for \$1,083 and \$1,500, respectively, commenced by the services of summons and complaint on February 9, 1901. The facts of the two causes are the same, the only difference being that in the first cause the suit is for personal injury and damages to property; in the second, for personal injury only. The injuries and damages complained of were alleged to have been caused by collision with a passenger train of defendant at the Buncombe road crossing, near the city of Greenville, on the afternoon of December 6, 1900. Both causes came on to be heard together before his honor Judge W. C. Benet and a jury at the March, 1901, term of the court of common pleas for Greenville county. The jury returned a verdict in the first named cause for \$283, and in the second for \$1,000, upon which judgments were duly entered. Motions for new trials on the minutes were refused."

After judgment, an appeal was taken on the three following grounds, to wit:

"(1) Because his honor erred in charging the jury as follows: 'The railway company takes upon itself to prove that it was not negligent.' The error being that the burden of proof was upon the plaintiffs to show that the defendant was guilty of negligence.

"(2) Because his honor erred in modifying the defendant's fourth request to charge as follows: 'That is the law, unless you are satisfied from the testimony that that accident occurred through no willful act of the plaintiffs themselves, but was the result of their efforts to escape from danger; for if the railroad was negligent in failing to sound the signals, and if plaintiffs, in attempting to cross that track, discovered themselves in their danger, and if they left the crossing, endeavoring to escape from that danger, and if they were injured, the railroad company cannot get any comfort from that fact, if fact it be, by the collision taking place not on the crossing, if it is also shown that the parties were on the crossing when they saw the danger, and left the crossing to avoid the danger, but did not succeed in escaping the danger.' The error being that the statute was passed for the protection of those injured

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at a railroad crossing by the engines or cars of the railroad company. It does not afford protection to one whose horse has become frightened and has run upon the railroad track some forty or fifty feet away from the crossing, where the collision takes place.

"(3) Because his honor erred in charging the jury as follows: 'So I charge you that if a person finds himself on a crossing, and he sees that a collision will occur, and he then and there, in order to avoid danger, leaves the railroad crossing, and is injured beyond the crossing, the mere fact of his not being upon the railroad crossing when injured will not deprive him of the benefit of the signalling statutes. The railroad would be liable unless it shows that the person is guilty of contributory negligence.' The error being as set in second, above."

We will now pass upon these exceptions in their order:

Exception 1. The words excepted to, "The railway company takes it upon itself to prove that it was not negligent," are a part of this sentence in the judge's charge to the jury: "The plaintiffs take upon themselves the proving of their claim, and must do so by the preponderance of the testimony. The burden of proof is upon them to prove before you can find a verdict for them, and the railway company takes it upon itself to prove that it was not negligent." The charge of the presiding judge was singularly clear and fair. In it the presiding judge had again and again read the two sections, 1685 and 1692, of the Revised Statutes of 1893. He had pointed out that it was incumbent upon the plaintiffs to show by their testimony that the defendant railway company had failed to give the statutory signals, either by sounding the whistle or ringing the bell, at least 500 yards before the engine reached the crossing on the highway, street, or traveled place where the accident occurred, but laid down the law that when the plaintiffs, by their testimony, established this, it was negligence per se, and transferred the burden of refuting negligence upon the railway company. In declaring the law applicable to this condition, the circuit judge followed strictly the cases of *Wragge v. Railroad Co.*, 47 S. C. 105, 25 S. E. 76, 33 L. R. A. 191, 58 Am. St. Rep. 870, 4 Am. & Eng. R. Cas., N. S., 639; *Strother v. Railroad Co.*, 47 S. C. 385, 25 S. E. 272, 5 Am. & Eng. R. Cas. 430; *Edwards v. Railway Co.*, 62 S. C. —, 41 S. E. 458; *Davis v. Railway Co.*, 62 S. C. —, 41 S. E. 468. He had laid down the law governing the plaintiffs, and, in using the words objected to, he was intending to point out the duty of the defendant when the force of plaintiffs' testimony should force the defendant to take up its burden of explaining away by its testimony the charge of negligence. This exception, in the light of the charge as a whole, must be overruled.

Exceptions 2 and 3. We propose to treat these two exceptions together. The circuit judge had just charged, at the

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request of the defendant, that: “(1) One approaching a railroad crossing where gates are kept and lowered on the approach of trains does not have the right to assume, when he sees the gates up, that no train is approaching, but must exercise such degree of care as an ordinarily prudent man would exercise under similar circumstances before going on the track. 30 S. E. 386.’ Court: I charge you that, because, while railway companies may place gates at those railway crossings, still, when they do erect them, that does not relieve the traveling public of the necessity of exercising care when they come to a railway crossing. They must exercise due care, and the fact that a gate is shut at a crossing would not relieve the traveling public from listening and looking, and sometimes even stopping until the train passes. ‘(2) If the jury believe from the evidence that the gateman lowered the gates within a reasonable time after notice of the approach of the train, and in an honest effort to prevent a collision, the defendant cannot be held responsible for the horse taking fright at the lowering of the gates, unless the jury believe from the evidence that, in the mind of a person of ordinary prudence, the danger to plaintiff by reason of the lowering of the said gate, under the circumstances, was greater than the risk of the collision with the train.’ Court: I charge that as law. ‘(3) If the jury believe from the evidence that the alleged collision did not take place at a crossing, the plaintiff cannot maintain this action under sections 1685, 1692, Rev. St.’ Court: I so charge you.” It will be observed that the modification of the request to charge was especially designed and carefully restricted to a case where a person is upon the crossing itself, and only suffers himself, in an effort to avoid danger to life, to move off the crossing, in a case where the railroad has failed to give the signals, and where the use of a man’s senses fails to disclose danger. Within this compass, we fail to see that the circuit judge erred. It is not the case of *Kinard v. Railroad Co.* (S. C.) 18 S. E. 119, where a man was never on the crossing at any time of the accident, nor the case of a bystander. But it was the case of a man and his wife trying to cross the railroad over a public highway, to whom no statutory signals had been given to warn them of the approach of the train, running at least 390 miles an hour,—the statutory danger provided against, to wit, a train, without signals being given, approaching a crossing upon which there are living human creatures. The negligence of the railroad exists *per se* in such a case, by not giving the statutory signals. In an effort to save the railroad from the dreadful consequences of a collision, two human creatures a little way from the crossing, as is supposed in his request to charge, are thrown into the air by this railroad train, and barely escaped with their lives. The circuit judge might very well have refused any charge in response to the fourth request, for he had already

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made plain the law. The evidence on both sides had been submitted as to the plaintiffs being on the crossing or not at the time of the collision. The jury, at the instance of the defendant, had been carried to the crossing in question, a map or diagram of the crossing in question had been before the jury. The judge had already charged that, unless the collision occurred at a crossing, the plaintiffs could not recover. Still, in the charge as made, we see no error. These remarks cover both exceptions. They are overruled.

It is the judgment of the court that the judgments of the circuit court be affirmed.

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(*Supreme Court of Pennsylvania, June 4, 1902.*)

[52 Atl. Rep. 191.]

Negligence—Proximate Cause.*

Plaintiff's intoxication is the cause of the injury; he, while drunk, when walking over a bridge, the roadway of which was 17½ feet wide, having got through the 9½-inch space between the first and second rails of the guard fence, and fallen over the edge of the bridge, 2½ feet beyond the fence.

Appeal from court of common pleas, Luzerne county.

Action by Michael Mooney against the Pennsylvania Railroad Company for personal injuries received by falling over the edge of its tollbridge. The width of the roadway was 17½ feet. On each side of this was a guard fence 3½ feet high, and between the guard fence and the edge of the bridge was a space of 2½ feet. Plaintiff claimed to have stubbed his foot against a spike projecting from the floor, and to have been precipitated between the lower guard rail and the one next above it; the space being 9½ inches. Judgment for defendant. Plaintiff appeals. Affirmed.

James L. Lenahan and Thomas D. Shea, for appellant.

John McGahren and Henry W. Palmer, for appellee.

PER CURIAM. Unless we hold that the defendant company is responsible for the effect on the plaintiff of the "York State cider" and Nanticoke gin consumed by him on the day of the accident, we must sustain this nonsuit. They, and not the negligence of the defendant, were the cause of his injuries. There was no evidence whatever that the bridge was defectively constructed, as alleged by the plaintiff, nor that his injuries were occasioned by the negligence of the defendant company. The nonsuit was properly entered by the court below, and therefore the judgment is affirmed.

*See note, 12 Am. & Eng. R. Cas., N. S., 790.

PALMISANO *et ux.* v. NEW ORLEANS CITY R. CO.*(Supreme Court of Louisiana, March 17, 1902.)*

[32 So. Rep. 364.]

Boys Stealing Rides—Right to Catch Hold of and Lecture.*

Where urchins have been stealing rides by hanging onto the rear end of a gravel train on the street of a city, the employee in charge of the train, who has in vain tried to make them desist by warnings and threats, is entirely justified in catching hold of one of them and lecturing him.

Same—Same—Injury on Track.

If the employee's lecture has been temperate, and he has not rough-used the boy, but has merely held him, and no longer than was necessary for the purpose of the lecture, he or his employer is not responsible if the boy (a child eight years, lacking three months, old), on being turned loose, runs blindly in a direction converging with that of a coming car, and collides with the car and is injured.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Fred D. King, Judge.

Action by Antonio Palmisano and wife against the New Orleans City Railroad Company. Judgment for plaintiffs, and defendant appeals. Reversed.

Denegre, Blair & Denegre, for appellant.

Boatner, Dodds & Boatner, for appellees.

PROVOSTY, J. Salvator Palmisano, a boy seven years and nine months old, and two other boys, were stealing a ride by hanging onto the rear end of a gravel car drawn by an electric street car on defendant's road in the city of New Orleans. The motorman of the traction car, who had been considerably annoyed by the like conduct of these and other boys as his train went back and forth that day, conceived the plan of capturing one of the boys to lecture him, and, in execution of that plan, turned off the power from his car, put on the brake, and beckoned to the conductor to come and take his place, and, when the car was about to come to a stop, slipped off, and crouched, and as the rear end of the gravel car reached him, caught hold of the Palmisano boy. He stood with him between the rails of the track up which the gravel car had just passed, and lectured him, holding him with one hand, and shaking a finger of the other hand at him the while, —and then turned him loose. What he said to the boy was this: "Look here, young fellow; you have been jumping on this car every time you get a chance, and I have a good mind to have you arrested. Go and tell all your playmates the first one I catch on this car, I am going to lock him up." Alongside this track was another track, the two tracks being four feet three inches apart. On this other track an electric street car was coming. The boy, as soon as set free, scampered off,

*As to the duty of a railroad company to infant trespassers, see extensive note, 20 Am. & Eng. R. Cas., N. S., 327, and foot-note.

running towards his home, in the direction opposite to that in which the gravel car had gone, and the same as that in which the car on the other track was coming. His course tended to converge with that of the coming car. The bystanders and the motorman of the coming car, seeing the danger of a collision, hallooed at him, but too late. He came in contact with the side of the car just aft of the front platform, was thrown down, and his left foot crushed, necessitating amputation just above the ankle. How far the spot where the motorman stood when he held the boy was from the spot of the collision, and precisely in what direction the boy started to run when he was released, and at that exact moment how far off was the downcoming car,—these are the points on which the testimony conflicts. This testimony cannot be reconciled, and the analyzing of it would serve no useful purpose. The efforts of plaintiff have tended to abbreviate the distances so as to bring the act of the motorman and the accident in closer relation, and those of the defendant have tended to the contrary, so as to give greater scope to the agency of the boy; and, with the same ends in view, the plaintiff would have the course of the boy as direct across the course of the car as possible, and defendant the contrary. The boy ran far enough to give time to the bystanders and to the motorman of the descending car to halloo at him, and to hope that there was yet time for him to change his course. This shows that mere distance and time are not controlling elements, or even necessarily important elements, in the problem. The view we take of the case is that the descending car was blameless, as plaintiff admits, and that the motorman of the traction car did nothing but his duty, and did not do it in an improper manner. The theory of the plaintiff is that the child was so frightened by the acts of the motorman that for the time being he had lost his wits, and that, in a dazed and bewildered condition, he instinctively made for home,—his course thereto lying across the path of the car,—and that the motorman, by detaining the child until the downcoming car was close, and the danger from it imminent, and then suddenly turning him loose, in the face of the car, as it were, was guilty of negligence. If it be true that the child was so frightened as to lose his wits, is the motorman responsible, when he did no more to him than what was the proper thing to do? Had he exercised undue severity, either in act or language, then might some fault attach to him; but he simply caught and held the child (admittedly the proper thing to do), and lectured him with moderation (again the proper thing to do). We do not see how fault could attach to him on that score. To say that he should have held the child longer than was necessary for the purpose of the lecture, or that he should have carried him away from a place so near to a track on which an electric car was either going to pass or in the act of passing, is to look at the situation from the stand-

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point of what has happened, and not from the standpoint of what, under the circumstances, was likely to happen, or of what the motorman, under the circumstances, had reasonable grounds for supposing might happen. Here was a street urchin who that very day had been getting on and off this gravel car every time it sped by; was the motorman to suppose for a single instant that this boy, who had been accomplishing these car-riding feats all day, would be likely to run into a passing car if turned loose near a car track? So far as the impressionability or timidity of the boy is concerned, the motorman had the perfect right to deal with him as with any other street gamin caught in the same way; and the average street gamin is not usually bereft of his wits by being held, without violence, and being told that future punishment shall be visited on him in case he renews his offense. By continuing to catch on to this car and holding on to it all that day despite the remonstrances and threats of the motorman and of the conductor, this boy had made full proof of his possessing the usual assurance and brazenness of the street gamin. That the boy forgot himself is clear, and that the act of the motorman contributed to cause the forgetfulness is also clear; but those acts were mere links in the chain of events, and were themselves brought on as the legitimate or natural consequences of the fault of the boy in catching onto the car, and of the fault of the parents of the boy in letting him indulge in that dangerous amusement. By the way, the house of the parents was close by, facing on the same street, so that they had had a full opportunity that day of witnessing the boy's dangerous pastime.

We cannot hold defendant responsible. It is therefore ordered, adjudged, and decreed that the judgment of the lower court be set aside, and that the plaintiff's suit be dismissed, with costs in both courts.

BREAUX, J., concurs in the decree.

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(*Supreme Court of Washington, July 16, 1902.*)

[69 Pac. Rep. 636.]

Death of Child—Action by Mother.

Under 2 Ballinger's Ann. Codes & St. § 4829, providing that a father, or, in case of his death or desertion of his family, the mother, may sue for death of a child, though the parents have been divorced and custody of a son awarded to the father, yet, the father having brought him to and left him with the mother, and then gone away, and the son being thereafter supported by the mother, she can sue for his death.

Killing of Boy—Making Short Cut to Circus Showing in Railroad Yard—Liability.*

Where a railroad company permits a circus to show in its yards at a

*See generally, *Kramer v. Southern Ry. Co.* (N. Car.), 20 Am. & Eng. R. Cas., N. S., 329, and notes, 335.

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place unoccupied by tracks, and which can be approached by a public highway, without necessity of crossing its switch tracks, it is not liable, on the ground of maintaining a dangerous place, for death of a boy, who, attempting to make a short cut, starts across the switch yards, and, though told by two switchmen that he must not go that way, and warned of the danger, proceeds in that way, and gets on a moving car, though told by companions not to do so, and afterwards jumps from it immediately in front of a moving train.

Appeal from superior court, Pierce county; Thad Huston, Judge.

Action by Mrs. Alberta Clark against the Northern Pacific Railway Company. Judgment for defendant. Plaintiff appeals. Affirmed.

Govnor Teats and E. W. Taylor, for appellant.

B. S. Grosscup, Jas. F. McElroy, and A. G. Avery, for respondent.

HADLEY, J. Appellant instituted this action against respondent to recover damages on account of the death of her son, which, it is alleged, was caused by the wrongful and negligent act of respondent. At the trial the court granted a motion for nonsuit. The motion was based upon two grounds: First, that appellant had failed to show such title or right as enabled her to maintain the action; and, second, that no negligence of respondent was proven. We will first discuss the branch of the motion relating to appellant's right to maintain the action.

The accident which caused immediate death occurred August 6, 1901. The deceased, Oscar Perry Dix, lacked a little more than one month of being 12 years of age. He was the son of Elihu Dix and the appellant, who were formerly husband and wife. Some time prior to June, 1897, the parents separated; the appellant keeping the two children of the marriage,—the son above named and a daughter. On the 14th of June, 1897, appellant procured a decree of divorce from her said husband, and by the terms of the decree the care and custody of the daughter was awarded to appellant, and that of the son to the husband. After the separation, and before the divorce, the mother mainly supported both the children; the husband having contributed about \$20 toward their support. After the divorce the father took the boy and kept him about two weeks, when he brought him back to his mother and told her he could not get along with him, and said if she would keep him he would support him. Soon afterwards the husband gave the mother \$10 towards the support of the boy, and has never contributed any sum since. The mother, who afterwards remarried, continued to support the boy for a period of more than three years, and until the time of his death. The location of the father is unknown to her, and she has been unable to discover where he is. Under these circumstances, the respondent contends that appellant cannot maintain this action, for the reason that the father was

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charged with the lawful care and custody of the boy. Section 4829, 2 Ballinger's Ann. Codes & St., provides as follows: "A father, or in case of the death or desertion of his family the mother, may maintain an action as plaintiff for the injury or death of a child, and a guardian for the injury or death of his ward." It will be observed that by the terms of the statute the mother may maintain the action in the event the father has deserted the family. It is contended by respondent that by the divorce the family status was broken, and that there can be no longer a desertion of the family, within the meaning of the statute. The facts as stated, we think, show at least an abandonment of the boy by the father. He not only withheld from the boy his own companionship, but wholly neglected to contribute to his support. It was his primary duty to support his child, independently of that cast upon him by the decree of divorce. The boy being left with his mother, the duty of his support and education was cast upon her. As a natural son, he was, in legal contemplation, a part of his father's family. The family status between mother and child, as constituted by natural relationship, was not broken by the divorce, and their companionship as members of the same household continued, with only an interruption of two weeks. The family status as thus constituted was left by the father without any contribution on his part toward its support. This we believe was not only an abandonment of the child, but also of the family, within the meaning of the statute. By his abandonment the father has forfeited his right to maintain this action, and it belongs to the mother. The first ground stated in the motion for nonsuit should therefore have been denied. Whether the superior court intended to deny the motion on said ground does not appear from the record. It may have been the intention to grant the motion upon the other ground only. We will now consider the second ground of the motion for nonsuit,—that no negligence of respondent was proven. Deceased met his death by being struck by a freight train in the switch yards of respondent in the city of Tacoma. On the day of his death a circus show exhibited in Tacoma, and occupied with its tents grounds belonging to respondent, lying to the north of the system of tracks in the switch yards, and near the east end thereof. The space occupied by the tents and that immediately around them, together with a similar space to the east and west thereof, was unoccupied by tracks. This unoccupied space was to the north and parallel with the system of tracks. Persons being in the switch yards could approach the tents over this space without walking upon or among the tracks. Similar exhibitions had been given upon the same grounds before, and some persons in going thereto entered the switch yards toward the westerly end, and crossed over the tracks towards the show grounds. The yards are principally inclosed by a fence. Parallel with the fence on the south is a street,

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along which runs a street railway, which extends as far as the switch yards extend. The traveled highway reaching the show grounds was to go out said street car or otherwise. Just beyond the terminus of the street car line the street is intersected by a county highway running to the northeast around the easterly end of the switch yards, and which passes near the show grounds on the south. It appears that some persons sought to avoid this highway over the traveled highway by entering the switch yards, crossing the tracks, thus approaching the tents from the north or southwest. In the center of the yards were 2 main tracks and on the south of these was a lead track for the switch yard and connecting with it were 19 switches leading to the switch yards therefrom. To the north of the main tracks were many other tracks of others running practically parallel therewith. A system of tracks respondent daily moved many cars and locomotives. On the morning of the accident the deceased boy and two other boys about his age were on their way to the show grounds to see the preparations for the parade which was to precede the exhibition. They were hurrying to the show grounds, and passed into the switch yard at the west end thereof. They were met by a switchman, who at first tried to turn them away, but, upon their urgent request and protest, careful, he permitted them to pass him. They then met another switchman, who told them to get out of the switch yard and go around. He also told them not to go that way as they might get killed. They, however, went aside upon the switch tracks upon the north side, that were not much traveled, where the grass grew. The deceased boy was barefooted and remarked to the other boys that the cinders hurt his feet. A freight engine with some cars moving easterly toward the show grounds came along on the aforesaid lead track from the south of where the boys were walking. The deceased boy ran across the intervening tracks and jumped upon one of the moving flat cars. One of the other boys told him not to do it. Just in the rear of the switch train, but upon the main track, came an outgoing freight train, going easterly. The deceased remained upon the flat car until it was about to leave the site the show grounds, when he jumped off; and while he was in the act of crossing the main track toward the show grounds the before-mentioned freight train, being but a short distance away when he entered upon the track, struck him and killed him.

It is not contended by appellant that there was negligence in the operation of the train which caused the death of the deceased. Appellant urges that respondent maintained a dangerous place, a danger inherent in the premises and in the operation of the same, that in the midst of this dangerous place respondent permitted the show to exhibit, and that the boys and children were attracted upon and over the premises thereby; that the boys and children especially went through these premises

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invitation and inducement held out by respondent in permitting the show to be held upon its premises; that the deceased was not a trespasser, but an invited visitor; and that the danger was known to respondent and unknown to the boy. The contention, in short, is that respondent's negligence consisted in permitting the show to be located upon these premises without taking proper precaution to protect the deceased boy and others from danger. If the show grounds had not been owned or controlled by respondent, then no liability could have arisen, since it was operating its own property in the customary and lawful way, without negligence. Does the fact that the grounds happened to belong to respondent change its obligation in the premises? There was ample room for the purposes of the show without any interference from the switch grounds. There was a well-traveled public highway leading to the show grounds, without making it necessary to cross the switch yards. It is a matter of common knowledge that such switch grounds cannot be operated without probable danger to casual strangers who may happen upon them, and that the general public are not invited or expected to come upon them. The public could not have expected that respondent would cease operating its trains in order to extend the convenience of a shorter way to the show grounds. In leaving the traveled way to cross these grounds, they were chargeable with knowledge of the attendant danger. The deceased boy knew of the danger. He was an intelligent, active boy, about 12 years of age. He had theretofore spent much time in selling papers, and evidently knew much of the city and its environment. His boy companions testified that they all knew of the danger. They and the deceased knew they were not invited upon the grounds, for the reason that they were twice told by representatives of respondent not to go there, because of the danger. At the encounter with the last switchman he gave peremptory command that they should leave, but they disregarded the command. It would seem that this repeated precaution from respondent was a careful effort to prevent the opportunity for danger, and more could not well have been done, except by resort to forcible expulsion. It is true that, while one is under no obligation to keep his premises in safe condition for the visits of trespassers, yet if "he expressly or by implication invites others to come upon his premises, whether for business or for any other purpose, it is his duty to be reasonably sure that he is not inviting them into danger; and to that end he must exercise ordinary care and prudence to render the premises reasonably safe for the visit." Cooley, Torts (2d Ed.) p. 718. The above is a generally recognized rule, and is fully sustained by authorities cited by appellant. If the deceased boy came within the class of guests invited expressly or by implication, then the authorities are in point here. It is not conceivable,

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however, that one should in the first instance understand that he was invited to cross the switch tracks which were in constant use, merely because a show was exhibiting near by, and when other plain and safe ways of approach were at hand. In any event, when this boy was told not to go there, he knew he was not invited; and instead of going the safe way, as advised by respondent, he rushed into immediate danger. The cases cited by appellant related to some inherent defect in the premises, which ought not to have existed, but which was negligently allowed to exist. In the case of *Bennett v. Railroad Co.*, 102 U. S. 577, 26 L. Ed. 235, 1 Am. & Eng. R. Cas. 71, the injured person fell through a hole in the depot floor, which had been left unguarded and unlighted. In *Powers v. Harlow* (Mich.) 19 N. W. 257, 51 Am. Rep. 154, dynamite was left exposed upon the premises, where children ignorant of its nature could easily find it and handle it. In *Railroad Co. v. Morey* (Ohio) 24 N. E. 269, a ditch was left unguarded and unlighted in the nighttime. Similar conditions existed in *Curtis v. Kiley* (Mass.) 26 N. E. 421. In *Tucker v. Draper* (Neb.) 86 N. W. 917, 54 L. R. A. 321, a small child was killed by falling into an open and unguarded well. The conditions considered in the above cases were inherent defects in the premises, and were hidden from and unknown to the injured persons. In the case at bar the premises were not defective. There were no hidden dangers inherent in them, and they were being used for lawful purposes. Any danger which existed was open and apparent, and was the unavoidable consequence of the customary and lawful use of the premises if one placed himself in a position to encounter it. Appellant also cites what are known as the "Turntable Cases." These cases are based upon the theory that a turntable is a machine of such a nature as to attract children to play with it, and, being inherently dangerous for children to handle, negligence is predicated upon the failure to lock it or securely fasten it so that it cannot be moved by children. The same principle has been applied where other structures or conditions existed, but the doctrine has not been uniformly adopted by American courts, and it has, indeed, been severely criticised. In *Beach, Cont. Neg.* (3d Ed.) § 51a, the author observes that the trend of the most recent decisions is against it, and many cases are cited. This court applied the rule in a turntable case in *Navigation Co. v. Hedrick*, 1 Wash. 446, 25 Pac. 335, 22 Am. St. Rep. 169; but, in view of the more modern tendency of the courts, we should, however, hesitate to extend the rule as one of general application to other conditions. For especially forcible reasoning upon this subject we refer to *Railroad Co. v. Reich* (N. J. Err. & App.) 40 Atl. 682, 41 L. R. A. 831, 11 Am. & Eng. R. Cas., N. S., 313, 68 Am. St. Rep. 727. The respondent in the case at bar had not placed upon its premises a dangerous machine or device, that was in its nature and at once particularly attract-

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ive to children. The deceased boy neither meddled with nor was he injured by any such instrument. The attractive thing which it is claimed respondent permitted upon its premises was the show. There was, however, nothing dangerous in the show itself, and the boy was not injured by anything in or about it. The case therefore materially differs from *Railroad Co. v. Moore's Adm'r* (Va.) 27 S. E. 70, 37 L. R. A. 258, cited by appellant. There a street railway company advertised a balloon ascension at a park owned by it. A person in attendance was killed by a falling pole used to suspend the balloon while being inflated. The company was held liable because no warning was given that the pole would fall at that time, and the people were allowed to gather near. The danger inhered in the operation of the thing itself, which was the immediate inducement for people to go upon the grounds. It was not occasioned by the lawful use and operation of some permanent machinery upon the premises, and wholly disconnected from the thing which was the attraction. The case of *Thompson v. Railroad Co.* (Mass.) 49 N. E. 913, 40 L. R. A. 345, 64 Am. St. Rep. 323, involved conditions similar to those existing in the above case. We are not aware of any case which holds that the operation of trains over railroad premises makes them dangerous machines, within the meaning of the Turntable Cases. It was expressly held that they are not such, within the meaning of that rule, in *Barney v. Railroad Co.*, 126 Mo. 372, 28 S. W. 1069, 26 L. R. A. 847, and *Catlett v. Railroad Co.*, 57 Ark. 461, 21 S. W. 1062, 54 Am. & Eng. R. Cas. 113, 38 Am. St. Rep. 254. We are therefore unable to find that negligence on the part of respondent was shown. The accident was an unfortunate one for appellant, as the mother of the boy; but we are unable to see that respondent is chargeable therewith, when viewed in the light of safe and sound principles. We believe the court did not err in granting the nonsuit on the ground that negligence of respondent was not shown.

Error is assigned upon the court's refusal to admit certain evidence, in the way of an identified show bill, offered for the purpose of showing an inducement to the public to go upon respondent's premises. We are unable to find that the offered exhibit disclosed the place where the coming show would exhibit, further than it would be in the city of Tacoma. It was, however, admitted by the answer that the grounds were leased for the purposes of the show, which showed that respondent had notice that the public would be in attendance. We think the offered evidence was therefore immaterial.

Believing that the court did not err, the judgment is affirmed.

REAVIS, C. J., and FULLERTON, ANDERS, and MOUNT, JJ., concur.

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[69 Pac. Rep. 582.]

Accident on Track—Issues.

Where the complaint in an action for injuries inflicted by a railroad train alleged negligence only in that no warning was given, and that the speed of the train was in excess of that permitted by ordinance, submission of the issue of negligence on the part of the engineer, in not seeing plaintiff or in failing to keep a lookout, was error.

Same—Licensees.*

Continued use of a railroad track as a footway does not make the users licensees, where repeated protests and warnings against such use are given.

Same—Trespassers—Liability.†

A railroad company is liable to a trespasser on its tracks for injuries willfully or intentionally inflicted by its servants.

Willfulness—Pleading.

An allegation in a complaint in a personal injury action that an act was wanton, reckless, or grossly negligent is not equivalent to an allegation that the act is willful and intentional.

Accident on Track—Contributory Negligence—Walking on Track.

Plaintiff stepped on a railroad track at a point 600 feet from a station at which a train was standing; testifying that she looked in both directions, but saw no train, though the view was entirely unobstructed. She walked between the rails in the same direction in which the train was going, with an umbrella over her shoulder, and did not look around after going on the track. The train started from the station on an up grade, necessarily making noise: *held*, that plaintiff was guilty of contributory negligence, as matter of law.

Same—Same—Negligence after Discovery of Plaintiff's Peril.

Plaintiff in a personal injury action, though guilty of contributory negligence, may recover if, after discovery of his peril, defendant could, by ordinary care, have prevented it, and failure to exercise such care was the proximate cause of the injury.

Same—Same—Same.

The doctrine that, in an action for personal injuries, plaintiff may recover, though guilty of contributory negligence, if defendant failed to use ordinary care to avert the injury after he discovered plaintiff's peril, applies not only to cases where defendant actually discovered the peril, but also where by the exercise of ordinary care he could have done so.

Pleading—Issues.

Where the complaint in an action for injuries inflicted by a railroad train alleged negligence only in that no warning was given, and that the speed of the train was in excess of that permitted by ordinance, but the case was tried on the theory that a cause of action for willful or wanton injury was stated, and the evidence tended to support such cause of action, rather than the one pleaded, the action should not be dismissed on appeal, but remanded, with permission to amend.

Appeal from district court, Lake county.

Action for personal injuries by Christina Buffehr against the Denver & Rio Grande Railroad Company. From a judgment for plaintiff, defendant appeals. **Reversed.**

*See generally, *Morgan v. Wabash R. Co. (Mo.)*, 20 Am. & Eng. R. Cas., N. S., 372, and extensive note, 394 et seq.

†See foot-note appended to *Mizzell v. Southern Ry. Co. (Ala.)*, 1 R. R. R. 514, 24 Am. & Eng. R. Cas., N. S., 514.

The complaint attempts to state a cause of action based on acts of the defendant showing wanton, willful, and intentional misconduct. The answer is a general denial and a plea of contributory negligence by plaintiff. The evidence is not voluminous or substantially conflicting. The statement of the parties is accepted as to the case thereby made, with such additions from the record as the court deems material. On the 6th of September, 1895, appellant railroad company owned and operated a line of railroad which passes through the town of Glenwood Springs, Colo. Its passenger station is at the corner of Pitkin avenue and Seventh street, whence the track easterly therefrom runs on a curve diagonally across Seventh street, leaving it a block east of the station, from which point on eastward the track is entirely upon private property of the appellant, except at the crossing of Grand avenue, which is about 600 feet east of the railway station. The track crosses Grand avenue, passing under a large wagon bridge which there spans Grand river. The approach to this bridge leaves Grand avenue at a point about half a block south of its intersection with Seventh street, and passes thence over Seventh street, the railroad track, and Grand river. Immediately underneath this wagon bridge is a foot bridge, the southern approach to which begins between the railroad track and the river bank. These two bridges afford practically the only means of access between the town of Glenwood Springs proper and the Hotel Colorado, which, with its baths and other improvements, is located on the northern side of the river. Travelers using the foot bridge in coming from the northern to the southern side, on their way to the town proper, necessarily cross the railroad track on Grand avenue at grade. For the convenience of its passengers,—not only those whose destination is the Hotel Colorado, but those going into the business portion of the town,—the company at times stops its trains at Grand avenue, and there has erected a platform about 8 feet wide, and extending upon its private property about 190 feet easterly from Grand avenue. The level of this platform is lower than that of Seventh street, and three flights of steps have been erected,—one at each end and one in the middle,—leading up from the platform to Seventh street. There are no buildings or improvements of any kind between the railway track and the river, and the land between Seventh street and the river from the railway station for several blocks east of Grand avenue is the private property of the company. Some distance east of Grand avenue, and between the railroad track and the river, is a cave, in which is a hot spring, to which persons resort for bathing. Seventh street and the public road into which it merges at the eastern limit of the town lead directly to this cave, but at certain seasons of the year the railroad track affords better walking than the street or the sidewalks, and persons going to the cave frequently go upon or alongside of the railroad

track. The plaintiff in this case claims that this existed for so long a time and was so general that it acquired a right to use the tracks and right of way company as a highway in passing from Grand the cave. The defendant denies that any such thereby acquired, and says that persons so using it were trespassers. The uncontradicted facts in that, while the tracks had been used as a passageway for general public, it was against the repeated protests of the railroad company, and that signposts by the company put upon its right of way, warning against entering and crossing the company's track the property for their own convenience. On the September 6th, appellee, a resident of Leadville, on the north side of the river, in the vicinity of Colorado. She returned to the south side by the ferry, apparently intending to return to her place of abode in the town. On arriving at the railroad track it crosses Grand avenue, she concluded to go to the north of the town and south of the river, and, with that view, turned eastwardly from Grand avenue and walked upon the railroad track of the defendant, between the rails. By continuing along or upon Grand avenue further south, plaintiff would have reached Severely and might have continued her journey to the cave by that thoroughfare, free from all danger from trains. This, however, she elected not to do. Before stepping onto the track she says that she looked along both directions, and although there was an unobstructed view of the point where she was standing to the passenger train of the defendant, 600 feet away, where was then standing a passenger train that afterwards collided with her, that she did not see it. After walking a few steps upon the track, as the day was warm and the sun shining, she took her umbrella over her head and rested it on her shoulder without looking back, or keeping any watch, or using her senses for the purpose of ascertaining whether trains were approaching her from either direction. She continued between the rails for a distance of about 100 feet, when she was struck by the passenger train, which came up behind her, and caused the injuries for which she sues. The engineer did not see plaintiff on the track, and does not know of the accident until his train reached some distance farther east, though he maintains that a lookout should have been while passing through the town. There is an ordinance in the town which requires a flagman to be stationed at every railroad crossing, or other suitable precaution to be taken against injury to persons and property in the operation of the roads; and there is a further requirement that no passenger train or train shall be run at a speed to exceed eight miles per hour within the town limits, and the bell attached to the

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tive is required to be rung while running therethrough. No evidence was produced by plaintiff as to the speed at which the train was running, only one of her witnesses saying "it looked as if it ran pretty swift." The testimony of a number of witnesses for the defendant was that the speed did not exceed six miles an hour. Some of plaintiff's witnesses testified that there was no sound of the whistle or ringing of the bell, others said they did not remember whether the bell was rung, while the testimony of the fireman and engineman was that the bell was continuously rung from the station till the limits of the town were passed, and the whistle was sounded on approaching street crossings. The foregoing we think is a fair summary of the material points of the evidence, in so far as it affects the questions raised upon the appeal.

Walcott, Vaile & Waterman (W. W. Field, of counsel), for appellant.

James Glynn and Clinton Reed, for appellee.

CAMPBELL, C. J. (after stating the facts). Numerous errors are assigned, relating chiefly to the instructions of the court. The important questions discussed are: Was the plaintiff a licensee or a trespasser? Was the plaintiff guilty of negligence that directly or proximately contributed to the injury? Was the defendant guilty of what plaintiff characterizes as gross or willful negligence? Or speaking more accurately, was the conduct of defendant such as indicated a willful or malicious intent to inflict injury? We do not notice in detail the objections raised, but shall discuss and lay down the principles by which this controversy should be determined.

1. The negligent acts or mischief charged against defendant in the complaint as constituting the sole proximate cause of the injury are that its servants did not give any warning of the approach of the train, and that its speed was greatly in excess of the limits prescribed in the town ordinance. As we read the complaint, these, and these only, are the particulars as to which defendant is said to have been remiss. The court, however, submitted this branch of the case upon the alleged negligence of the engineman in not seeing plaintiff upon the track, or in failing to keep an outlook in front of his engine, as it was said to be his duty to do in the circumstances of this case. There was objection to this, and the court should have confined the case to the issues made by the pleadings.

2. Under the facts of the case before us, we do not consider it very important whether plaintiff was a trespasser or a licensee, though the latter may, as a general rule be entitled to more consideration than the former. Still the court erred in instructing the jury that if the railroad track had been continuously, commonly, and generally used for a number of years prior to the accident, and was then used, as a passageway by the general public, this was equivalent to an acquiescence by

defendant therein, and constituted a license by the railway company that its track might be so used. The testimony is uncontradicted that the company repeatedly protested against this use, and did all that might reasonably be expected in such circumstances to warn the public against using the railroad property for their own convenience. Instead of inducing or alluring people to enter upon its property, or acquiescing in its use as a highway, the contrary is true, viz., that defendant repeatedly warned people against the same. It is difficult to conceive how it is possible for a license thus to be acquired. But though plaintiff was a trespasser, it does not necessarily follow that she cannot recover if the injury was willfully or intentionally inflicted, as plaintiff in her pleading has tried to aver, and if the other essentials of such a cause of action are established. Evidently the plaintiff had this in mind when the complaint was drawn, for she did not content herself with charging that defendant was guilty of mere negligence, but she attempted, at least, to aver that her injuries were occasioned by an intentional, willful, and deliberate act or omission of duty of defendant's servant, and she must be held to proof of such act or omission. And so we must regard the complaint as stating a cause of action based, not upon mere negligence, but upon an intentional, willful act or dereliction of duty on the part of defendant's servant, characterized by recklessness or heedlessness as to the consequences of his act, or failure to act. It may be that this cause of action is defectively stated, and we think it is, but both parties seem to have proceeded upon the assumption that something more than mere negligence of defendant was alleged. In passing, we observe that an allegation that an act is wanton, reckless, and grossly negligent is not equivalent to an allegation of a willful or an intentional act.

3. That plaintiff was guilty of negligence of a flagrant sort, we have not the slightest doubt. She testifies that before she stepped upon the railroad track she looked both ways, but did not see any train. The uncontradicted evidence is (and, indeed, plaintiff so alleges in her complaint) that at the time she went upon the track the passenger train, the engine of which afterwards struck her and caused the injuries, was standing at the station, about 600 feet to the east of Grand avenue where it intersects the railroad track. The view was wholly unobstructed either by cars or natural objects. The complaint further says that, from the moment the train pulled out from the station until the engine threw plaintiff from the track, the engineer could plainly see her, for she was constantly in full view. If this is so,—and plaintiff is bound by it,—then she certainly could have seen the train. It is true, she says she did not see it. That, however, is her misfortune, not defendant's fault. The train was there, and, if she did not see it, it was because she was heedless or careless or absent-minded. If she had carefully looked, she would have

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seen the train. That, however, is not the only respect in which she was guilty of negligence. While the authorities differ as to whether mere walking between the rails of a railroad track is negligence per se, they are unanimous upon the proposition that the presence of a railroad track itself puts a reasonably careful person upon notice that danger is present; and when one deliberately walks along a railroad track without properly making use either of his sense of hearing or of sight, to avert danger, he is guilty of negligence. The undisputed facts are that plaintiff stepped upon the railroad track at a time when the passenger train was 600 feet away to the westward, which she saw, or ought to have seen, and she deliberately turned her face eastward, and walked in the center of the track, with an umbrella raised and thrown across her shoulder, without once looking back from the time she began her walk until she had traversed a distance of 150 or 160 feet, and she did not, as she says, hear the noise of the approaching train. It must have made more or less noise, because it stopped at the station for 15 or 20 minutes, and in going eastward it was on an up grade, and, in the very nature of things, the running of the train could not have been unattended with noise, and plaintiff's attention was not distracted by noises from any other sources. Yet plaintiff says that the first intimation she had of its approach was at the very moment of collision, and at once thereafter she became unconscious. So we say that as a matter of law, under the uncontradicted testimony, plaintiff was guilty of negligence. It has been directly held in a number of cases that one does not do his full duty merely by looking or listening before going onto a railroad track, but it is his duty to keep a constant watch for the approach of a train or an engine while thereafter walking along it. *Railroad Co. v. Godfrey*, 71 Ill. 500, 508, 22 Am. Rep. 112; *Railway Co. v. Tartt*, 12 C. C. A. 618, 64 Fed. 823, 18 Am. & Eng. R. Cas., N. S., 226; *Candelaria v. Railway Co.*, 6 N. M. 266, 279, 27 Pac. 497, 48 Am. & Eng. R. Cas. 565. This court and our court of appeals have held that such acts as plaintiff admits constitute contributory negligence. *Kennedy v. Railway Co.*, 10 Colo. 495, 16 Pac. 210; *Railroad Co. v. Ryan*, 17 Colo. 98-101, 28 Pac. 79; *Railroad Co. v. Holmes*, 5 Colo. 197; *Davidson v. Tramway Co.*, 4 Colo. App. 283, 35 Pac. 920. In actions grounded on negligence, the general rule is that a plaintiff who is guilty of negligence which contributes to or is a direct cause of his injury may not recover; and, if the charge against defendant here was mere negligence, the court below, upon the admitted facts, ought to have directed a verdict in its favor. Were this not a case of an intentional or willful act or omission, but merely one where, notwithstanding the negligence of the plaintiff, the defendant was sought to be held responsible for the accident because it had a last clear opportunity of avoiding it, the

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question would be presented whether it was a fit occasion for the application of the doctrine of "last clear chance." Learned courts differ in the reasons given for enforcing it, and much confusion has arisen in the attempt to fasten a liability upon or give relief to a defendant in such circumstances. An interesting article upon this question is found in volume 8, Case and Comment, for April, 1902. But we are not dealing with that kind of a case. Here the alleged grievance was an intentional infliction of injury, and we think, by the great weight of authority, a plaintiff, though guilty of negligence, may still recover, if, after the discovery of his peril, defendant fails to exercise ordinary care to prevent the injury, if in fact such failure of defendant was its proximate or direct cause, and if, as said by this court in *Railway Co. v. Crisman*, 19 Colo. 30, 35, 34 Pac. 286, defendant was "also guilty of such conduct as implied an intent or willingness to cause the injury." *Transit Co. v. Dwyer*, 20 Colo. 132, 36 Pac. 1106, 2 Am. & Eng. R. Cas., N. S., 18, 301; *Railway Co. v. Crammer*, 4 Colo. 524. In the *Crisman* Case the element of willfulness seems to have been considered present, but there is some doubt about it as to the other two cases cited. However that may be, it is clear that the doctrine which we have announced applies to a case where willful or intentional injury is charged against a defendant. Yet it is to be always borne in mind that, if plaintiff's own negligence—being in point of time either prior, concurrent with, or subsequent to that of the defendant—turns out to be the sole proximate or direct cause of the injury, she is not entitled to recover, whatever the cause of action be. There was some evidence, which should have been submitted to the jury under appropriate instructions, upon these various propositions. *Beach, Contrib. Neg.* §§ 54-57. Assuming, then, that plaintiff was guilty of negligence, the pivotal question in the case is whether the accident might have been averted had defendant, after discovering plaintiff's peril, or after her peril might have been discovered by the exercise of ordinary care and diligence, used ordinary care to stop the train. In other words, was the conduct of the engineer in not stopping his train after he saw, or by the exercise of reasonable care and diligence might have seen, the plaintiff, such as to show an utter and wanton indifference to the consequences of his act or omission to act, and was such conduct the sole, proximate, and direct cause of the injury, or was plaintiff's negligence, continuing down to the moment of the collision, the sole, proximate cause? There are authorities which hold that the mere failure of an engineer to cause the bell attached to his engine to be rung, or the whistle to be sounded, is not of itself sufficient proof to establish a willful intent to cause injury, and such decision we think is right. And it is proper to add that the authorities hold that where an engineer sees an adult walking on the

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track in front of an approaching train, and knows of no reason, like deafness or drunkenness or undue prostration, that prevents him from acting, he is justified in presuming that the pedestrian will step off before a collision occurs.

4. Defendant's counsel strenuously insist, however, that a railroad company is not bound to take any precautions for the safety of trespassers, and that in no event may a trespasser recover from it for injuries inflicted while he is upon its private property, except at street crossings, unless it is guilty of a failure to exercise ordinary care after it actually discovers that the trespasser is in a position of peril. In other words, the contention is that, even though by the exercise of ordinary care the peril might have been discovered, yet if, as a matter of fact, actual knowledge of the trespasser's peril was not acquired by the company's servants in time to enable them by ordinary care to avert the accident, no recovery can be had. Undoubtedly a large number of able courts have so decided; but this court, in the case of *Railway Co. v. Dwyer*, supra, has at least foreshadowed a qualification of the general rule contended for by defendant. The direct question, however, was not then presented as to whether recovery was limited to cases where actual knowledge is shown; but we think the better rule in applying the doctrine of last clear chance, or in cases of willful act, is, as stated in 2 *Shear. & R. Neg.* § 484, that, if a defendant fails to see what he was bound to look for and ought to have seen, he is guilty of negligence. It is upon a somewhat similar principle that we have just held plaintiff guilty of negligence in not seeing the passenger train at the station when she says she looked for it. She ought to have seen it, and, if she had exercised reasonable care, would have seen it, and the fact that she did not will not relieve her from the results of her negligence. So, with respect to defendant, though its engineman did not see plaintiff upon the track in time to avert the accident, still, if, in the circumstances of this case, he ought to have seen her, and through some fault or neglect of his own did not, the result is the same as if he had seen her and did not stop his train, if with safety to his passengers he could have done so after actually seeing her.

By an enforcement of the strict rule, the judgment might be reversed, with instructions to the trial court to dismiss the action, for it was not established by proof, or submitted by the court upon the charges of the specific misconduct which the plaintiff stated in her complaint, but, rather, upon the alleged willful and wanton conduct of the engineer in not keeping a sufficient lookout for persons upon the track at this place. But both parties we think, by their conduct, have waived a strict compliance with the rules of pleading, and at least one, and possibly both, of them, supposed that a cause of action based upon the willful misconduct of defendant was pleaded.

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The judgment must be reversed because of rulings by the trial court opposed to the principles herein laid down; but we shall not, as requested by defendant, order the action dismissed, but will permit the complaint to be amended, if the plaintiff sees fit, and remand the cause for a new trial in accordance with the views herein expressed. Reversed.

ILLINOIS CENT. R. CO. v. GHOLSON.

(Court of Appeals of Kentucky, March 4, 1902.)

[66 S. W. Rep. 1022.]

Railroads—Negligent Killing of Live Stock.

Where a number of horses and mules were struck and killed by two trains running close together, and the engineer of the first train testified that the accident occurred on or directly after leaving a curve, and that he did not see the stock, or know of it, until he felt his locomotive strike it, the second engineer testifying that he saw an indistinct object 25 or 30 yards ahead, but before he could do more than apply the brakes he had struck the object, and the testimony for plaintiff tended to show that the stock had been running for a distance of several hundred yards before being struck, and might have been seen by the engineer for a distance of from 50 to 100 yards, the question of negligence was for the jury.

Appeal from circuit court, Ballard county.

"Not to be officially reported."

Action by R. L. Gholson against the Illinois Central Railroad Company to recover damages for the killing of live stock. Judgment for plaintiff, and defendant appeals. Affirmed.

Corbett & White and Pirtle & Trabue, for appellant.
Shelbourne & White, for appellee.

O'REAR, J. Two freight trains on appellant's railroad injured and killed eight horses and mules belonging to appellee on August 19, 1900. The trains were running close together, and the stock was killed and injured between 3 and 3:30 o'clock in the morning. The engineers each testified that the accident occurred on or directly after they came off a curve. The first one did not see the stock, or know of it, till he felt his locomotive strike it and smelled the blood. The second engineer saw an indistinct object 25 or 30 yards ahead, but before he could do more than apply the brakes he had struck the object. He did not see it plainly enough to know what it was, but from the odor of the flesh and blood upon his engine thought it was a horse or cow. The fireman each say they were engaged in firing their engines. The night was dark. For appellee it was shown by a number of witnesses that the horses, as were shown by the location of their carcasses, had been struck at different times, except two, which were probably struck at the same time. The carcasses were strewn for a distance of about 100 yards. These witnesses further testified that the tracks seen between and beside the

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rails showed that they were fresh horse and mule tracks, and that the stock had been running for a distance of several hundred yards before being struck. The accident occurred on a long fill. The headlights on these engines were in good condition, and would have shown far enough ahead to give warning of the presence of such obstructions for a distance of from 50 to 100 yards, at least. Yet they were not seen. We are of opinion that the verdict for appellee was clearly sustained by the evidence. The instructions given to the jury presented simply and fairly the question of negligence. We perceive no error in them; indeed, none is urged in argument. The amount of the verdict, measured by the evidence, is temperate.

The judgment is affirmed, with damages.

SOUTHERN RY. CO. v. BROCK.

(*Supreme Court of Georgia, June 10, 1902.*)

[42 S. E. Rep. 65.]

Action against Railroad for Killing Stock—Venue.

A judgment against a railroad company upon a suit for damages resulting from an injury to property, rendered in any other county than the one in which the cause of action originated, is "utterly void," except in cases where the suit is brought in the county where the principal office of the company is located, and it is shown that the company had no agent in the county where the cause of action originated. Civ. Code, § 2334.

Same—Same—Evidence.

Even if in the present case the evidence was sufficient to authorize a finding that the animal for the killing of which damages were claimed was killed by the agents and servants of the defendant, there was no sufficient evidence to authorize a finding that the injuries which resulted in the death of the animal were inflicted in the county in which the suit was brought; and it not appearing that the suit was brought in the county where the principal office of the defendant was located, and that there was no agent in the county in which the animal was killed, a verdict in favor of the plaintiff was unauthorized, and the court erred in not sustaining the certiorari upon the ground that the verdict was contrary to the evidence.

(Syllabus by the Court.)

Error from superior court, Whitfield county; A. W. Fite, Judge.

Action by A. Brock against the Southern Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

Shumate & Maddox, for plaintiff in error.

B. Z. Herndon and Jones & Martin, for defendant in error.

PER CURIAM. Judgment reversed.

LEWIS, J., absent on account of sickness.

SOUTHERN RY. CO. *v.* CAMP.*(Supreme Court of Georgia, June 7, 1902.)*

[42 S. E. Rep. 56.]

Railroads—Killing Stock—Evidence.*

The evidence in behalf of the plaintiff established a right to recover, and though the testimony of the defendant's witnesses, if credible, make out a complete defence, yet, as there was a conflict between their testimony and that of a witness for the plaintiff upon a material point,—the former swearing that the animal killed did not get upon the railroad track until the locomotive was within 10 or 15 feet of the place where the animal came upon the track, and the latter testifying that the animal was on the track when the train was 75 or 100 yards distant from it,—the verdict against the company was not unwarranted. In such a case the jury are authorized, because of the conflict, to reject the testimony in behalf of the defendant, and base their finding on that introduced by the plaintiff.

(Syllabus by the Court.)

Error from city court of Floyd county; John H. Reece, Judge.

Action by G. D. Camp against the Southern Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Shumate & Maddox, for plaintiff in error.

Fouche & Fouche and Harris, Chamlee & Harris, for defendant in error.

PER CURIAM. Judgment affirmed.

LEWIS, J., absent on account of sickness.

THACKER *v.* CHICAGO, I. & L. RY. CO.*(Supreme Court of Indiana, June 20, 1902.)*

[64 N. E. Rep. 605.]

Employers' Liability Act.

Burns' Rev. St. 1901, § 7083, subd. 4, providing that a railroad company shall be liable for injuries to its employees caused by the negligence of a fellow servant while performing a duty owed by the corporation to the employee injured, and while the latter is obeying an order from one having authority to direct, not only does not enlarge the company's common-law liability, but restricts it, so that the employee injured cannot recover unless he was obeying an order of a superior at the time of his injury.

Fellow Servants.†

A section foreman while transporting his men on hand cars to a place

*As to credibility of railroad employees as witnesses in actions against the company, see *Brunswick & W. R. Co. v. Wiggins* (Ga.), 22 Am. & Eng. R. Cas., N. S., 588, and foot-note.

†As to whether a section foreman is a fellow servant of the hands under him, see *Chattanooga Electric Ry. Co. v. Lawson* (Tenn.), 12 Am. & Eng. R. Cas., N. S., 669, and foot-note; *Rittenhouse v. Wilmington St. Ry. Co.* (N. Car.), 6 Am. & Eng. R. Cas., N. S., 784; *Omaha, etc., R. Co. v. Krayenbuhl* (Neb.), 4 Am. & Eng. R. Cas., N. S., 483.

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where they are to work does not act as a vice principal in giving an order to stop.

Same—Injury to Section Hand—Negligence of Section Foreman—Pleading.

A declaration in an action by a section hand against his employer for injuries caused by a fall from a hand car while he was being transported thereon to his work, which alleged that the foreman, who was on a car behind the one on which plaintiff was riding, ordered the front car to be stopped, and that the brakemen stopped it without warning plaintiff, as it was their duty to do, is insufficient on demurrer, even if the foreman was acting as vice principal in giving the order, for failing to charge the foreman with any negligence.

Employers' Liability Act—Proper Order Negligently Performed.

Under Burns' Rev. St. 1901, § 7083, subd. 3, making a railroad company liable to its employees for injuries resulting from the act or omission of any person done or made in obedience to the particular instructions given by any person delegated with the authority of the corporation in that behalf, the railroad company is not liable where the order is a proper one, but is negligently performed by a fellow servant receiving it.

Same—Negligence of Section Foreman—Pleading.

A declaration in an action by a section hand for injuries received by a fall from a hand car on which he was being carried to his work, which alleged that plaintiff was on the car pursuant to an order from his foreman, to which he was bound to conform; that while the car was going 20 miles per hour the foreman, who was on another car, negligently and without warning plaintiff, ordered the brakeman of the car plaintiff was on to stop it suddenly; that obedience to the order was, to the foreman's knowledge, calculated to increase plaintiff's hazard and to throw him off, and did throw him off and injure him; and that he had no means of knowing that the car was to be stopped as it was, or that the foreman would give such order,—sufficiently alleged negligence on the part of the foreman and injury to plaintiff while conforming to his order, within Burns' Rev. St. 1901, § 7083, subd. 2, making a railroad company liable for injuries to employees from the negligence of any other employee to whose order the injured employee at the time of his injury was bound to, and did, conform.

Appeal from circuit court, Monroe county; Wm. H. Martin, Judge.

Action by Charles Thacker against the Chicago, Indianapolis & Louisville Railway Company. From a judgment in favor of defendant, plaintiff appeals. Transferred from the appellate court under section 1337u, Burns' Rev. St. 1901 (Acts 1901, p. 590). Reversed.

Walter E. Hottel and East & East, for appellant.

E. C. Field and W. S. Kinnan, for appellee.

MONKS, J. Complaint by appellant for personal injuries, in four paragraphs. Demurrer to each paragraph for want of facts sustained. Appellant refusing to plead further, judgment was rendered against him. The assignments of error not waived call in question the action of the court in overruling the demurrer to the first, second, and fourth paragraphs of the complaint. Appellant was a section man engaged in the line of his duty with an extra gang of men running a hand car to Bryfogle, a station on appellee's road. One McGill was section foreman, and had ordered the men to make this

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trip for the purpose of doing work at said place. Appellant and the other men in the gang were working under the orders of said foreman. It required two hand cars to carry the men. Appellant, with others, was riding on the front hand car, and following this was another hand car, on which the foreman and other laborers were riding. The front car, on which appellant was riding, had two men who acted as brakemen, and who could check, stop, or control the movement of the hand car by pressing their feet on a brake; that it was the duty of said brakeman, when the signal was given by the foremen, McGill, to put on or take off the brake and otherwise control said car. In addition to the above, it is alleged in the first paragraph of the complaint that in approaching Bryfogle they were going down grade at a speed of 15 or 20 miles an hour, when "McGill gave a signal to said brakemen to stop; that it was the duty of said brakemen, and each of them, when said signal to stop was given, to notify those on the car of said signal, and give them time to catch hold of something or stay themselves in some way, but that when said signal to stop was given said brakemen, without giving any warning or notice of any kind, or before any warning or notice could be given, said brakemen at once threw on the brake in a careless and reckless manner, bringing said car to such a sudden stop that appellant was pitched violently forward off said hand car" and injured. Appellant says this action was brought under the employers' liability act, and that the first paragraph is founded on the fourth subdivision of section 7083, Burns' Rev. St. 1901 (section 5206s, Horner's Rev. St. 1901), which reads as follows: "That every railroad * * * shall be liable for damages for personal injuries suffered by any employee while in its service, the employee so injured being in the exercise of due care and diligence * * * Fourth. Where such injury was caused by the negligence of *any person in the service of said corporation who has charge of any signal, telegraph office, switch yard, shop, round house, locomotive engine, or train upon a railway*, or where such injury was caused by the negligence of any person, co-employee or fellow servant engaged in the same common service in any of the several departments of the service of any such corporation, the said person, co-employee or fellow servant at the time acting in the place and performing the duty of the corporation in that behalf, and the person so injured obeying or conforming to the order of some superior at the time of such injury, having authority to direct." Appellant concedes that said first paragraph would be bad at common law, because it shows that his injury was caused by the negligence of the brakemen, his fellow servants, but insists that the same is sufficient under that part of said subdivision not in italics. At common law a master owes certain duties to his servants which concern their safety, and if he intrusts such duties to one of his servants, who negligently performs the same, by reason of

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which another servant is injured without his fault, the master is liable therefor, because the servant to whom such duties are intrusted is, in the performance thereof, a vice principal, and not a fellow servant. A vice principal, therefore, is one who represents the master in the discharge of those duties which the master owes to his servants. If, however, the servant whose negligence caused the injury was not at the time discharging a duty which the master owed to his servants, but simply a duty which the servant owed to the master, he was a fellow servant with others engaged in the common business, and the master would not be liable for any injury inflicted upon such fellow servants by reason of his negligence. *Justice v. Pennsylvania Co.*, 130 Ind. 321, 325, 30 N. E. 303, 53 Am. & Eng. R. Cas. 604, and cases cited; *Hodges v. Wheel Co.*, 152 Ind. 680, 687, 688, 52 N. E. 391, 54 N. E. 383; and cases cited; *Robertson v. Railroad Co.*, 146 Ind. 486, 488, 45 N. E. 655; *Mitchell v. Robinson*, 80 Ind. 281, 284, 41 Am. Rep. 812; *Krueger v. Railroad Co.*, 111 Ind. 51, 52, 11 N. E. 957, 31 Am. & Eng. R. Cas. 329; *Coal Co. v. Young*, 117 Ind. 520, 522, 20 N. E. 423; 12 Am. & Eng. Enc. Law (2d Ed.) pp. 946, 948. In this state there is a clear distinction between a superior servant and a vice principal. A superior servant is generally one who has authority to direct and control other servants, and may or may not be charged with any of the duties which the master owes his servants. Whether or not one is a vice principal does not in any way depend upon his rank. *Justice v. Pennsylvania Co.*, *supra*; *Hodges v. Wheel Co.*, *supra*; *Robertson v. Railroad Co.*, *supra*; 12 Am. & Eng. Enc. Law (2d Ed.) App. 948, 949. Before the passage of said act, it was held as to most, if not all, of the persons described in that part of said fourth subdivision printed above in italics, for whose negligence railroads are made liable, that they did not perform any duty which a railroad owed its servants, and that they were, therefore, mere fellow servants, for whose negligence railroads were not liable. That part of said subdivision has, therefore, enlarged the class of vice principals. *Railroad Co. v. Little*, 149 Ind. 167, 48 N. E. 862; *Railway Co. v. Houlihan*, 157 Ind. 494, 499, 60 N. E. 943, 54 L. R. A. 787. It is evident, however, that the part of said subdivision upon which appellant bases his first paragraph of complaint only makes railroads liable for the negligence of such persons as are performing duties which it owes its servants in certain cases. Such persons were vice principals, and employees injured by their negligence in the discharge of such duties could recover therefor before said act was passed. It is clear that such part of said subdivision is the mere enactment of a liability which already existed at common law, and that the class of vice principals was not increased thereby. It is not as broad as the common-law liability, because the right to recover is limited to persons injured while obeying or conforming to the order of some superior at the time of the injury

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having power to direct. The right to recover for injuries caused by the negligence of vice principals is not so limited at common law. It follows that, if said appellant's first paragraph of complaint is not good at common law, which he conceded it is not, it is not good under the part of said fourth subdivision upon which he claims it is founded. It was held by this court in *Justice v. Pennsylvania Co.*, 130 Ind. 325, 326, 30 N. E. 304, 53 Am. & Eng. R. Cas. 604, that a section foreman of a railroad having power to employ and discharge section hands is a vice principal when employing and discharging such employees, but that he is a fellow servant in his control of such men after their employment. The court said in that case: "That a section foreman may be a vice principal is not doubted. In this case he was a vice principal in the matter of hiring and discharging hands, for the master owes it as a duty to exercise reasonable care not to employ any but careful men and to discharge those who prove to be negligent. In the hiring and discharging of the men he was in the performance, therefore, of a duty which the master owed to his servants, and was, while so engaged, a vice principal. But it was not so in transporting the men to and from their work. In the matter of moving the hand car and their tools to and from the locality at which they worked upon the track they were in the discharge of a duty which they owed the master, and were, therefore, fellow servants. *Wilson v. Railroad Co.*, 18 Ind. 226; *Railroad Co. v. Tindall*, 13 Ind. 366, 74 Am. Dec. 259; *Sullivan v. Railroad Co.*, 58 Ind. 26; *Gormley v. Railroad Co.*, 72 Ind. 31; *Robertson v. Railroad Co.*, 78 Ind. 77, 41 Am. Rep. 552; *Car Co. v. Parker*, 100 Ind. 181; *Railroad Co. v. Adams*, 105 Ind. 151, 5 N. E. 187; *Boyce v. Fitzpatrick*, 80 Ind. 526; *Capper v. Railroad Co.*, 103 Ind. 305, 2 N. E. 749." Even if McGill, the foreman, in giving the signal to stop the hand car, was performing a duty which the master owed its servants, and was, as to the same, a vice principal, yet no liability is shown by the allegations of said first paragraph, because no facts showing negligence on the part of said foreman are alleged therein. The court did not err in sustaining the demurrer to the first paragraph of complaint.

The second paragraph alleges the same facts as the first, but charges that the foreman, "McGill, gave the signal to said brakemen to put on brakes; that the brakemen in obedience to the particular instruction given by said foreman, McGill, who was delegated with the authority of the corporation in the behalf of said company, put on the brakes and brought the car to such a sudden stop that appellant was pitched violently out of said car" and injured; "that said injury resulted from the act of said brakemen done in obedience to the particular instruction given by said McGill, who was delegated with the authority of the corporation in that behalf." Appellant insists that said paragraph is sufficient under that part of

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the third subdivision of said section 7083, Burns' Rev. St. 1901 (section 5206s, Horner's Rev. St. 1901), which is as follows: "Where such injury resulted from the act or omission of any person done or made * * * in obedience to the particular instructions given by any person delegated with the authority of the corporation in that behalf." Said subdivision 3 is the same as clause 4 of section 1 of the English employers' liability act of 1880, and clause 4 of section 2590 of the Alabama employers' liability acts of 1885. What is obedience to particular instructions was considered in *Whatley v. Holloway*, 6 Times Law R. 190, s. c. 62 Law T. (N. S.) 639, 54 J. P. 645, decided in 1890. In that case one Ancliffe was employed by the defendant to attend to an engine and boiler. His duty was also to assist the plaintiff in working a circular saw, in doing which he was instructed not to neglect the engine. At the time of the accident, Ancliffe and the plaintiff were at work with the saw; the plaintiff feeding it with wood, Ancliffe at the other end receiving the wood as it came from the saw, and holding the same so as to steady it. A noise being heard from the engine indicating that it required attention, Ancliffe let the piece of wood he was holding go without warning. The result was that the piece of wood the plaintiff was holding was rendered unsteady, and the plaintiff's hand was knocked against the saw and injured. The jury found a verdict for the plaintiff, with £40 damages. The question was whether, under said subdivision 4, there was an act or omission done or made in obedience to particular instructions. The plaintiff contended that the instruction to Ancliffe not to neglect the engine was a particular instruction, obedience to which caused the accident. Defendant's contention was that no particular instruction within said subdivision had been given, and, if the instruction was held to be a particular one, that Ancliffe's act was merely the negligent act of a fellow servant, and not done in obedience to the instruction. On appeal the divisional court was in favor of the defendant's contention that the instruction given to Ancliffe was not a particular instruction within the meaning of the statute. For the purposes of the case, however, the court assumed that it was, and said, in substance, that the instruction to Ancliffe was not to neglect the engine; that this meant that he was to attend to the engine with due regard to the safety and lives of others, and not that he should look after the engine at all hazards without regard to the safety of others; that the instruction was a reasonable one; that the engine was to Ancliffe's first care, at the same time leaving his work in a proper and reasonable manner. If Ancliffe had waited a few seconds and given plaintiff notice before leaving that would not have been a disobedience to the instruction. Therefore, Ancliffe was not required by the instruction to do as he did. "The injury, therefore, was caused here, not by Ancliffe's obedience, but by his disobedience, to his instruc-

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tions." Judgment was accordingly rendered for the appellant. This was affirmed in the court of appeal, where L. J., said (6 Times Law R. 353, 354): "No doubt was required to attend to the engine, but the instructions did not require him, when it was necessary to attend to the engine, to leave the saw without giving his mate notice, which was impossible to so construe Ancliffe's instructions as requiring this,—that he must go away without giving notice to the plaintiff." This was the construction given said statute in 1890 by the English courts long before the statute was re-enacted in this state in 1893 as subdivision 3 of section 1 of the employers' liability act. *City of Laporte v. Fire Alarm Tel. Co.*, 146 Ind. 466, 469, 45 N. E. 686, 58 Am. St. Rep. 359; *Hilliker v. Railroad*, 86 Ind. 88, 52 N. E. 607, and authorities cited; *Conner*, 155 Ind. 484, 496, 58 N. E. 828, and authorities cited. In the second paragraph the right of McGill to give the signal to stop the hand car, and that it was given in a proper manner, is not questioned. Said signal, if it may be regarded as an instruction within the meaning of said subdivision 3, requires the brakemen to stop the hand car in such a manner as to endanger the lives of the persons riding the car, and that they should stop the car with a due regard to the safety of the persons mentioned. It is evident that if the brakemen, in response to the signal to stop, had stopped the car with a due regard to the lives of the persons on the car, without injuring them, it would not have been a disobedience to such signal. Said signal did not require the brakemen to stop the car in the manner they did. The injury was therefore caused, not by the brakemen's disobedience, but by their disobedience, to McGill's signal, as was said in *W. v. Holloway*, supra; and said second paragraph is not sufficient, therefore, sufficient under said subdivision 3. *Lau v. Brewer*, 113 Ala. 509, 518, 21 South. 415. It is not necessary, therefore, to determine whether or not the signal given by McGill to the brakemen to stop the car was a proper instruction, or whether he was delegated with the authority of the railroad in that behalf, within the meaning of subdivision 3.

Appellant contends that the fourth paragraph of section 1 is sufficient, under the second subdivision of section 1 of Burns' Rev. St. 1901 (section 52068, Horner's Rev. St. 1901, supra, which is as follows: "Where such injury results from the negligence of any person in the service of such railroad, to whose order or direction the injured employee was bound to conform and did conform at the time of the injury was bound to conform and did conform." This subdivision is substantially the same as subdivision 1 of the English employers' liability act of 1885. Appellant contends that no negligence is charged against McGill as for the violation of said fourth paragraph, and that, before appellant can

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under said subdivision 2, "the injury must have resulted (1) from the negligence of one clothed with authority to give the order to the injured servant; and (2) the injured employee must, at the time, have been conforming to such negligent order, and conforming because he was bound to do so; that no negligent order was given appellant. The case is simply one of a proper order given in a proper way, and through the negligence of a fellow servant of appellant in the execution of the order his injury resulted." Counsel for appellee are incorrect in their claim that the fourth paragraph of complaint does not charge any negligence against McGill, but only shows that the injury was caused by the negligence of the brakemen. Said fourth paragraph is the same as the first, except it is expressly averred that "McGill, the section foreman, negligently gave the brakemen on the front hand car the signal to stop the front hand car suddenly and quickly when the same was going at the speed of twenty miles per hour, without giving appellant and the other persons on the front of said car notice thereof; and that said brakemen complied with said signal and stopped said car suddenly and quickly, as it was their duty to do, and thereby appellant was thrown violently from the car and injured; that the obedience to said order to so stop said car would necessarily cause said car to stop suddenly, and would endanger the life and limb of this appellant and others so stationed on said front car; and to so stop said car while running at the rate of twenty miles per hour was calculated to greatly increase the danger and hazard to appellant, which said McGill well knew, and did increase the danger and hazard to him, and by reason of giving said order as herein set out appellant received his injuries; that he had no notice or knowledge, and no means of knowing, said hand car was to be stopped when it was, or that such order to stop was, or would be, given by said McGill, section foreman." It is also alleged in said paragraph that "McGill, section foreman, ordered said extra gang of men, including appellant, to go on hand cars over appellee's track to meet a gravel train for the purpose of unloading the gravel from the cars of said train; that appellant, in obedience to the orders of said McGill, in company with eight others of said extra gang, got on one hand car, and McGill and others of said extra gang got on another hand car, and started to meet said gravel train"; that appellant was bound to conform, and did conform, to said order of McGill, section foreman, in going upon said hand car to meet said gravel train. It is true, as a general rule, that a section foreman, in giving such signal, has the right to assume that the brakemen will obey the same intelligently, having a due regard to the safety of themselves and others; that they will execute such signals in such manner and with such precaution as not to endanger the life or limb of anyone, if that can reasonably be done without disobedience to the order. If it

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was the duty of the brakemen, when the signal to be given by McGill, to notify those on the car with the signal, in order to give them an opportunity to themselves, and the failure to give such notice, or negligence on the part of the brakemen, who, under circumstances, were the fellow servants of appellant, no injury, appellee was not liable. It is alleged, however, that the injury complained of was caused by the negligence of the section foreman. It is not necessary, as was held in *Railroad Co. v. Wagner*, 153 Ind. 420, 53 N. E. 928, that the "order or direction in said subsection be followed" but it is sufficient if the employee was bound to conform to the order or direction which he was conforming at the time of the injury, to the order or direction of the person whose negligence caused the injury. See *Ruegg, Empl. Liab.* (5th Ed.) 106, 107; *Bev. Empl. Liab.* (2d Ed.) pp. 152-161; *Dresser, Empl. Liab.* p. 308; *Waygood* [1892] 1 Q. B. 783, s. c. 8 Times Law R. 64-68; *question as to what kind of orders and directions issued to the employee in subdivision 2, and the connection that must exist between such "order or direction" to which the employee is bound to conform and is conforming when the injury occurred and the negligence of the person giving such order or direction, is discussed to some extent in the following authorities: Ruegg, Empl. Liab. (5th Ed.) pp. 98-105; Bev. Empl. Liab. (2d Ed.) pp. 152-161; Dresser, Empl. Liab. pp. 264-68; Railroad Co. v. Wagner, supra; Snowden v. Iron Co., 101 Ala. 309, 10, 22 L. R. A. 361. It was said in Railroad Co. v. Wagner, 153 Ind. 424, 53 N. E. 928: "The order to loose the car was the proximate cause of the plaintiff's injury. The defendant was both directing the plaintiff into the dangerous situation and he was bound to enter, and the ordering the train to loose upon him without warning, that constitutes the proximate wrong. See Wild v. Waygood [1892] 1 Q. B. 783, s. c. 8 Times Law R. 779; City Council v. H. v. Wallis, 3 Times Law R. 779; City Council v. H. Ala. 564, 14 South. 357."*

We have only considered the objections to the foregoing paragraph of complaint urged by appellee, as stated above, and it is clear that they are not tenable. The judgment is, therefore, affirmed as to the first, second, and third paragraphs of complaint, and reversed as to the fourth, with instructions to overrule appellee's demurrer thereto, and for further proceedings not inconsistent with this opinion.

TAYLOR v. NEVADA-CALIFORNIA-OREGON RY. CO.

(Supreme Court of Nevada, July 31, 1902.)

[69 Pac. Rep. 858.]

Master and Servant—Defective Machinery—Right to Continue Work Relying on Promise to Repair.

If a servant, on noting a defect in machinery operated by him, notifies his master, and receives his promise to repair it, he may continue to operate such machinery for a reasonable time without thereby assuming the risks incident to the defect, provided the danger therefrom is not so imminent that a person of ordinary prudence would refuse to continue the work.

Same—Same.

A railroad engineer notified his employer that his engine tender, which was practically new, was rolling too much on its trucks, and that it was getting dangerous, and received a promise that the defect would be remedied. Four days later he again gave notice that the defect ought to be remedied at once, and received a similar promise. The defect consisted of a gradually increasing weakness of the tender's springs, which, no repairs being made, finally resulted, five days after the second notice, in the derailment of the engine and plaintiff's injury, the front bolster of the tender having caught in the front truck, and lifted it from the track: *held*, that the question as to whether the danger was so imminent as to require plaintiff to discontinue work notwithstanding the promises to repair was for the jury.

Same—Same.

Whether plaintiff continued in the service after such a period of time had expired after the promises to repair as would preclude all reasonable expectation that such promises would be fulfilled was a question for the jury.

Excessive Verdict.

In an action for personal injuries plaintiff's evidence showed that he was 36 years old, and earning \$100 per month, when injured; and that his injuries consisted of a blow on the head, causing partial deafness, a burn on the right leg, a burn and bruise on the arm, two ribs broken from the sternum, a depressed lung, a permanently painful strain and separation of the muscular fibers of the back, rendering him permanently weak, and causing lateral curvature of the spine, and permanently disabling him from following his avocation or performing ordinary manual labor. Defendant's evidence tended to contradict plaintiff's as to the extent of the injuries: *held*, that a verdict of \$15,500 was not so excessive as to show any improper motive or bias on the part of the jury.

Fitzgerald, J., dissenting.

Appeal from district court, Washoe county; W. D. Jones, Judge.

Action by Andrew J. Taylor against the Nevada-California-Oregon Railway Company. From a judgment in favor of plaintiff, and from an order denying a new trial, defendant appeals. Affirmed.

W. E. F. Deal and E. R. Dodge, for appellant.

Torreyson & Summerfield and F. H. Norcross, for respondent.

MASSEY, C. J. This action was brought by the respondent to recover from appellant damages for personal injuries, physical pain, and mental anguish caused and alleged to have

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been suffered by him in a wreck while in the employ of the appellant as engineer on one of its engines on the 1st of January, 1900, of which respondent was in charge at the time. The material averments of the complaint, briefly stated, are that on or about the 15th day of January, 1900, while respondent, as a locomotive engineer, he discovered that his engine was in need of repair by reason of the fact that the spring connecting with the bolsters supporting the tank on the tender had become weakened from use, so that the tank would be liable to roll from side to side when the engine was in motion; that upon discovering the condition of the spring, he notified E. Gest, the general manager of appellant, of the condition, and the effect thereof, and requested him to have them repaired; that about the same time he gave notice to and made the same request of E. Smith, agent and master of transportation; also at the same time notified Smith of what was necessary to remedy the defect, namely, to fasten pieces of iron upon the ends of the tank so as to prevent the tank from rolling, and by attaching chains, one at each corner of the truck, to prevent the tank from turning under the tender. Thereupon Gest advised and informed respondent that the engine would be repaired as requested. Shortly thereafter, and on the 30th day of January, 1900, while respondent was running the engine, on account of the defect, the tank rolled to such an extent that the front bolster of the tender caught in the frame of the tender, the tender in such a way that when the tank rolled in the opposite direction it lifted the truck from the track, so that the truck turned under the tender, causing a derailment of the engine, throwing it over an embankment, and throwing respondent off from the engine so that he fell beneath a portion of the engine and was injured to the extent of having two ribs on the left side broken and crushed into the left lung, the muscles of the right arm bruised and burned, a blow received upon the head causing the right ear to become affected, so that it was necessary to lance the drum thereof; that the injury was caused to respondent by reason of the negligence of appellant in failing to repair after being notified by respondent of the defect. The answer of the appellant put in issue all the material allegations of the complaint, and, in addition, set up other defenses not necessary to be stated, as the facts and questions are involved in this appeal under the same. The case was tried before a jury, and a verdict in favor of the appellant was returned for \$15,500 damages. From the judgment rendered thereon, and from the order denying appellant a new trial, this appeal was taken.

The material facts controlling the questions made in this appeal under the assignment of errors are as follows: That respondent, at the time of the trial, was 37 years old. At a period of 15 years preceding he was a locomotive engineer continuously in the employment of the appellant.

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about the —— day of January, 1900, he discovered that the tank of the tender of the locomotive which he was running was rolling from side to side, caused by a gradual weakening of the springs under it from use, and that there was danger that the bolster supporting the tank would catch under the arch bar of the truck, and the tank rolling in the opposite direction would lift the truck from the track and derail the tender. On or about the 21st of January, 1900, respondent called the attention of the train master and general manager of the appellant to the defect, and at the same time explained what was necessary to remedy it. The train master at that time informed respondent that he would see the general manager, and have it fixed. It required two days to make a trip over appellant's road from Reno and return. On or about January 25, 1900, the respondent went to the office of appellant's general manager, and notified him that the tank was rolling too much, and that it ought to be fixed right away. The general manager informed him that he would have the needed repairs made right away. Relying upon the promises of the officers of appellant, the respondent continued to run his locomotive until the 30th day of January, 1900, at which time, on his return trip to Reno, when coming down a grade upon a curve in the road at the usual rate of speed, the tender was derailed from the defect, the engine thereby thrown from the track over an embankment and upon the respondent, inflicting the injuries complained of. The following injuries to respondent were occasioned in the wreck: A blow upon his head, causing almost deafness of a permanent character in his right ear; a burn upon his right leg; a burn upon his right arm; two ribs broken, detached from the sternum, and depressed upon the left lung; a permanently painful sprain and separation of the muscular fibers of the back, rendering it permanently weak, causing lateral curvature of the spinal column, and permanently disabling respondent from following his avocation of locomotive engineer or performing ordinary manual labor. There was evidence before the jury tending to show that respondent's hearing would gradually grow worse, and that the injury to the muscles of the back would cause continuous pain in the future. There was also evidence tending to show that respondent's earning capacity as a locomotive engineer was about \$100 per month. The engine and tender in use at the time of the wreck were practically new, having been in use since the 13th day of December preceding the accident.

When the cause was called for trial, the appellant applied to the court for a continuance. The application was based upon the absence of a witness, who was sick. The refusal of the court to grant a continuance has been assigned as error. It appears from the record that the witness on account of whose absence the continuance was sought was not present when the accident causing respondent's injuries happened, and was

not even at that time within this state. His knowledge of the facts expected to be proven by him as set out in the affidavit in support of the motion could have been based on hearsay alone, and such testimony was not even admissible. The other testimony of the absent witness, relative to the incompetency of the respondent to properly and safely run, operate, and control a locomotive engine with cars thereto attached with compressed air by means of a Westinghouse air brake, was not material to any issue raised by the pleadings (Comp. Laws 1900, § 3255); and, if material, the record shows that such expert testimony had been supplied by other witnesses familiar with such mechanical appliances. It appearing that the refusal to grant the motion was an abuse of discretion in the refusal to grant the motion, the action of the trial court thereon must be sustained.

Upon the facts stated, the appellant contends that the continuance in the service by respondent notwithstanding the promise of appellant to repair as a matter of law constitutes contributory negligence as to defeat his claim for damages. For this reason it is earnestly insisted by appellant that the verdict is against both the law and the evidence. It may be true that it is the duty of the court in a proper case, upon the facts found, to declare as a matter of law that there was such contributory negligence as would relieve the master of all legal liability, yet such rule should be applied only in cases where, from the facts found, such inferences as are drawn. The general rule applicable to cases of this character, established by the great weight of authority, is that the servant, noting a defect in the machinery, coming to the master of such defect, who promises that such defect will be remedied, the servant may, in reliance upon the promise, continue in the service for a reasonable time thereafter without thereby assuming the risk, provided the danger is so imminent and immediate a character that a person of ordinary prudence would refuse to continue in the service. See *Stephens v. Railroad Co.*, 100 U. S. 215, 25 L. Ed. 612; *Stephens v. Railroad Co.*, 73 Wis. 404, 41 N. W. 337, 9 Am. St. Rep. 8; *Manufacturing Co. v. Morrissey*, 40 Ohio St. 150, 48 Am. Rep. 1; *Laning v. Railroad Co.*, 49 N. Y. 521, 10 Am. Rep. 412; *Terson v. Railroad Co.*, 76 Pa. 389, 18 Am. Rep. 412; *v. Iron Works*, 62 Mo. 35; *Greenleaf v. Railroad Co.*, 114 Ind. 52; *Railway Co. v. Watson*, 114 Ind. 20, 14 N. E. 7; *E. 824*, 5 Am. St. Rep. 578; *Railway Co. v. Ott*, 111 Ind. 564, 38 N. E. 842, 39 N. E. 529; *Marsh v. Chickering*, 101 N. Y. 396, 5 N. E. 56; *Lyttle v. Railroad Co.*, 84 Mich. 1, 44 N. W. 571; *Furnace Co. v. Abend*, 107 Ill. 44, 47 N. E. 425; *Linch v. Manufacturing Co.*, 143 Mass. 206, 9 N. E. 425; *Railroad Co. v. Bingle*, 91 Tex. 287, 42 S. W. 971; *Railroad Co. (C. C.)* 15 Fed. 205. Upon the facts above cited is also based the general rule that the

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which the servant is justified in continuing in the service in reliance upon such promise without assuming the risk is such a period as would not preclude all reasonable expectation that the promise might be kept, and this is ordinarily a question for the jury. We cannot, therefore, hold, as a matter of law, neither are we able to say as a matter of fact, upon this record, as against the verdict of the jury, that the danger was so imminent and immediate that the respondent, as a prudent man, should have refused to continue in the service notwithstanding appellant's promise to repair. As a matter of fact, the tank set up on springs, when filled with water and fuel, would necessarily roll to some extent when running upon the road. The tender was new, and had been used only a few weeks before the accident. The rolling of the tank was the result of the gradual weakening of the springs from use. When respondent first called the attention of appellant's officers to the defect, it was only "getting dangerous." That the danger was not imminent and immediate at that time appears from the fact that he continued to run the engine and tender without accident. Even after he thought it was rolling too much, and had notified appellant's officials on the 25th day of January, he continued to run it without accident. The danger, therefore, at the time the promise was made, was not imminent and immediate, but, measured by the defect shown, was progressively dangerous. It will not do to say that because respondent knew the machinery was getting dangerous, and because the accident did happen, as a matter of law and a matter of fact the danger was immediate and imminent. To so hold would absolutely destroy the legal effect of the master's promise under the rule stated. *Conroy v. Iron Works*, 6 Mo. App. 102. Under the facts of this record it was for the jury to say, under the rule stated, whether the danger was so imminent and immediate that the respondent, as a reasonably prudent man, would have refused to continue in the service notwithstanding appellant's promise to repair, and whether he did continue under such promise such a period of time as to preclude all reasonable expectation that the promise would be kept.

It is next urged by appellant that the damages awarded are so excessive as to appear to have been given under the influence of prejudice. There was evidence showing that as the result of the accident the respondent, who was about 36 years of age, received a blow upon his head, causing permanent partial deafness of the ear, a burn upon his right leg, a burn and bruise upon his arm, two ribs broken from the sternum and depressed upon the lung, a permanently painful strain and separation of the muscular fibers of the back, rendering it permanently weak, and causing a lateral curvature of the spinal column, permanently disabling respondent from following his avocation as a locomotive engineer, or performing ordinary manual labor. There was also evidence tending to

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show his earning capacity as a locomotive engineer. was justified in taking into consideration all the estimating the amount of damages, notwithstanding evidence tending to show that the injuries were extensive, permanent, nor painful as claimed by r "There being no absolute fixed legal rule of con appellate courts ought not to interfere with the ver it clearly appears that there has been such a mis principles upon which the damages were estimate improper motive or bias indicating passion or prej the part of the jury." *Solen v. Railroad Co.*, 1 Taking all these facts into consideration, we cann it clearly appears that there has been such a mis principles upon which the damages were estimate improper motive or bias indicating passion or prej the part of the jury. "The amount of the verdict perhaps greater than we would have given—is opinion, inconsistent with the exercise of an hones upon the part of the jury, whose special province determine this question." *Solen v. Railroad Co.*,

An examination of the other assignments rela exclusion and admission of evidence convinces us are without merit, and therefore require no not opinion.

The judgment and order appealed from are affir BELKNAP, J., concurs.

FITZGERALD, J. I dissent. In two instances were committed at the trial: (1) Appellant's mo continuance should have been granted, the showing being sufficient. The case cited in the prevailing wit, *Choate v. Mining Co.*, 1 Nev. 73, is against, in favor of, the doctrine it is cited to support. And (2) instances appellant's testimony was erroneously rule

SOUTHERN RY. CO. v. BUNT.

(*Supreme Court of Alabama, Feb. 13, 1902.*)

[32 So. Rep. 507.]

Injury to Servant—Propelling Car against Other Cars—W Pleading.*

A complaint alleging that an engineer wantonly or i

*See generally, *Louisville & N. R. Co. v. Brown* (Ala.) Eng. R. Cas., N. S., 794, 802 et seq.; *Memphis & C. R. Co.* (Ala.), 23 Am. & Eng. R. Cas., N. S., 683, and foot-note, 68; *Missouri Pac. Ry. Co. (Mo.)*, 21 Am. & Eng. R. Cas., N. S., 581; *Tanner v. Missouri Pac. Ry. Co. (Ala.)*, 20 Am. & Eng. R. Cas., N. S., 809; *Southern Ry. Co. v. Bush* (Ala.), 19 Am. & Eng. R. Cas., N. S., 46; *Highland Ave. & B. R. Co. v. Robinson* (Ala.) & Eng. R. Cas., N. S., 357; *Southern Ry. Co. v. Prather* (Ala.) & Eng. R. Cas., N. S., 832, and note; *Ullrich v. Cleveland, L. Ry. Co. (Ind.)*, 13 Am. & Eng. R. Cas., N. S., 783.

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caused or allowed his engine to propel a car against other cars with too great force, "with knowledge or notice" that plaintiff was between the cars, and in great danger from the car being so propelled, does not state a cause of action for wantonness.

Same—Wantonness—Exemplary Damages.

Under Code, § 1749, providing that, when a personal injury is received by a servant in the service of the master, the master is liable to answer in damages in certain cases as if the servant were a stranger, a master is liable to exemplary damages for wanton injury to a servant where death does not ensue.

Appeal from circuit court, Jefferson county; A. A. Coleman, Judge.

Action for personal injuries by John B. Bunt against the Southern Railway Company. From a judgment for plaintiff, defendant appeals. Reversed.

After the introduction of all the evidence, the bill of exceptions contains the following recital: "Counsel for the plaintiff stated to the court and jury that they did not claim a recovery in this cause upon the first, second, third, fourth, or sixth counts of the complaint, but only claimed a recovery on the fifth count of complaint, charging wanton negligence or intentional injury to the plaintiff by Sam Watkins, who was the engineer of the engine attached to the train by which the plaintiff was injured." The defendant requested the court to give, among others, the following written charges, and separately excepted to the court's refusal to give each of them as asked: "(1) The court charges the jury that, if they believe all the evidence in this case, they must find a verdict for the defendant." "(8) The court charges the jury that, if they should find a verdict for the plaintiff, they can only award him actual damages. Plaintiff in this case is not entitled to vindictive or punitive damages." There were verdict and judgment for the plaintiff. The defendant appeals, and assigns as error the several rulings of the trial court to which exceptions were reserved.

Smith & Weatherly, for appellant.

Bowman & Harsh, for appellee.

DOWDELL, J. The appellee, John B. Bunt, sued the appellant railroad company to recover damages for personal injuries sustained by him while in the employment and service of said railroad company as a brakeman. The complaint contained six counts, all of which charged simple negligence, except the fifth and sixth, in which it was attempted to charge wantonness. Upon the conclusion of the evidence in the case the plaintiff stated to the court and jury that he would not claim a recovery on any of the counts in the complaint except the fifth count. The abandonment by the plaintiff of all the counts in the complaint except the fifth eliminates from consideration the rulings of the court relating to the counts of the complaint thus abandoned, so that, if there was error in the first instance in the rulings upon demurrers, such errors

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were rendered harmless by the action of the plaintiff. His announcement of the abandonment of all of the other counts in the complaint except the fifth, for all purposes of the trial, was in its effect the equivalent of an amendment of the complaint by striking out all of said abandoned counts. *Iron Co. v. Andrews*, 114 Ala. 243, 21 South. 440. The question of error without injury, as here presented, is different from that presented in the case of *Railroad Co. v. Weems*, 97 Ala. 270, 12 South. 186, where the complaint contained but one count, in which several different causes of action were laid. There was no abandonment in that case of any of the causes of action laid in the complaint by the plaintiff, and the reasoning there stated as to what pleas the defendant might have filed, if but one cause of action had been laid and relied on in the complaint, is not applicable here, as in the form of pleading here adopted the defendant was in no wise prejudiced as to any defense which might have been set up to the fifth count; and we think the rule as laid down in *Iron Co. v. Andrews*, *supra*, controls in the present case.

The fifth count, as originally framed, was demurred to, and demurrer confessed, and thereupon it was amended; and as amended it averred that "the engineer of said engine wantonly or intentionally caused or allowed said engine to propel said car against said other car with too great force, with *knowledge or notice* [italics are ours] that plaintiff was between said cars, and in great danger from said car being propelled against said other car with such force." The averment in this count in the alternative, "with knowledge or notice," rendered it bad, as counting on wantonness. Wantonness in the doing of, or omission to do, an act, the probable result of which will be to injure, can only be predicated upon actual knowledge or existing conditions attending the act or omission that causes the injury. Notice in such cases is not the equivalent of actual knowledge. *Brown v. Railroad Co.*, 111 Ala. 275, 19 South. 1001, 14 Am. & Eng. R. Cas. 794. In *Railroad Co. v. Martin*, 117 Ala. 367, 23 South. 231, it was said: "Unless there was a purpose to inflict the injury, it cannot be said to have been intentionally done; and unless an act is done, or omitted to be done, under circumstances and conditions known to the person, that his conduct is likely, or probably will result in injury, and through reckless indifference to consequences he consciously and intentionally does a wrongful act, or omits an act, the injury cannot be said to be wantonly inflicted. These principles have been frequently declared by this court." In *Glass v. Railroad Co.*, 94 Ala. 581, 10 South. 215, again speaking of what constitutes wantonness and intention to do wrong on the part of the employees of a railroad company, it was said: "This wantonness and intention to do wrong can never be imputed to them unless they actually know—not merely ought to know—the perilous position of the person on the track, and,

with such knowledge, fail to resort to every reasonable effort to avert the disastrous consequences." To the same effect are the following cases: *Railway Co. v. Lee*, 92 Ala. 262, 9 South. 230; *Railway Co. v. Vaughan*, 93 Ala. 209, 9 South. 468, 30 Am. St. Rep. 50; *Railroad Co. v. Vance*, 93 Ala. 144, 9 South. 574; *Railway Co. v. Ross*, 100 Ala. 490, 14 South. 282; *Railroad Co. v. Banks*, 104 Ala. 508, 16 South. 547; *Railroad Co. v. Burgess*, 114 Ala. 587, 22 South. 169; *Id.*, 116 Ala. 509, 22 South. 913; *Railroad Co. v. Anchors*, 114 Ala. 492, 22 South. 279, 62 Am. St. Rep. 116; *Railroad Co. v. Moore*, 116 Ala. 642, 22 South. 900; *Electric Co. v. Bowers*, 110 Ala. 328, 20 South. 345; *Stringer v. Railroad Co.*, 99 Ala. 397, 13 South. 75; *Railroad Co. v. Richards*, 100 Ala. 365, 13 South. 944; *Railroad Co. v. Hall*, 105 Ala. 599, 17 South. 176; *Burke v. Railroad Co. (Ala.)* 26 South. 947. If the words "or notice," which are stated in the alternative, should be eliminated, the count as it would then stand would be a good count for wantonness. But when the averment is made in the alternative that the engineer caused the car to be propelled with knowledge or notice that the plaintiff was between the cars, "notice" not being the equivalent of "knowledge," it does not affirm that he did the act with knowledge of the plaintiff's situation, nor does it affirm that he did the act with notice of the plaintiff's situation. In other words, the averment, as it stands, in the disjunctive, embraces two different causes of action, and affirms neither, but merely that it is one or the other. *Tinney v. Railroad Co. (Ala.)* 30 South. 623; *Porter v. Hermann*, 8 Cal. 619. It follows that the fifth count of the complaint upon which the trial was had fails to state a cause of action, and, failing to state a cause of action, will not support a judgment.

As to the question of the measure of damages in such case (that is, as to whether exemplary or punitive damages may be awarded in an action under the statute where death does not ensue), we think there can be no doubt that such damages are authorized by the statute. The statute provides as follows (Code, § 1749): "When a personal injury is received by a servant or employee in the service or business of the master or employer, the master or employer is liable to answer in damages to such servant or employee, as if he were a stranger, and not engaged in such service or employment, in the cases following." It is quite clear from this language that as to the measure of damages the employee is put upon the same footing as if he were a stranger. In construing this statute, in connection with section 1751 of the Code, in cases where death results from the injury inflicted, a different rule as to recoverable damages has been established by this court. The right of action in such cases survives only by virtue of section 1751, and no one can sue except the personal representative. In *Railroad Co. v. Orr*, 91 Ala. 552, 8 South. 363, it was said: "The theory of the statute is that those for whom compensa-

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tion is provided have a pecuniary interest in the life of the person killed, and consequently the amount of the recovery is limited to the amount of such interest. These precedents furnish a correct exposition of our statute, and consequently we declare that under the provision of section 2559 of the Code [which is the same as section 1751 of the present Code] neither exemplary nor vindictive damages are recoverable.

* * * The amount of the compensation being limited to the pecuniary injury, nothing can be allowed on account of the pain and suffering of the deceased before his death, or the grief and distress of his family, or loss of his society. This is the same doctrine as to measure of damages in case of death was laid down by this court in the case of Railroad v. Trammell, 93 Ala. 350, 9 South. 870. The several sections of this statute, when taken together, make it quite clear that a different rule as to the measure of damages was applied where death ensued, from that where death does not result from the injury.

The judgment of the circuit court is reversed, and the cause is remanded.

ARKANSAS CENT. R. CO. *et al.* v. JACKSON.

(*Supreme Court of Arkansas, March 22, 1902.*)

[67 S. W. Rep. 757.]

Injury to Brakeman—Unballasted Switch Track—Assumption of Duty.

A brakeman, though knowing that the tracks of his employer, which he was hired to brake, were not ballasted, and therefore the risk as to such tracks, does not assume such risk where he makes a coupling on a switch track of another road, he not knowing the condition, and having a right to presume that it was in proper condition.

Appeal from circuit court, Sebastian county; *Sebastian* vs. *Rowe*, Judge.

Action by W. L. Jackson against the Arkansas Cent. R. Co. and William Blair, receiver of said company, for damages. Judgment for plaintiff, and defendants appeal. Affirmed.

W. L. Jackson, the appellee, a brakeman on the Arkansas Cent. R. Co., brought this action against the appellants, and recovered damages for the loss of a finger in the sum of \$750. He was retained while coupling cars on a switch or spur track of the St. Louis, Iron Mountain & Southern Railway, near the town of Ft. Smith. The complaint alleged, in substance,

*See generally, *Louisville & N. R. Co. v. Bowcock* (Ky.), 19 Am. & Eng. R. Cas., N. S., 421, and note, 428 et seq.; *Lake Erie & Western R. Co. v. Wilson* (Ill.), 20 Am. & Eng. R. Cas., N. S., 164, and foot-note; *Louisville & N. R. Co. (Ky.)*, 19 Am. & Eng. R. Cas., N. S., 421; *Wilkie v. Raleigh & C. F. R. Co.* (N. Car.), 19 Am. & Eng. R. Cas., N. S., 295; *West v. Southern Pac. Co.* (C. C. A.), 11 Am. & Eng. R. Cas., N. S., 447; *Illinois Cent. R. Co. v. Sanders* (Ill.), 11 Am. & Eng. R. Cas., N. S., 861.

through an arrangement between the receiver and the St. Louis, Iron Mountain & Southern Railway Company, the receiver had secured the use of the terminal facilities of the latter road in the city of Ft. Smith, and was using the same, under their agreement, at the time the plaintiff was injured; that in the yards was a spur or switch track, which had been negligently constructed and maintained, in that the same was not ballasted,—that is, that the ties of said switch track were laid on the ground, and the iron rails on the ties, without any dirt or other material thrown between the ties so as to fill the spaces between them; that the receiver was using the said unballasted switch track in operating said road, and that while so using the same the plaintiff was directed by the conductor to make a coupling of a certain car standing on said switch track with the train, which plaintiff proceeded to do, the plaintiff never having been engaged in breaking on said switch track before, and not knowing or being informed of its condition or that it was unballasted, and that, in making said coupling, plaintiff, without negligence on his part, stepped on and fell from the edge of one of the ties into the unballasted space between the ties, which caused his left hand to be caught between the drawheads of the cars he was attempting to couple, and terribly mashed, bruised, and lacerated, and part of the thumb and two fingers were cut off, and plaintiff suffered then and for a long time thereafter great agony and pain therefrom, and that the use of his hand had been materially impaired for life; and plaintiff claims \$5,000 damages. Defendants answered, and denied the allegations of the complaint, and charged the plaintiff with contributory negligence. The testimony tended to show that the Arkansas Central Railroad was in the hands of Blair, receiver, and being operated by him, and that it was in an unfinished condition, and that plaintiff was a brakeman on that road; that he knew that that road was unballasted, and accepted employment on it as a brakeman with knowledge of its condition; that plaintiff's injury occurred at about 10 o'clock a. m. His statement is that the train stopped at this spur or switch track, before it came into the depot at Ft. Smith, to set out some cars; that the engineer pulled the cars forward, another brakeman opened the switch, and he went back up the spur track to couple the cars onto some other cars which were standing on this spur track; that the cars which were being set out came back slowly, approaching the stationary cars, when he stepped in to make the coupling, and that his foot dropped into a hole between the ties, which caused him to fall, and in falling he threw his hand between the couplers, and his hand was mashed, causing the loss of his fingers; that he did not know and had not been informed of the condition of that track. The space into which he says his foot fell was 16 to 18 inches wide, 6 inches deep, and 8 feet long. He says that weeds covered the track there, so that he could not see.

There was testimony tending to show that plaintiff occupied a wrong position in attempting to couple the cars; that is, that he faced the wrong way, and used the left hand instead of the right.

The court gave the following instructions on behalf of the plaintiff: "(1) The use of a railroad track by one who is not the owner of it makes the party using it responsible to his employees precisely as if he had owned it. (2) It was the duty of the defendants to exercise ordinary care and diligence to provide a reasonably safe track at this place for the use of the plaintiff, and if they failed to perform that duty, and plaintiff was injured by reason of such failure, then the plaintiff may recover, unless he was guilty of negligence which contributed to his injury, or knew, or ought to have known, of the defect of the track before attempting to use it. * * * (3½) If, under all the circumstances which surrounded the plaintiff at the time of the accident, he ought to have observed and comprehended the danger of an unballasted track, if the same was unballasted, before using it, then he assumed the risk in that condition, and cannot recover. The fact that he might know of the defect, or that he had means of knowing it, will not preclude him from recovery, unless he did in fact know them, or in the exercise of ordinary care ought to have known of them. (4) The plaintiff was not bound to inspect this track before using it, but had the right to rely upon his employer for the performance of his duty in that behalf, as hereinbefore outlined; and if you find that the track was unballasted when it should have been, and on this account was unsafe, and that the plaintiff, in the exercise of ordinary care and prudence, did not observe its condition before attempting to use it, then he did not assume the risk of its condition, and may recover for an injury caused by such want of ballast. * * * (6) If you find for the plaintiff, you will give him such damages as will be a fair and just compensation for the pecuniary loss which he incurred as a result of his injury, and also for all his suffering as a result of his injury. In estimating his losses, you will take into consideration his age, habits, and earning capacity at the time he was injured, the time lost by reason of his injury, and the decreased earning capacity for the future, if you find a decrease in that respect. For his suffering there is no fixed rule of law, and you will give him such a sum as in your good judgment, honestly exercised, you believe will compensate him for the mental and physical pain and suffering at the time of the injury and afterwards, including any mental anguish and mortification and any physical inconvenience he may suffer in the future by reason of the mutilation of his hand." To the giving of each one of these instructions the defendants objected, and saved their several exceptions. Several instructions asked by the defendants were given, and several asked by them were refused, and the defendants excepted to the one given for plaintiff, and to the

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refusal of those of defendants refused. Motion for new trial overruled, and defendants excepted and appealed.

Oscar L. Miles, for appellants.

Mechem & Bryant, for appellee.

HUGHES, J. (after stating the facts). The appellants contend that having been employed to brake cars on the Arkansas Central, and knowing that its track was not ballasted or filled in between the ties, he must be held to have assumed the risk ordinarily incident to his employment. But the injury did not occur on the Arkansas Central Railroad, but on a switch or spur track of the Iron Mountain Railway, which might reasonably have been supposed to be properly ballasted in its switch yards. The appellee had a right to rely upon this having been done, as it was the duty the master owed his servants. He was obliged to furnish them a reasonably safe place in which to exercise their employment. *Railway Co. v. Leverett*, 48 Ark. 333, 3 S. W. 50, 3 Am. St. Rep. 230. The evidence shows that it was the custom of railroads to have such tracks ballasted; that brakemen do not anticipate that they will be unballasted. The company or receiver was liable for using an unballasted track of another road, if injury occurred by reason thereof. *Railway Co. v. Cagle*, 53 Ark. 347, 14 S. W. 89. The law requires a railroad company to furnish a reasonably safe track inside the switching limits, where switching is required to be done. *Railroad Co. v. Morrissey*, 177 Ill. 376, 52 N. E. 299, 12 Am. & Eng. R. Cas., N. S., 624; *Railroad Co. v. Cozby*, 174 Ill. 109, 50 N. E. 1011; *Railroad Co. v. Moseley*, 6 C. C. A. 225, 56 Fed. 1009; *Hollenbeck v. Railroad Co.* (Mo. Sup.) 8 Am. & Eng. R. Cas., N. S., 277, 38 S. W. 723. The appellee did not assume the risk of danger arising from defendant's failure to perform its duty; this was not in the contract of service. *Leverett Case*.

The question of plaintiff's contributory negligence was for the jury, and was left to them by the instructions. We find no reversible error in the instructions. The damages are not excessive.

The judgment is affirmed.

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(*Court of Errors and Appeals of New Jersey, June 16, 1902.*)

[52 Atl. Rep. 634.]

Duty to Employee with Respect to Roadbed.*

As between a railroad company and such of its employees as are required, in the performance of their duties, to travel upon its trains, the

*See *Chicago, B. & Q. R. Co. v. Oyster* (Neb.), 12 Am. & Eng. R. Cas., N. S., 655, and note, 668; *Chesapeake & N. R. Co. v. Venable* (Ky.), 21 Am. & Eng. R. Cas., N. S., 449; *Louisville & N. R. Co. v. Ross* (Ky.), 17 Am. & Eng. R. Cas., N. S., 432.

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company is bound to exercise reasonable care to so construct and maintain the track and roadbed as to make them reasonably safe for such travel.

Same—Liability for Negligence of Trackmen.

For the negligence of the trackmen charged with the inspection and repair of the tracks and roadbed, where such negligence causes injury to a trainman traveling thereon, the railroad company is responsible.

Same—Nonassignable Duties.†

The master's duty to exercise reasonable care in furnishing a place for the work, and appliances for the work, that shall be reasonably safe for those engaged in the general employment, is not avoided by the employment of competent agents for its performance. Those servants to whom the duty is delegated are not fellow servants engaged in a common employment with those for whose reasonable safety the duty is imposed upon the master.

Same—Right to Assume That Master Has Performed Duty.

A servant has the right to take it for granted that his master has performed his duty by exercising reasonable care for the servant's safety in the respects above indicated, until the servant is warned or notified of a danger arising from the master's negligence, or until the danger becomes so obvious that a reasonably prudent servant, under the circumstances, would observe it.

Assumption of Risk.

The risk of injury from a defect in a railroad track or roadbed negligently permitted to remain in bad repair is not among the ordinary and natural risks that are assumed by a trainman, and is not assumed unless it becomes known to him, or is so obvious that by the exercise of ordinary care on his part it would be observed.

(Syllabus by the Court.)

Error to supreme court.

Action by Charles R. Smith against the Erie Railroad Company. Judgment for plaintiff. Defendant brings error. Affirmed.

Cortlandt Parker and Cortlandt Parker, Jr., for plaintiff in error.

W. Bradford Smith and Robert H. McCarter, for defendant in error.

PITNEY, J. At the time of the occurrence which gave rise to this action, plaintiff was in the employ of the defendant in the capacity of baggage master and acting brakeman, and in the performance of his duties was traveling upon one of defendant's passenger cars over the Greenwood Lake Branch of its railroad. This car, together with a locomotive and tender, made up the train. The occurrence took place on the evening of Saturday, January 14, 1899, shortly after 7 o'clock. The train was running at some speed down a grade of about 60 feet to the mile, when, in rounding a curve, the passenger car became derailed, and, after bumping for some distance over the crossties, broke away from the tender, and was thrown down a steep embankment and demolished. The plaintiff sustained serious personal injuries, to recover damages for which he brought this action. The verdict and

†See foot-note appended to *Chicago & A. Ry. Co. v. Eaton* (Ill.), 1 R. R. 353, 24 Am. & Eng. R. Cas., N. S., 353.

judgment in the court below having gone in his favor, the defendant now asks for a reversal because of alleged errors committed by the trial judge.

Plaintiff's insistment at the trial was that the derailment was occasioned by the nonrepair of the track. Evidence was introduced tending to show that the inspection and repairs of this part of the railroad were customarily done by a section gang of which one Duffy was foreman, and Sloat and two others were members; that during this particular week the section gang worked only on the alternate days; that at least as early as the afternoon of Friday, the day before the accident, a noticeable depression, called by the witnesses a "low joint" or "low spot," was found in the outer rail of the track at or near the curve in question; that this depression was observable by a person walking the track, and was sufficient to cause a decided lurch in a car passing over it; that on Friday afternoon Sloat reported this low joint to Duffy, yet the section gang was laid off duty from Friday night until Monday morning. Duffy, the track foreman, was called as a witness by the plaintiff, and testified that he was at work on Saturday, the 14th, but that his men were not, they having been laid off by him on the orders of Mr. Lynch, the supervisor of that division; that none of the trackmen were on duty on the 14th except Duffy himself; and that he walked over the section twice that day, but did nothing towards the repair of the low point in question; it being conceded that he could not repair it without help.

The plaintiff also produced the printed book of rules of defendant company, from which he introduced in evidence, without objection, the following rules:

"Supervisors. The supervisor has charge of the repairmen and other laborers employed on his subdivision, and must see that they perform their duties properly, and discipline them for neglect of duty. It is the supervisor's duty to keep the track, roadbed, bridges, culverts, buildings, and other property of the company on his subdivision in repair. He must pass over his subdivision daily; observe the condition of the track and bridges; see that the proper slopes and ditches are preserved, * * * that ties are of a standard size, evenly spaced, and properly tamped, and that the rails are in proper surface and securely fastened; * * * and do everything necessary to secure the safety of the road."

"Track Foremen. Track foremen report to, and receive their instructions from, the supervisor. They have charge of repairs on their respective sections, and are responsible for the proper inspection and safety of the tracks, bridges, and culverts. They must see that the track is in good line and surface, and properly spiked; that it is in true and uniform gauge; that the cross-ties are properly spaced, lined, and tamped; that the roadbed is in good order," etc.

Upon this evidence, and other to the same effect, the plain-

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tiff claimed that the proximate cause of the accident was the bad condition of the track; that the defect was such that reasonable vigilance and proper inspection would have discovered it, and reasonable care required its reparation; and that in fact it was discovered by the trackman in ample time to enable them to mend it before the accident, so that there was negligence of the trackman, for which the defendant was responsible to the plaintiff. Defendant's insistence was that the low spot in the track was not the cause of the derailment of the car, and that the disaster was the result of the reckless speed of the train, for which the locomotive engineer, a fellow servant of the plaintiff, was responsible. With respect to the speed of the train the testimony was quite variant. There was evidence from which the jury would have been at liberty to believe that it was not exceeding 20 miles an hour, and other evidence from which they might believe its speed was far in excess of 30 miles per hour. It was claimed by the defendant that the low spot was 60 feet or more above the point where the wheels of the passenger car left the track; it being argued that this distance, of itself, demonstrated that the low spot did not cause the derailment. It was further insisted that in a derailment resulting from such a low spot the wheels would jump over the outer rail, whereas in this case several lengths of the outer rail rolled over under pressure of the wheels, thereby causing a spreading of the track, and permitting the wheels to settle down upon the cross-ties. As corroborating the defendant's theory, and negating the theory which attributed the derailment to the low joint, it was pointed out that the locomotive remained on the track, and that the tender remained attached to the locomotive, although the rear wheels of the tender left the track. It is also claimed that after the passenger car became derailed it remained attached to the tender, and that its wheels bumped along the cross-ties for a distance of over 200 feet before the car broke from the tender and pitched down the bank. From all this it is argued that the occurrence resulted not from the car leaving the track by reason of roughness, unevenness, or any low joint, but by the locomotive and cars remaining on the track, clinging to it and destroying it. But the evidence tends to show that the low joint indicated that the track was being heaved by the frost, and so it cannot be said to be a necessary conclusion that the weakness of the track was confined to the immediate vicinity of the low joint. Nor can it be said that a derailment which occurs by the overturning of the rails, caused by the weight of a train consisting of a locomotive, a tender, and a single car driven at a speed less than that which would cause them to jump the track, necessarily excludes the notion that the rails spread by reason of the nonrepair of the tracks.

There were motions for nonsuit and for directions of a verdict for the defendant. The refusal of these motions raises

the questions on which the principal stress was laid in the argument before this court. The motions were based in part on the ground "that the accident was due to the negligence of a fellow servant of the plaintiff." As we have already seen, there was evidence from which the jury had a right to infer that the occurrence was due to negligent nonrepair of the track, and not to excessive speed of the train. Therefore the question is raised whether the employees whose duty it was to inspect and repair the track were fellow servants of the plaintiff, engaged in a common employment with him, within the meaning of the rule that absolves the master from liability to a servant for the consequences of a fellow servant's negligence. It is entirely clear that as between a railroad company and such of its employees as are required, in the performance of their duties, to travel upon its trains, the company is bound to exercise reasonable care to so construct and maintain the tracks and roadbed as to make them reasonably safe for the purposes of such travel. So far as the trainmen are concerned, the tracks and roadbed come within the familiar rule that imposes on the master the duty of taking ordinary care that the places in which and the appliances with which the servant is required to work shall be reasonably safe for the purpose. The cases of *Harrison v. Railroad Co.*, 31 N. J. Law, 293, and *Paulmier v. Railroad Co.*, 34 N. J. Law, 151, are instances in which the supreme court asserted the master's liability where the supports of the track were insecure, and the master had notice thereof. The recent decisions of this court furnish numerous illustrations of the general principle. Among them are *Mills v. Ice Co.*, 51 N. J. Law, 342, 17 Atl. 695; *Steamship Co. v. Ingebregsten*, 57 N. J. Law, 400, 31 Atl. 619; *Telegraph Co. v. McMullen*, 58 N. J. Law, 155, 33 Atl. 384, 32 L. R. A. 351; *Van Steenburgh v. Thornton*, 58 N. J. Law, 160, 33 Atl. 380; *Day v. Donohue*, 62 N. J. Law, 380, 41 Atl. 934; *Cole v. Manufacturing Co.*, 63 N. J. Law, 626, 44 Atl. 647. In each of these cases the employer was held liable by reason of some neglect of the duty in question.

The defendant's insistent involves the proposition that the men in charge of inspection and repair of the track were fellow servants of the plaintiff, so that for the consequences of their negligence he cannot recover against the common employer. This contention cannot prevail. It is true that in *Harrison v. Railroad Co.*, where the imputed negligence was the failure to repair a railroad bridge known to be unsafe for want of repair, in consequence of which the bridge broke down under the weight of a train, thereby causing the death of a brakeman upon the train, the late Chief Justice Beasley said, in substance, that if the company had in fact directed its agents, possessed of competent skill, to examine at stated periods the bridge in question, and they had reported it secure, the plaintiff could not recover, even if the agents making such

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report had acted carelessly in the discharge of their duties, or falsely reported their conclusions. But this remark was confessedly based upon a supposed state of facts precisely opposite to that presented by the case, nor was the remark necessary for the decision. This dictum has sometimes been treated as authority for the proposition that a master may fully discharge his duty with respect to providing a safe place of work and safe appliances for the work by employing competent agents to make inspections and repairs. But since the decision by this court in the case of *Steamship Co. v. Ingebregsten*, 57 N. J. Law, 400, 31 Atl. 619, it must be taken as established that this duty may not be delegated by the master, except at his own risk; that those who are employed to make inspections and repairs for the purpose of keeping in proper repair the place of work and the tools and appliances of the work are not fellow servants engaged in a common employment with those employees for whose reasonable safety the precautions are required. In that case Mr. Justice Dixon said: "The master's duty to his servant requires of the former the exercise of reasonable care and skill in furnishing suitable machinery and appliances for carrying on the business in which he employs the servant, and in keeping such machinery and appliances in repair, including the duty of making inspections and tests at proper intervals. So far the authorities are at one. Almost as unanimous are they in the proposition that if the master selects an agent to perform this duty for him, and the agent fails to exercise reasonable care and skill in its performance, the master is responsible for the fault."

It is now fully recognized in this state that the test for determining, in a given case, whether the master is liable to one servant for the negligence of another servant, is in the answer to the inquiry whether the negligent servant was in the performance of work which the law imposes as a positive duty upon the master, by way of preparation for the general employment, or whether, on the other hand, such negligent servant was at the time in the performance of some duty incidental to the general employment itself. In the former case the master is liable; in the latter case, not. It is the master's duty to exercise reasonable care in furnishing those things which go to make up the plant and appliances, so as to have them at the outset reasonably safe for the work of the servants who are engaged in the general employment, and, further, to exercise reasonable care, by means of inspections and repairs, when needed, to keep the plant and appliances reasonably safe. These duties the master cannot avoid by employing others for their performance. If the negligence of those who are charged with such performance results in injury to one of those servants for whose safety the precautions are required, the master is liable, unless by reason of the obvious character of the consequent risk, or otherwise, it is assumed

by the injured employee, or unless the injury is brought about by contributory negligence. Recent cases clearly recognize the distinction referred to. In *Maher v. Thropp*, 59 N. J. Law, 186, 35 Atl. 1057, Mr. Justice Van Syckel, speaking for this court, said: "The master was charged with the duty to furnish to the plaintiff proper implements with which to do the work in which he engaged. If he intrusted the discharge of that obligation to the foreman, he is undoubtedly responsible for the failure of the foreman to exercise due care in that respect. But the injury to the plaintiff is in no way chargeable to the failure of the master to furnish proper tools. On the contrary, the accident is attributable wholly to the fact that the plaintiff, under the advice of the foreman, laid aside the safe tool, and used in its place a chisel and a pair of tongs. In doing that the foreman did not act as the vice principal, standing in the place of the master, but he acted as a fellow servant, performing, with the assistance of the plaintiff, the work in which both were engaged, and for which the master had provided the necessary implements with due care." In *McLaughlin v. Iron Works*, 60 N. J. Law, 557, 38 Atl. 677, Mr. Justice Collins said: "Where appliances for work are needed, the duty is on the master to use reasonable care in their selection, and he cannot escape it by delegation. But carelessness in their use, or failure to use them on the part of his servant, whereby injury is received by a fellow servant in the same common employment, is not chargeable to the master, no matter what may be the grade or authority of the servant." In *Curley v. Hoff*, 62 N. J. Law, 758, 42 Atl. 731, Mr. Justice Collins said at page 762, 62 N. J. Law, and page 732, 42 Atl.: "While delegation to others will not relieve the master from the consequences of negligence in the performance of what the law makes the master's duty, it will not charge upon the master the consequences of the negligence of his servants toward each other. The risk of that negligence, for reasons of public policy, the law places on the servant. The test always must be whether the negligent act or omission was in discharge of the master's or the servant's duty." In *Cole v. Manufacturing Co.*, 63 N. J. Law, 626, 44 Atl. 647, the same distinction was taken.

It is plain, therefore, that, so far as the motions to nonsuit and for direction of a verdict were based upon the idea that the men charged with inspection and repair of the track were fellow servants of the plaintiff, the motions were properly refused. This disposes at the same time of the principal remaining exceptions, they being intended to raise the same question upon the instructions of the trial court to the jury.

The motion to nonsuit and to direct a verdict were based on the further ground that the risk of derailment by reason of the low point in question was assumed by the plaintiff, because he had passed over the same place many times before

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while traveling in defendant's trains, the last trip being an hour before the accident. The low spot caused a jolt or lurch, that was readily observed by passengers on the train. It is insisted, therefore, that the plaintiff assumed the risk. *Regan v. Palo*, 62 N. J. Law, 30, 41 Atl. 30; *Illingworth Co. v. Costello*, 63 N. J. Law, 27, 42 Atl. 30. But the risk of injury from a defect in a track or road is not so lightly permitted to remain in bad repair as the ordinary and natural risks of the employment of a servant. It was, therefore, not assumed by the plaintiff unless it was known to him, or was so obvious that by the exercise of ordinary care on his part it would have been known. The plaintiff has the right to take it for granted that his master has formed his duty by the exercise of that reasonable care for the servant's safety which the law requires, until the servant is warned or notified of danger, or until the danger is so obvious that a reasonably prudent servant, under the circumstances, would observe it. But plainly it was so obvious to one traveling upon the train that the road on the track indicated a weakness sufficient to cause derailment. The trial judge, therefore, could not say, as matter of law, that the plaintiff assumed the risk of the injury he received; and so it was, at best, a question for the jury to determine whether the special danger was known to the plaintiff, or was so obvious that he ought to have known it.

One of the assignments of error is directed to the charge, as requested by the defendant, that, "if the plaintiff was guilty of any negligence contributing to the injury, which recovery is sought, he cannot recover." The charge, in substance, that in order to bar the plaintiff's recovery the defendant must show "that some negligence of the plaintiff contributed to the accident in such a way that, if the plaintiff had not been negligent, the accident would not have happened. The criticism is upon the use of the word 'accident' instead of the word 'injury,' which was included in the request. The negligence imputed to the plaintiff was that he failed to couple up the air brakes when the train was stopped. This, admittedly, was his duty. The argument is that the 'accident' refers to the derailment, while the 'injury' is, the wounding of the plaintiff—occurred by the car falling to the bottom of the embankment. The answer is that with respect to causation they are practically indistinguishable. If the derailment was not caused in whole or in part by the air brakes being uncoupled, neither was the injury to the plaintiff caused by the car falling from the bank so caused. It is true, the evidence shows that the car was dragged along the ties for 200 feet after leaving the rails, and that then the coupling between the tender and the car broke, leaving the car to pitch into the embankment. But it is not perceived that the negligence of uncoupling the air brakes after the car left the track could have caused the injury.

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catastrophe. For the purposes of this case, it was proper enough to treat "accident" and "injury" as synonymous.

The other assignments of error have been examined, and found to be without support. The trial judge in his charge to the jury did no injustice to the defendant. His rulings upon questions of evidence, so far as complained of, were correct.

The judgment should be affirmed, with costs.

McLEMORE et al. v. MEMPHIS & C. R. CO. et al.

(*Supreme Court of Tennessee, June 13, 1902.*)

[69 S. W. Rep. 338.]

Right of Way—Deeds—Breach of Condition—Subsequent Conveyance by Grantor.

Land was conveyed to a railroad company, the deed containing a condition requiring it to construct a certain road, but, after it became apparent that the road would not be constructed, the owner and successor of the company partitioned the land, the owner executing a quit-claim deed of a portion thereof to the successor. Thereafter, the owner executed a conveyance of all the rights, titles, and claims, and all other rights and reservations which he had in the tract originally conveyed to the company: *held*, that such conveyances divested the owner of all right in such tract, even though he might have had a right under the original conveyance to the possession of the land, for the failure of the company to construct the road.

Same—Same—Easements—Effect of Abandonment.*

A deed granting to a railroad company a right of way through any of the lands of the grantor only conveys an easement, which may be lost by abandonment, or surrendered.

Mortgages—Foreclosure—Title of Purchaser.†

On an issue as to what passed by a mortgage-foreclosure sale arising nearly 50 years after the foreclosure, evidence extrinsic to the proceedings and deed will not be received to vary the recitals of the deed, which have been accepted and acted on by the purchaser, and not denied by the mortgagor.

Same—Same—Same—Right of Way.

Where no reservation of the fee in a railroad right of way is made in any of the proceedings or deeds in a foreclosure of a mortgage on lands traversed by such rights of way, the fee passes to the purchaser.

Right of Way—Abandonment.

The abandonment of the easement of a railroad in a right of way over land inures to the benefit of the owner of the land at the time of the abandonment, if not reserved to the original owner.

Estoppel.

An agreement between the heirs of a deceased mortgagor and the purchaser of the mortgaged property under foreclosure, conveying a portion of the lands to the heirs, and referring to an agreement between the mortgagor and purchaser, and purporting to be a final

*See *Northern Pac. Ry. Co. v. Ely* (Wash.), 22 Am. & Eng. R. Cas., N. S., 90; *Scarritt v. Kansas City, etc., Ry. Co.* (Mo.), 15 Am. & Eng. R. Cas., N. S., 809, and note, 813; *Jones v. Van Bochovee* (Mich.), 1 Am. & Eng. R. Cas., N. S., 664, and note, 667 et seq.

†As to whether title by adverse possession can be acquired against a railroad company to lands originally acquired by it for railroad purposes, see foot-note appended to *Graham v. St. Louis, etc., Ry. Co.* (Ark.), 1 R. R. R. 527, 24 Am. & Eng. R. Cas., N. S., 527.

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division of the lands mentioned in such agreement, precludes the heirs from claiming any interest, under any agreement between the mortgagor and purchaser, in the lands retained by the purchaser.

Same.

The complainant in a suit to recover real estate, being required to establish title in himself, cannot assert that defendant is estopped from showing a paramount title which is necessarily brought out by complainant's efforts to establish his title; estoppel not operating to show that such facts do not exist.

Same.

A party cannot invoke the doctrines of estoppel in pais, to preclude his opponent from asserting certain facts formerly denied, unless the complaining party shows that he has been prejudiced by such denial.

Same.

Where an unsworn denial of a title in a pleading is more in the nature of a conclusion than a statement of fact, and is made inconsiderately, and without a due knowledge of the fact, the pleader is not estopped from asserting such title, in a subsequent suit, against a party not prejudiced by the former denial.

Appeal from chancery court, Shelby county; F. H. Heiskell, Chancellor.

Suit to recover real estate by John C. McLemore and others against the Memphis & Charleston Railroad Company and others. From a decree for defendants, complainants appeal. **Affirmed.**

Randolph & Randolph and Carroll, McKellar & Bullington, for appellants.

C. H. Poston, F. P. Poston, and Wright & Wright, for appellees.

BEARD, J. This suit was instituted by the heirs of John C. McLemore to recover possession of a strip of ground, running east and west through the city of Memphis from a point near the Mississippi river, $2\frac{1}{2}$ miles long and 100 feet wide, to the line of the Memphis & Charleston Railroad, and known in this record as "Broadway." The prayer of the bill is for possession, for rents and profits, and general relief, including prayer for preliminary injunction preventing the various defendants from further occupying the ground for right of way purposes, and from interfering with complainants' possession.

In 1834, John C. McLemore was the owner of large tracts of land in Shelby county, Tenn., one of which extended from the Mississippi river eastwardly nearly $2\frac{1}{2}$ miles to what was known as Solomon Rozelle's west boundary line, and through which this strip, 100 feet wide, known as Broadway, extends. On July 15, 1834, McLemore conveyed the property, embracing within its boundaries Broadway, as well as certain other lands, by mortgage, to William and Stokely Donelson, to secure certain enumerated debts, and among other things provided: "That the said John C. McLemore reserves personally to himself the power, and it is hereby reserved to him accordingly, in as full a manner as if this mortgage were not executed, at any time before the foreclosure of his equity of redemption and sale of said mortgaged premises under decree

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of court, to sell or contract to sell all or any of the lands or lots aforesaid, on such terms as he may deem expedient, for the purpose of paying and satisfying the debts and claims aforesaid, or such of them, and giving such preference, as he may think right and proper, and upon such sale to be made by him as aforesaid, and the receipt of the purchase money by the said John C., to make and execute conveyances accordingly, discharged of this trust." On June 13, 1840, William and Stokely Donelson reconveyed and quitclaimed to John C. McLemore 208 acres of the land embraced in the mortgage, and upon which was afterwards situated the town of Ft. Pickering, and which also included the western end of Broadway. On June 17, 1840, McLemore conveyed this 208-acre tract, released by the Donelsons, as above stated, to the La Grange & Memphis Railroad Company, for the consideration of \$25,000, but subject to certain conditions, reservations, and restrictions, among which may be noted the following: The railroad company agreed to construct and build, within a reasonable time, a lateral railroad connecting with the La Grange & Memphis Railroad at or near the western boundary of Solomon Rozelle's land, at a point where the railroad diverged toward Memphis; and running thence west over the lands of McLemore to a point within the 208-acre tract, at or near the south boundary and near the river, to be selected by the company. And the deed then recites: "And for this purpose the said McLemore grants to the said company the right of way through any of his lands over which the said lateral road may pass." This recitation relates solely to the remaining portion of Broadway east of the 208-acre tract. The deed also provided that the 208-acre tract was to be plotted into town lots by the railroad company. In laying off the town, convenient depot grounds were to be reserved for the railroad. Certain spaces were to be set apart and dedicated as public promenades, a male and female academy, a tavern, and for certain church purposes. An auction sale of lots was to be held at such time as should be convenient, and, after the auction sale of lots, the railroad company was to sell from time to time lots in the town site at private sale. The proceeds of the sale of all lots were to be equally divided between McLemore and the railroad company, and at the end of five years the lots remaining unsold were to be equally divided between them. This 208-acre tract was bounded on the west by the Mississippi river and on the east by Bayou Gayoso; and, in accordance with the terms of this deed, the tract was plotted as a town site by the railroad company, the streets ranging in width from 65 to 80 feet, with the exception of the one known as "Broadway." Toward the center of the tract, one entire block, 400 by 300 feet, was set apart, and designated on the map as the depot. West from this block to the river was a street 100 feet wide, and designated "Broadway," and the same street was continued east of this block to Bayou

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Gayoso, 100 feet wide, and upon this end of the street, and on its center line, was designated a railroad track. Between this depot block and Bayou Gayoso on the east, lots were made to front on either side of the street or railroad line, many of them not having any other method of egress. The purpose of McLemore and the railroad company was to make Ft. Pickering a rival town to Memphis, which was then distant about one mile north.

Many of the lots were sold, considerable excitement was manifested, and some business houses were erected. Some grading was done upon the branch line of railroad, extending from near the center of this 208-acre tract to the La Grange & Memphis Railroad, near Solomon Rozelle's west boundary line. The right of way east of Bayou Gayoso was a continuation of Broadway eastwardly through the lands of McLemore embraced in the mortgage to the Donelsons. The railroad company, however, became involved financially, judgments being rendered against it as early as 1842, and executions were soon thereafter levied upon its property. No work other than some grading was ever attempted by this company upon the right of way; and, certainly as early as 1851, it became apparent that this company could never construct this branch line of road, since in January of that year it undertook to sell and convey all of its property of every kind to the Memphis & Charleston Railroad Company, and no effort to construct any line of railroad was thereafter undertaken by it. Among other things conveyed in that deed was "the whole bed of all the road belonging to said party of the first part (La Grange & Memphis Railroad Company), together with its right of way on said road, and all the rights, privileges, immunities, and appurtenances thereunto belonging, or in any wise appertaining," and "including all its real estate at Ft. Pickering." Within a very limited period after the effort was made to establish Ft. Pickering as a commercial town, it became apparent that the scheme would be a failure. Without success to the town, the lateral railroad would not be needed; and this is no doubt the explanation of its abandonment. It is probable that the failure of the town of Ft. Pickering to prosper as contemplated caused a change in the plans of McLemore and the further indulgence of his creditors, who commenced proceedings to foreclose their mortgages, as hereinafter stated. Early in 1842, McLemore executed a second mortgage upon the same property mortgaged to the Donelsons, excluding the 208-acre tract above mentioned, to Willoughby Williams and Oliver B. Hayes, to secure certain debts therein set out; and in September, 1842, McLemore executed a third mortgage, upon the same property, to Samuel I. Hayes, to secure certain debts therein set out; and thereafter, on October 7, 1842, William and Stokely Donelson and the other mortgagees, under the mortgages above referred to, filed their bill in the chancery court held at Franklin, Tenn.

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against John C. McLemore, seeking a foreclosure of all three of the mortgages, and requiring McLemore to state in his answer what part of the lands had been sold by him under the reservation contained in the first mortgage to the Donelsons. On the same day, John C. McLemore filed his answer, and among other lands mentioned as having been sold by him was the following: "The item about 600 acres, part of grant No. 19,060, embraces the sale of lots from twenty acres down to small sums, and also includes the 208 acres sold to the railroad company, a more particular description of which, as well as the land undisposed of, will be given hereafter if required. He cannot at this time give a full and accurate description thereof, but will furnish the same to the court or its commissioners when deemed necessary." Thereupon the cause was heard at the October term, 1842, and the lands mentioned in the pleadings were directed to be sold, and F. P. Stanton, Charles D. McLean, Marcus B. Winchester, and Jephtha Fowlkes were appointed commissioners to sell the lands through which the eastern end of Broadway runs, as well as certain other lands not necessary to be mentioned. The commissioners made a report to the succeeding term of the court, in which they stated that they had divided the lands through which the eastern end of Broadway runs into four tracts, excluding roads, streets, and sales previously made by McLemore; and that Willoughby Williams had become the purchaser of all four of the tracts, the first containing 441 acres, the second 205 acres, the third 346 acres, and the fourth 232½ acres. This report was accompanied by a plat, and made a part of the record, showing the exact boundaries of the four different tracts sold. This plat, however, has been lost, and has never been supplied. The report of the commissioners was approved, and they were directed to execute to Willoughby Williams a deed for the property purchased by him at said sale; and accordingly, on May 17, 1843, the four commissioners conveyed to Willoughby Williams the four tracts mentioned in their report, but described the land as one entire tract, and, among other things, designated the land conveyed as being "the unsold portion of the Ft. Pickering tract of land, which was laid off and conveyed to said John C. McLemore on the division of grant No. 19,060, subject to streets, roads, and sales previously laid out and made by said McLemore, which sales are embraced in the bounds of the said Ft. Pickering tract as hereinafter described, to wit." Then follows a particular description of the land, which includes the entire tract owned by McLemore and conveyed by mortgage to the Donelsons, with the exception of the 208 acres theretofore conveyed by John C. McLemore to the railroad company. And within the boundaries of this deed lies the entire strip of land in controversy, east of Bayou Gayoso. At some time subsequent to this conveyance from the commissioners to Williams, he seems to have plotted a certain

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part of the land east of Bayou Gayoso, embracing a part of Broadway also lying east of Bayou Gayoso, and sold lots fronting upon Broadway, treating it as roadway in his subdivision.

In 1868, the town of Ft. Pickering became a part of the city of Memphis; and subsequently certain other parts of Broadway, east of Bayou Gayoso, became a part of the city of Memphis. The city did some work upon Broadway west of Bayou Gayoso at different times, beginning in 1868. For the most part, however, throughout its entire length, it remained vacant and unimproved land, with some grading done for a railroad, until 1871, when General Forrest, as president of the Selma, Marion & Memphis Railroad Company, entered upon the strip of land, and did considerable work, preparing it for a railroad track. This road, however, became financially embarrassed, and in 1881 the Memphis, Selma & Brunswick Railroad Company entered upon the strip of ground, and did work preparatory to laying a track; and in 1882, for the first time, a railroad track was completed, along the entire length of the strip of ground, by the Kansas City, Ft. Scott & Memphis Railroad Company, as the successors of the Memphis, Selma & Brunswick Railroad Company. From that time until this bill was filed, in December, 1889, other tracks were placed upon Broadway, and there was litigation between these various railroad companies and the city of Memphis, each claiming title to all or parts of this strip of ground. The heirs of John C. McLemore appear never to have asserted any title or ownership to any part of this strip of ground until about the time the bill in this suit was filed. The Memphis & Charleston Railroad Company claimed to have become the owner in fee of the entire strip under its deed from the La Grange & Memphis Railroad Company, made in 1851, and the deed of the state of Tennessee conveying its interest in the property to the Memphis & Charleston Railroad Company, executed in 1852. Willoughby Williams conveyed, in January, 1867, a one-fourth interest in this entire strip to Archibald Wright and Lewis B. McKissek, and upon the same day entered into a lease with Esau Jones, by which he leased the property in question to Jones for a period of seven years from January 1, 1867. Willoughby Williams, by will probated in December, 1882, devised his "Memphis & Ft. Pickering property, and any other property I [he] may have omitted to mention herein," to his executors, to be sold, and the proceeds to be equally divided among his children. Willoughby Williams' executors, on November 13, 1886, conveyed the property in dispute to Wallace Pratt; and Wallace Pratt conveyed, on November 14, 1887, to the Kansas City, Springfield & Memphis Railroad Company. On December 28, 1867, Willoughby Williams entered into an agreement with the heirs of John C. McLemore, in which Williams conveyed to McLemore's heirs certain specified property included within the boundaries of the original tract of land purchased by him at the chancery

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sale, but south of and entirely apart from this 100-foot strip, which was accepted by the McLemore heirs as a final division of the land mentioned in an agreement made in 1859 between Williams and McLemore, and therein referred to, but which agreement has not been found, and its contents have not been otherwise ascertained. John C. McLemore died in 1864. The present parties complainant are his grandchildren and great-grandchildren, many of whom have resided since the death of John C. McLemore near the city of Memphis and in Shelby county. McLemore himself resided in Memphis until 1850, when he removed to California, and returned to Memphis in 1859, and remained until his death in 1864. The property in dispute is now claimed in part by the city of Memphis, which insists that that part of Broadway west of Bayou Gayoso has been a public street since the original dedication in 1840. That part of the strip lying east of Bayou Gayoso is claimed in part by the city of Memphis as a street, and in part by certain railroad companies which have from time to time, since 1881, placed thereon railroad tracks, under agreements between themselves and the authorities of the city of Memphis. It is conceded that the strip of ground is now exceedingly valuable, and that improvements costing hundreds of thousands of dollars were placed thereon prior to the institution of the present suit, and without any intimation of any claim upon the part of the heirs of John C. McLemore.

We do not think that the title to the entire strip of ground in controversy can be rested upon the assumption that it all must necessarily be in the heirs of John C. McLemore or that the title to the entire strip was devested out of McLemore under the same proceedings or conveyances. Upon the contrary, we think that the title to that part of Broadway west of Bayou Gayoso, and lying within the boundaries of the 208-acre tract conveyed by McLemore to the railroad company, rests upon entirely different proceedings and conveyances from that part of Broadway lying east of Bayou Gayoso. The title to the former must be traced from the deed of John C. McLemore to the railroad company made in 1840; and the title to the latter must be traced from the proceedings in the chancery court at Franklin, in which the mortgages were foreclosed upon the tracts of land within which the eastern part of Broadway lies. The deed from McLemore to the railroad company in 1840 expressed a cash consideration of \$25,000, but was made "subject to certain conditions, reservations, and restrictions." This cash consideration was evidently paid, which is evidenced not alone by the recitation in the deed, but it is referred to both in the correspondence of McLemore and of the president of the railroad company. It is true that the railroad company agreed to build a lateral line of road, from the main line to about the center of this 208-acre tract, within a reasonable time after the execution of the deed. It is not necessary, how-

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ever, to determine what would be the respective rights of the parties to this conveyance upon the failure of the railroad to build the lateral line within a reasonable time. However this may be, the railroad was not built within a reasonable time, or any other time, by the La Grange & Memphis Railroad Company, but the ground was laid out as a town site, as provided in the deed, lots were sold, and the proceeds presumably divided in accordance with the terms of the deed; certain parts of the tract were designated upon the map as streets, and a block expressly reserved for a depot site, as provided for in the deed. We think it clearly appears that the 100-foot strip from this depot site to the eastern boundary of the 208-acre tract was intended as a street and railroad right of way combined. Lots were fronted upon either side with no other outlet than upon this street. The continuation westwardly from the depot site to the river is plainly marked as a street, and is of the same width. When Ft. Pickering was taken into the corporate limits of Memphis, the city, as early as 1868, exercised municipal control over this land as a street, without any objection upon the part of any one. When it became apparent to every one that the railroad would not be built, and could not possibly be built, by the La Grange & Memphis Railroad Company, no steps were taken to recover possession, and no claim of ownership was asserted by McLemore or anyone claiming under him. But, whatever right John C. McLemore may have had to regain possession of this part of the land in controversy after the failure of the railroad company to construct this lateral line within a reasonable time, he divested himself of all ownership, and of all rights in the premises, as early as 1859; since on the 15th of August of that year he entered into a deed of partition with certain parties claiming to be the successors in interest of the La Grange & Memphis Railroad Company in the 208-acre tract, and with whom John C. McLemore dealt as such successors. In this deed of partition, it is recited that there had at some time in the past been a division of the unsold part of the 208-acre tract between McLemore and the railroad company, which McLemore was then willing to and desired to ratify, and thereupon certain specified lots were conveyed by Wickersham, Scruggs, and others who claim to be the successors of the railroad company to Charles D. McLean, with the consent of McLemore, as his (McLemore's) share of the unsold portion of the 208-acre tract; and he, in turn, conveyed by quitclaim to third parties "all the rights, title, and interest or estate, into or concerning all the residue of the lots and lands in said town of Ft. Pickering, which he now has, or had on the 5th day of October, 1843, or thence hitherto." It is evident that this deed was intended as a final settlement of all the interest of McLemore remaining in the 208-acre tract under his deed to the railroad company in 1840; and it is equally clear that he fully realized at this time that the rail-

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road would not be built as contemplated in said deed of 1840, since he obtained title, in his portion of the unsold property under this partition deed, to the land or block which had been reserved under the terms of the original deed for depot purposes. We cannot believe that he would have appropriated to his own use the grounds set apart for a depot if he at that time contemplated the completion of the railroad as originally intended. But if there is doubt as to the effect of this deed of partition upon whatever interest Col. McLemore may have had in so much of Broadway as lay west of Bayou Gayoso, and within the limits of the 208-acre tract, it is set at rest by a conveyance which he made to C. D. McLean about two months thereafter, to wit, on the 31st of October, 1859. By this, for a consideration, valuable in part, he conveyed to McLean in fee "all the rights, titles, interest, and claims" he had "in and to all lots, lands, depots, grounds, academy lots as set apart for the use of schools, together with all lots reserved for the use of churches, all rights of ferry, etc., together with all other rights and reservations, belonging to said McLemore, situate within the original limits of the town of Ft. Pickering as sold and conveyed by him by deed dated 17th day June, 1840, containing 208 acres more or less." We therefore hold that by these two deeds the ancestor of complainants divested himself of all interest, direct or indirect, immediate or remote, in every portion of this particular tract, and that, independent of other considerations which of themselves would be sufficient to repel the complainants, the bill must fail in so far as it seeks to establish rights therein, and that the chancellor was right in so decreeing.

In the consideration of the ownership of the title to the remaining portion of Broadway, we are confronted at the threshold with a question as to what was the character of the interest acquired by the La Grange & Memphis Railroad Company to that part of the right of way east of Bayou Gayoso, under the conveyance by John C. McLemore made in 1840. We observe, in passing, that the reservation to McLemore in the mortgage to the Donelsons only gave him the power to sell, or contract to sell, parts of the mortgaged premises, for the purpose of discharging the debts secured thereunder. When he executed his deed to the railroad company, in 1840, for the 208-acre tract, the title to which was in him by quitclaim deed from the Donelsons, he undertook to convey to the railroad company the right of way over any other lands owned by him which might be needful in the construction of the railroad line from the main line of road to the 208-acre tract. Clearly, the purpose of this conveyance of a right of way over the remaining portions of the land owned by McLemore, but under mortgage to the Donelsons, was not so much the paying of the mortgage as it was to develop and make valuable the 208-acre tract when it should have been laid out as a town site and the railroad constructed to it. We cannot construe

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the language of the deed to convey anything more than an easement over the mortgaged lands to the railroad company, which was subject to be defeated by abandonment or voluntary surrender to the owner. The clause in the deed making the grant has been set out in an early part of this opinion. It was very general, and in terms only purported to convey an easement. "A grant of a right of way to a railroad company is the grant of an easement merely, and the fee remains in the grantor." *Jones, Easem.* § 211; citing *Railway Co. v. Geisel*, 119 Ind. 77, 21 N. E. 470; *Jones v. Van Bochove*, 103 Mich. 98, 61 N. W. 342; *Railroad Co. v. Frost*, 147 Mass. 121, 16 N. E. 773; *Flaten v. City of Moorhead*, 51 Minn. 518, 53 N. W. 807, 19 L. R. A. 195; *Williams v. Railway Co.*, 50 Wis. 71, 5 N. W. 482; *Robinson v. Railroad Co.*, 59 Vt. 426, 10 Atl. 522, 30 Am. & Eng. R. Cas. 299. The nature of an easement, for railroad right of way purposes, is so clearly stated in *Railway Co. v. Telford's Ex'rs*, 89 Tenn. 293, 14 S. W. 776, that we cannot hope to add anything to what has there been said.

In considering the foreclosure proceedings in the chancery court at Franklin, in which the land through which this right of way extended was sold, we do not think that we are warranted in looking outside of the proceedings and the deed of the commissioners, executed in obedience to the decree of the court in that case, to indulge presumptions favorable to the contentions of parties, after the lapse of nearly half a century, when to do so would be contrary to the recitals found in the deed, and which seemed to have been accepted and acted upon by the purchaser under the deed and certainly not contradicted or denied by the former owner. It is true Mr. Stanton, one of the commissioners making the sale, in a deposition of remarkable intelligence and fairness, says the commissioners did not sell this strip of ground; but this statement is not borne out by the natural implication from the deed and report made by them. We think that the only safe course is to construe the proceedings and the deed made in the pursuance thereof according to the legal import contained in the language of the chancery proceedings and the deed of the commissioners.

The foreclosure proceeding was instituted in 1842; and, under the decree of the court, commissioners were appointed to sell all of the remainder of the property embraced in the mortgage to the Donelsons, and remaining unsold. McLemore was required in his answer to state what portions of the land he had sold, and, while specifying considerable property which he had disposed of, he made no mention in his answer of having sold or conveyed any strip of land to the railroad company for right of way purposes. The decree of the court, the report of the commissioners, and the pleadings made no reference to any such sale or right of way. The commissioners sold the land through which the right of way ran, after

having subdivided it into four tracts. No mention was made of any reservation except sales previously made and the streets and roads. Willoughby Williams having been the successful bidder for each of the four tracts, the commissioners executed to him a deed, describing the property as one tract, instead of describing separately each of the four lots into which the tract had been divided. This deed was made "subject to streets, roads, and sales previously laid out and made by said McLemore." But clearly this reservation is not sufficient to exclude the fee to any unsold part of the land, but, at most, conveyed the fee subject to the right of way or easement in favor of the railroad company. And we do not think that, when this easement was abandoned or otherwise lost, the fee reverted to the former owner, instead of to the purchaser under the chancery sale, claiming through the deed of the commissioners executed to him. It appears, as has been stated, that there was a map, accompanying the report of the commissioners, showing definitely the boundaries of each of the four lots into which the tract had been divided previous to the sale; but this map has been lost, and all efforts to supply it have failed; and, in the absence of this map, we do not think that the proceedings or the deed warrant the presumption that the strip of ground embracing the right of way was excepted from the sale, regardless of what the intention of the commissioners may have been at the time the sale was made. To hold that the fee to this strip of ground was excluded from the sale, and from the deed executed by the commissioners in obedience to the orders of the court, would be to contradict the language of the deed and of the decree, as well as the legal import thereof. The effort has been made, in argument, to demonstrate that the fee to this right of way must have been excluded in the sale, by calculations intended to prove that to include the ground embracing the right of way would result in embracing a larger acreage than was sold; but we think that this result is obtained by too many suppositions and hypotheses to overturn the plain language of the deed, and the legal results flowing from the proper interpretation of its terms. As we have said, it is clear that the railroad company only acquired an easement over the lands east of Bayon Gayoso under the deed of 1840; and it is equally clear that under the terms of the decree of sale and the commissioners' deed thereunder to Willoughby Williams, in 1843, he acquired all the rights in the fee which were then possessed by McLemore, subject, possibly, to this easement of the railroad company. Therefore, if the easement was lost or abandoned by the railroad company, there was nothing to revert to McLemore; but the title of Williams became free from the easement theretofore existing.

It is next insisted that this purchase by Williams under the chancery proceedings was really for the benefit of McLemore, and that therefore he held the title in trust for McLemore,

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and not for himself. There are circumstances developed in the record which do indicate that there was some kind of an arrangement or understanding, between Williams and McLemore, by which Williams recognized the fact that McLemore had some interest in some part of the lands conveyed to him by the commissioners; but whether this arrangement was made prior to the sale at which Williams became the purchaser, or whether it was later, is not in any way indicated in the record; nor does it appear whether McLemore secured any interest in this particular tract through which this right of way ran at the time of the chancery sale or any other time. But certainly there is not sufficient evidence in the record to justify us in holding that Williams purchased this property under foreclosure proceedings for the use and benefit of McLemore. And, for another reason, the heirs of John C. McLemore could not have had any interest in this property, after 1867, under any agreement with Williams, since we find in the record that in that year a settlement was made between Williams and McLemore's heirs, and this settlement refers to a prior agreement between Williams and McLemore, the contents of which, however, are not known; and in this agreement, made in 1867, certain specified lands are conveyed by Williams to the heirs of John C. McLemore, and it concludes with the following: "This agreement is entered into and accepted by the said heirs of John C. McLemore, deceased, and the said Williams, as a final division of the land mentioned in the agreement of said Williams and McLemore, which is hereby referred to."

The lands conveyed in this agreement to the McLemore heirs are situated wholly outside of the lands through which Broadway extends, and the agreement was executed in the latter part of the same year in which Williams had claimed title to all of Broadway, and had conveyed one-fourth interest to Wright and McKissek, and entered into a lease with one Jones for a period of seven years from January 1, 1867. What the agreement between Williams and McLemore was, this record wholly fails to show; but, whatever it was, it was finally ended by the settlement made in 1867, above referred to. It is true that this agreement was not signed by the McLemore heirs, but by C. D. McLean for them; and we refer to it because he probably had a more intimate knowledge of the affairs of John C. McLemore than did the heirs; he having been the confidential friend and adviser of John C. McLemore through a long period of time, beginning as early as 1840, and from 1850 to 1859 was the representative of McLemore in all his business matters in Memphis. But upon the same day the heirs of McLemore did execute an agreement, in substance the same, which referred to the prior agreement between McLemore and Williams as being dated February 4, 1859; and this agreement, signed by the McLemore heirs, contains the following recitation: "This par-

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tion and agreement is a final and complete division of the lands and settlement of all accounts relating to the same, and to the said agreement between the said Williams and John C. McLemore, Sr., of date February 4th, A. D. 1859." It is insisted that the defendants are estopped to rely upon the title derived from Williams, because in a former litigation, to which the heirs of McLemore were not parties, certain of the defendants in this cause denied the Williams title in their unsworn answers. We might omit any discussion upon this point by calling attention to the fact that the complainants in this case must establish title in themselves before they can recover, regardless of what the defenses of the defendants may be. Estoppel can never be invoked to establish facts, but may only be used to prevent parties from relying upon facts which do exist. In this character of litigation, the defendants may be estopped from establishing certain facts; but the complainants cannot use this to assert that those facts do not exist when the record shows that they do exist, and which are necessarily brought out by the complainants in their efforts to establish their title.

We do not, however, deem it necessary to rest our decision alone upon this view of the question. We do not think that the facts disclosed by the record create an estoppel against any of the parties to this record. It appears that in June, 1886, the executors of Williams instituted suit against the Kansas City Company, the Memphis & Charleston Railroad, and the heirs of McKissek and Wright, setting up title to Broadway, and deraigning title from McLemore under the mortgages, chancery sale, and deed of the commissioners to Williams. The Memphis & Charleston Railroad Company filed an unsworn answer, only signed by its counsel, in which Williams' title was denied, and its title under the deed from the La Grange & Memphis Railroad Company, made in 1851, sought to be established. The Kansas City, Springfield & Memphis Railroad Company also filed an answer, which has been lost, and never supplied. The heirs of Archibald Wright filed an answer and cross bill, in which they set up title to an undivided one-fourth interest in Broadway under the deed of McKissek and Wright, made in 1867. Thereupon the Kansas City, Springfield & Memphis Railroad Company and the Memphis & Charleston Railroad Company filed separate answers to this cross bill, which were also merely signed by counsel, and unsworn to. And it is the allegations contained in these answers which, it is claimed, estop them in the present case. The answer of the Kansas City Company is rested largely upon a denial of the Wright and McKissek title limitations, and laches. The Memphis & Charleston Railroad Company, in its answer, did deny the validity of the Williams title, and did recite many of the contentions now made by the complainants in this case. We think, however, that these pleadings were conclusions of law concerning the

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title, rather than a statement of facts deliberately made with due knowledge. There is, however, no element of estoppel in pais, for the reason that the complainants not only were not misled or placed in any different situation on account of these facts, but seem to have derived benefit therefrom, by seeking to set up many of the same facts in the present suit, for the purpose of insisting upon title in themselves. Unless they were prejudiced by the conduct of some of the defendants, they cannot set up estoppel to prevent the real facts being shown in the present case. It is only by invoking the doctrine of judicial estoppel that the question is entitled to serious consideration.

The law of judicial estoppel is firmly established in this state, and may be invoked by any one, regardless of whether any rights have been prejudiced by the conduct of some one else which, it is claimed, constitutes the estoppel. The policy of the law will not permit any one to gainsay what he has deliberately sworn to in the course of a judicial proceeding. The doctrine is thus stated in the leading case of *Hamilton v. Zimmerman*, 5 Sneed, 48: "This doctrine is said to have its foundation in the obligation under which every man is placed to speak and act according to the truth of the case, and in the policy of the law to suppress the mischiefs from the destruction of all confidence in the intercourse and dealings of men, if they were allowed to deny that which by their solemn and deliberate acts they have declared to be true. And this doctrine applies with peculiar force to admissions or statements made under the sanction of an oath, in the course of judicial proceedings. The chief security and safeguard for the purity and efficiency of the administration of justice is to be found in the proper reverence for the sanctity of an oath." But, in the same case, we find the following exceptions to the general rule, thus stated: "Admissions or declarations made in pais are often entitled to little or no consideration, because made inconsiderately, or in ignorance of the facts, or not correctly understood or reported. And even when made with more deliberation, and under oath, it may be made to appear that they were made inconsiderately or by mistake; and, if this be so, the party ought certainly to be relieved from the consequences of his error." We do not think that the unsworn pleadings in this record come within the rule of law, which is intended to suppress fraud and to prohibit the deliberate shifting of position to suit the exigencies of each particular case that may arise concerning the subject-matter in controversy. In this case, it is claimed that the statements made in the former pleadings were not made considerately, and with a due knowledge of facts, and that a further examination of the subject-matter has led to a wholly different conclusion. We are satisfied that any statement, concerning the title to Broadway, which may have been made on behalf of any of the various interests in the various

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litigations which have arisen, from time to time, concerning this property, could not be more than the expression of an opinion, and that no statement can be said to have been made so considerably, and with such knowledge of the facts, as to estop the parties. This property has been a fruitful source of litigation for a great number of years, and, from an examination of the immense record in this cause, we are not prepared to apply a rule of law, intended to prevent injustice, to such a complicated state of facts as is shown to have existed concerning the title to this particular property. Having concluded that the heirs of John C. McLemore had no title to any of the land in controversy when this suit was instituted, we do not deem it necessary to discuss or decide any of the other questions raised on the record, and therefore limit our decision to the single point that there is "no title in the complainants."

The decree of the chancellor is accordingly affirmed, with costs.

CITY OF SPRINGFIELD v. SPRINGFIELD ST. RY. CO.

(*Supreme Judicial Court of Massachusetts, Hampden, July 15, 1902.*)

[64 N. E. Rep. 577.]

Street Railways—Right of City to Mandatory Injunction to Compel Removal of Rails Replacing Old Rails.

The grant of a location to a street railroad company required the materials and details of the construction of its tracks to be "to the acceptance of the supervisors of highways and bridges," and its tracks were constructed in accordance with the grant; T rails being used. The company subsequently replaced such rails, at a large expense, with similar rails of a heavier weight; but they occupied no greater portion of the surface of the street, which was replaced in its former condition, nor rendered it less suitable for travel or less safe. The company accidentally omitted to obtain permission from the supervisors, but there was no intent to evade the laws, and it was not shown that the city objected to such work. The city had intended to require the company to use grooved rails when new rails were laid: *held*, that the city was not entitled to a mandatory injunction requiring the removal of the rails, even if the supervisors could have required grooved rails to be laid; the violation of an established right not entitling the injured party to a mandatory injunction as a matter of course.

Same—Duty to Repair Street.

Under St. 1898, c. 578, §§ 4, 7, 10, 13, providing that street railroads shall be subject to a certain tax, levied according to mileage, to be adjusted so that the amount collected shall correspond to the amount formerly paid by the company for the repair of the streets, and providing that street railroads shall not be required to keep any portion of the streets and highways in repair, except that such railroads shall remain subject to all legal obligations imposed in original grants of locations granted to the company in the city or town, such railroads are not bound to repair streets over which their lines run which are not embraced in their original location.

Same—Constitutionality of Statute Relieving Company of Duty—Obligations of Contract.

St. 1898, c. 578, providing that street railroads shall not be required to repair any portion of the streets or highways, is not unconstitutional, as impairing contracts, in relieving the roads from such obligations imposed on them by a city in granting locations to them.

City of Springfield v. Springfield St. Ry. Co

Case reserved from superior court, Hampden county; Robert R. Bishop, Judge.

Suit by the city of Springfield against the Springfield Street Railway Company to compel the defendant to remove certain rails and to pay for certain street repairs. The lower court found and reported the facts, and reserved the case for the determination of the supreme judicial court. Bill dismissed.

W. H. McKechnie, for complainant.

Wm. H. Brooks and Jonathan Barnes, for defendant.

MORTON, J. This is a bill in equity to compel the defendant to remove the rails laid by it in a portion of Sumner avenue, in Springfield, and to replace them with other rails of a kind approved by the board of supervisors of highways and bridges of the plaintiff city, and also to compel the defendant to macadamize the surface of another portion of said avenue, and to pay the plaintiff the expense incurred by it in macadamizing a portion which it claims the defendant was under obligation to macadamize. The case was heard by a justice of the superior court, who found the facts, and reported them, and reserved the case for the determination of this court upon the report and the bill and answer; such decree to be entered as this court should decide.

1. It appears from the report that the board of aldermen in 1895 granted to the defendant a location for the extension of its tracks through Sumner avenue aforesaid eastwardly from a certain point to Forest Park, subject to certain conditions, of which one was "that all materials used and all the details of the construction of said tracks shall be to the acceptance of the supervisors of highways and bridges." The ordinances of the plaintiff city provide that the supervisors shall have the general supervision of all public highways, streets, avenues, and bridges of the city. The defendant accepted the location, and constructed its track in accordance with the terms of the grant. The rails used were T rails, and were approved by the board of supervisors. Those used on the northerly track were of somewhat greater depth and weight than those used in the southerly track. Afterwards, in 1900, the defendant took up the rails of the southerly track, and laid rails of the same type, size, and weight as those on the northerly track. The new rails were of the same design and character as the former rails, differing from them only in depth and weight, and were rendered necessary to provide for the safety and comfort of the public, in consequence of the increased traffic. They occupy no greater portion of the street surface than the former rails did, and do not render the highway any less safe, suitable, or convenient for travel than it was before. In making the change the defendant expended a large sum of money, and dug up a portion of the surface of the street, but restored it to the same condition in which it was before the change. It did not apply for or obtain per-

mission from the board of supervisors to dig up the surface of the street or substitute the new rails, but the omission to do so was accidental and without any purpose to evade or violate the law. It was the purpose of the board of supervisors to harden the surface of the street, which is a wide and much-traveled avenue in front of the principal park of the city, and, in order to facilitate traveling, to require the defendant, when the old rails were removed, to substitute a rail known as the "grooved rail." It is not found, and there is nothing to show, that this intention was known to the defendant. The implication would seem to be that it was not. It does not appear when the substitution of the new rails and the work of restoring the surface of the street was completed, but the fair inference from the allegations of the bill is that it was all done before the bill was filed. The plaintiff contends that the permission of the board of supervisors to the digging up of the street and the substitution of new rails was a condition precedent, and that the defendant, having acted without obtaining it, should be compelled to take up the rails which it has laid on the southerly track, and lay such rails as would be acceptable to the supervisors. The defendant urges various objections to granting the relief which the plaintiff seeks. Amongst others is the objection that the plaintiff has no standing, and that the bill should be brought by the attorney general, or some other officer representing the public. If we assume that the city has a *locus standi*, we think nevertheless that it is not entitled to have the rails removed. The defendant has incurred large expense in making the change which it has made. There was no intent on its part to evade or violate the law, in omitting to obtain the permission of the supervisors. For aught that appears, the city authorities stood by and saw the work go on without objection. It is expressly found that the surface of the street has been restored to the same condition that it was in before, and that the new rails occupy no more of the street surface than the former rails did, and do not render it less safe, suitable, or convenient for travel than it was before. The only reason urged why the defendant should be compelled to take up the rails because it did not obtain the permission of the supervisors is that, for the purpose of improving the avenue, the supervisors intended to harden its surface, and to require a grooved rail to be laid when the old rails were removed. This does not seem to us to be an adequate reason. No damage is shown, nor any interference with or obstruction to public travel. Even when there is a violation of an established right, a mandatory injunction does not issue as matter of course to compel the restoration of the former situation. *Brande v. Grace*, 154 Mass. 210, 31 N. E. 633; *Starkie v. Richmond*, 155 Mass. 188, 29 N. E. 770; *Society v. Akers*, 167 Mass. 560, 43 N. E. 381. If we assume that the supervisors could have required a grooved rail to be laid, we are never-

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theless of opinion that, under the circumstances shown, the plaintiff is not entitled to an injunction compelling the removal of the rails that were laid.

2. In 1896 the board of aldermen granted the defendant another location in said avenue, extending westerly from the former location. This grant was also subject to certain conditions, one of which was, in substance, that the defendant should pave, macadamize, or harden, in such manner and with such materials as the supervisors should direct, the whole line of the location between the rails and 18 inches outside of them, and should keep the same in repair, to the approval of the supervisors, and if, after it was done, a change should be directed in the material of the paving, macadamizing, or hardening, the defendant should make such change in its paving, macadamizing, or hardening as the supervisors should direct, and keep it in repair. The defendant accepted the location, and constructed its tracks to the approval of the supervisors; paving with cobblestones the part that it was required to pave under the above condition. In 1900, after St. 1898, c. 578, had gone into effect, the city macadamized the street, and requested the defendant to do likewise with the part that it was bound to take care of under the condition. The defendant declined, and thereupon the plaintiff macadamized the space outside the rails at an expense of \$195.76, which it is agreed is the compensation to be paid by the defendant if the plaintiff is entitled to compensation. Since the passage of St. 1898, c. 578, a tax has been annually assessed upon the defendant, and paid to the plaintiff, as provided in section 7 of that act. The prayer of the bill on this branch of the case is that the defendant may be ordered to remove the cobblestones between the rails, and macadamize and harden that space in such manner as the supervisors may direct, and also may be ordered to compensate the plaintiff for the macadamizing done by it for the space of 18 inches outside the rails. Neither of the above locations is a part of the original location granted to the defendant in the plaintiff city. The principal question in regard to this location relates to the effect of St. 1898, c. 578, upon the conditions on which the grant of the location was made. The defendant contends that, even if the conditions were legally imposed, which it denies, the effect of the act of 1898 has been to abrogate them. It also maintains that on this branch of the case, too, the plaintiff has no standing. The plaintiff, assuming that the conditions were lawfully imposed, contends that they are still in force, and that, if the effect of St. 1898 is to abrogate them, it is, in so far as it does that, unconstitutional, as impairing the obligation of contracts. If there is a contract, as the plaintiff contends,—which we do not intimate,—it would seem to be between the plaintiff and defendant, and the plaintiff would seem to be the proper party to enforce it. See *City of Lowell v. Proprietors*

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of Locks & Canals on Merrimack River, 104 Mass. 18. We therefore assume, as before, that the plaintiff has a *locus standi*. We also assume, without deciding, that the conditions were lawfully imposed. This accords with what is said by the special committee appointed by St. 1897, c. 509, to investigate the subject of the relation between street railway and municipal corporations,—and whose report, it is agreed, may be referred to,—to be the practice and the usual view; meaning, of course, in this state. We come, then, to the effect of St. 1898 upon the condition in question, and it seems to us that the statute abrogates it. The statute is entitled “An act relative to street railways.” But it is plain from the act itself, and from its history, that it was intended to put and does put the relations between towns and cities, on the one hand, and street railway companies, on the other, upon a new footing in regard to the repair and care of the streets and highways in which the tracks of street railways are or may be located. It repeals Pub. St. c. 113, § 32, which expressly provides that street railway companies shall keep in repair the portion occupied by their tracks; and it also repeals so much of section 27 of the same chapter as relates to the removal of snow and ice (St. 1898, c. 578, § 26). It enacts, in so many words, that “street railway companies shall not be required to keep any portion of the surface material of streets, roads and bridges in repair” (St. 1898, c. 578, § 11), and provides that the corporation taxes assessed upon street railway companies shall be paid to cities and towns in proportion to the length of tracks operated by them therein, instead of according to the residence of the stockholders, as before, and that the same shall be expended in the maintenance, construction, and repair of the public ways, and the removal of snow therefrom. St. 1898, c. 578, §§ 4, 10. It further provides for the payment of an excise tax on the gross receipts, which is to be applied in the same way, and is accompanied by a provision for readjustment, so as to make the amounts paid correspond to the cost to the city of doing work previously done by the company. St. 1898, c. 578, §§ 7, 10. The report of the special committee which was before the legislature makes it still plainer—if that were necessary—that the object of these various provisions was to commute into money payments to cities and towns the burdens previously imposed upon street railways in regard to the care of the streets; and there can be no doubt, we think, that, if the provisions to which we have referred stood alone, the effect of the statute would be to abrogate the conditions on which the location was granted. But the provision previously quoted from section 11 (that the companies shall not be required to keep any portion of the surface material in repair) is immediately followed by the words, “but they shall remain subject to all legal obligations imposed in original grants of locations”; and it is further provided in section 13 that “all locations heretofore

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granted or in use are hereby ratified and confirmed, as if accepted under the provisions of this section, and shall continue in force, subject only to revocation as provided in section seventeen, and to all provisions, restrictions, regulations or conditions applying to all street railways under the general law as now in force except so far as changed or modified by this act." The petitioner contends that the effect of these provisions is to keep the conditions in force. But it is to be noticed that it is "legal obligations imposed in original grants of locations" to which the companies are to remain subject. And in the first section of the act it is provided that "an 'original location' of a company in any city or town shall mean the first location granted to it in such city or town." We think that "original grant of location" is the same thing as "original location" or "grant of original location." In the present case the location to which the condition was attached was not the first location of the defendant company in Springfield, and therefore not an original grant of location. It was not even the first location in Sumner avenue. It was an extension of a location which had already been granted in that avenue. And therefore the clause in regard to "legal obligations" which we have quoted from section 11 is not applicable to the case before us. That there is a difference between an original location and an extension or alteration of a location is plainly shown by the provisions in regard to extensions and alterations in sections 15 and 16. In the report of the special committee the reason for this difference is given. Report of service committee on relation between cities and towns and street railway companies, House Document No. 475, pp. 23, 49. The manifest purpose of what we have quoted from section 13 is to preserve and confirm to street railway companies locations previously granted, and to continue in force such provisions, restrictions, conditions, and regulations as were applicable by general law to all street railway companies, except so far as changed or modified by this statute. It has nothing to do with the effect of other provisions of the statute upon the terms and conditions on which such locations have been granted, except possibly in cases, if there are any such, where the terms and conditions embody general provisions that are continued in force; and it expressly saves from its operation changes in such general provisions (of which that in reference to repair of streets is one) made by this act. We think, therefore, as already observed, that the statute abrogates the conditions relied on. See *City of Boston v. Union Freight R. Co.* (Mass.) 63 N. E. 412.

The remaining question is whether this can be done consistently with the constitutional provision against impairing the obligation of contracts. It seems to us that the locations given to street railway companies in public streets by cities and towns in this commonwealth do not constitute contracts, or, if they do, that they are of such a nature that the legislature can modify or annul them without thereby violating the

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constitutional provisions. Except over private premises, they are, it seems to us, in the nature of a privilege or permit to use the public ways given by cities and towns by virtue of authority from the legislature for the purpose of facilitating public travel and accommodation. See *Attorney General v. Metropolitan Railroad Co.*, 125 Mass. 515, 28 Am. Rep. 264. They are analogous to licenses given to run omnibuses along certain routes, though, of course, to make the analogy complete, the omnibuses would have to be built so as to run on rails laid in the streets. St. 1847, c. 224. They convey no exclusive rights in the highways or streets in which they are granted, but are to be used in common with others having occasion to use the public way. The public authorities retain, in the main, full control over the streets or ways in which they exist, and may revoke the location, or alter or discontinue the ways, without liability to damages therefor, and subject only to such limitations, if any, as the legislature may see fit to impose. No doubt, the legislature could have granted the defendant the right to lay tracks in the streets of Springfield, or have authorized the plaintiff to grant it in such terms that, when accepted, they would have constituted a contract between the plaintiff and defendant. But it has not done so, and there is nothing in the charter of the defendant company or the amendments thereto which renders this case an exception to the policy which has hitherto prevailed in this commonwealth. St. 1868, c. 63; St. 1873, c. 149; St. 1887, c. 76. Indeed, the company does not contend that its rights are contractual. That is the contention of the city. It is possible that the rights of the company in locations granted to it might stand on a different footing from the rights and obligations of the city in regard to such locations. But however that may be, there is nothing in the legislation which we are considering which would be open to objection on the part of the company as violating the obligation of contracts, since its charter expressly provides that it shall be subject to all duties, restrictions, and liabilities set forth in all general laws, whether then or thereafter in force, relating to street railroads, except as therein provided. And it is settled that under the power there reserved this legislation would come within constitutional limits, so far as the company is concerned. *Sioux City St. Ry. Co. v. Sioux City*, 138 U. S. 98, 11 Sup. Ct. 226, 34 L. Ed. 898, 46 Am. & Eng. R. Cas. 169.

So far as the city is concerned, it must be deemed to have acted in behalf of the public, and not in virtue of any private or proprietary rights; and the legislature has the same right to modify or abrogate the conditions on which location in the streets and public ways have been granted that it would have if such conditions had been originally imposed by it. *City of New Orleans v. New Orleans Waterworks*, 142 U. S. 79, 12 Sup. Ct. 142, 35 L. Ed. 943.

The result is that we think that the bill should be dismissed. Bill dismissed.

**DENVER POWER & IRRIGATION CO. v. DENVER & R. G. R.
Co. et al.**

(Supreme Court of Colorado, April 7, 1902.)

[69 Pac. Rep. 568.]

Eminent Domain—Railroad Right of Way for Reservoir Site.

The fact that a certain site over which a railroad company has a right of way is the only one at which a water company can construct a reservoir for the prosecution of its business, no public necessity for the reservoir being shown, does not authorize the condemnation of such right of way for the reservoir.

Same—Same—Issues.

Where, in a proceeding to condemn land for a reservoir, the petition alleges that a certain railroad company owns a right of way over the land, and that others claim an interest therein, which the petitioner asks to have condemned, the petitioner cannot afterwards in the proceedings assert that such parties have no interest, and change the proceeding to one to try title.

Same—Same—Intervention—Forfeiture of Franchises.

In a proceeding instituted by a water power company to condemn a railroad right of way for a reservoir, the people, through the attorney general, have no right to intervene to determine whether the railroad company has forfeited its franchise and right to such right of way.

Instructions.

Where the undisputed evidence shows that a railroad company claiming a right of way over certain land constructed a grade thereon, and that nothing further was done thereto by such company or its successors, except 17 years thereafter to lay rails and ties thereon, a finding, 20 years after, that a successor of such company had constructed thereon and had in operation a line of railroad, is not justified.

Eminent Domain—Railroad Right of Way—Land Not Needed.

Where land which is not needed or used for railroad purposes has been appropriated for a railroad right of way, such appropriation will not prevent the condemnation of such land for another public use.

Same—Final Judgments.

Where, in proceedings to condemn land for a reservoir, judgment is entered on the pleadings and evidence dismissing the petition, such judgment is final, and may be reviewed on writ of error.

Error to district court, Douglas county.

Action by the Denver Power & Irrigation Company against the Denver & Rio Grande Railroad Company and others. From a judgment for defendants, plaintiff brings error. Reversed.

Plaintiff in error, as petitioner, commenced an action in the district court to condemn a piece of land for a reservoir site. To this proceeding defendants in error were made respondents. On the trial of the issues made by the pleadings, the court rendered judgment denying the right of petitioner to condemn the premises sought to be taken. From this judgment, petitioner brings the case here for review on error. Since the case was brought here, the people, through the attorney general, have filed a petition in intervention, and ask to intervene, which petition certain of the respondents move to strike from the files. These same respondents also move to

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dismiss the writ of error. The necessary facts and statements in the pleadings for an understanding of the questions discussed and determined appear in the opinion. For convenience, when named, the petitioner will be referred to as the "Power Company," and the respondents the Denver & Rio Grande Railroad Company as the "Rio Grande Company," the Denver, Leadville & Gunnison Railway Company as the "Leadville Company," the Denver, Cripple Creek & Southwestern Railroad Company as the "Cripple Creek Company," and the Colorado & Southern Railway Company as the "Colorado Southern." The only respondents appearing here are the Leadville, Cripple Creek, and Colorado Southern Companies.

Teller & Dorsey and Norman M. Campbell, for plaintiff in error.

Dines & Whitted, for defendants in error.

GABBERT, J. (after stating the facts). Counsel for respondents present two propositions which go directly to the authority of petitioner to condemn the lands in question, and we shall, therefore, consider these matters first. The power of the petitioner to condemn is challenged upon the ground that under the constitution of the state it cannot take lands for a reservoir site for all the purposes mentioned in its articles of incorporation, and the joinder of nonpermissible purposes with those which are permissible deprives petitioner of the right to condemn for any. Section 14, art. 2, of the constitution, provides: "That private property shall not be taken for private use * * * except for reservoirs * * * for agricultural, mining, milling, domestic, or sanitary purposes." The articles of incorporation of petitioner recite that its objects and purposes are "to procure * * * reservoirs * * * for the storage and use of water for power, irrigation, mining, milling, manufacturing, and other beneficial uses and purposes." According to the petition, petitioner seeks to condemn for the purposes mentioned in its articles of incorporation, and it is therefore urged that petitioner is seeking to utilize the proposed reservoir site for "power," "manufacturing," and "other beneficial uses and purposes," which, it is said, are not uses recognized by the constitution for which a reservoir site may be condemned. This view is not tenable. The constitution does provide that a reservoir site may be taken for milling purposes, and the term "milling," as employed in the constitution, is synonymous with "manufacturing." *Lamborn v. Bell*, 18 Colo. 346, 32 Pac. 989, 20 L. R. A. 241. The word "power," as used in the articles of incorporation and petition, clearly means a manufactured product,—the produce of a manufacturing establishment. No use is suggested which, under "other beneficial uses and purposes," would not directly or indirectly be associated or connected with one or more of the uses for which a reservoir site

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may be taken, according to the express terms of the provisions of the constitution under consideration. We conclude, therefore, that no purposes are claimed different from those embraced within the provisions of the constitution, if the purposes therein mentioned had been specified in the articles of incorporation, and nothing more.

The next point urged against the authority of petitioner to condemn is based upon the ground that the reservoir site is within the limits of a forest reserve of the United States, and it is therefore urged that, in the absence of a showing by petitioner of a compliance with the law relative to the location of reservoir sites on such reserves, it cannot take the lands in question. This proposition is not unlike the one raised in *Union Pac. R. Co. v. Colorado Postal Tel. Cable Co.*, 69 Pac. 564, where it was urged that the telegraph company could not condemn a right of way over lands extending through incorporated towns in the absence of a showing that it had obtained leave from the municipal authorities to erect its line along the streets and alleys of such towns. It was decided that the question was one which did not concern the railroad company. The fact that petitioner may not have leave from the government to maintain a reservoir site upon a forest reserve, if such leave is necessary, or has not complied with the law in this respect, if such is the case, may affect the ability of petitioner to enjoy the lands sought to be condemned, but does not affect its power to condemn such lands as against the respondents. They cannot raise a question which does not concern them, or which rests solely between the petitioner and the government. A further ground is also urged on behalf of respondents against the authority of petitioner to exercise the right of eminent domain, which will be noticed later.

We shall now consider the propositions urged on behalf of counsel for petitioner in support of their contention that the judgment of the court below should be reversed. The trial court determined that property held for a public use could not be taken, under the exercise of the power of eminent domain, when such taking entirely prevented its use for the public purposes to which it was devoted. This conclusion, it is claimed, is erroneous, for the reason, as we understand the argument of counsel, that corporate property devoted to a public use is subject to condemnation the same as private property of individuals, and may be taken for a different public use, even though such taking would render it impossible for the party from whom taken to in any manner utilize it for the purpose to which it was devoted, provided the requisite degree of necessity for the second taking be shown to exist, or where the party from whom taken can secure other property equally available. In support of this proposition we are referred to section 8, art. 15, of the constitution, which provides: "The right of eminent domain shall never be abridged

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nor so construed as to prevent the general assembly from taking the property and franchises of incorporated companies and subjecting them to public use the same as the property of individuals." It is unnecessary to attempt an analysis of this constitutional provision,—whether or not it is self-executing, or the legislature has provided laws by which its provisions may be enforced,—further than to say that neither the constitutional provision referred to nor any statute to which our attention has been directed changes or modifies the general rule that property already devoted to a public use cannot be taken for another in such manner or to such an extent that the use to which it is devoted will be wholly defeated or superseded, unless the power to so take be granted expressly or by necessary implication (*Cincinnati, S. & C. R. Co. v. Village of Belle Center*, 47 Am. & Eng. R. Cas. 72; *Id.*, 48 Ohio St. 273, 27 N. E. 464; *City of Seymour v. Jeffersonville, M. & I. R. Co.*, 126 Ind. 466, 26 N. E. 188, 47 Am. & Eng. R. Cas. 38; *Lake Erie & W. R. Co. v. Board of Commissioners [C. C.]* 57 Fed. 945; *Little Miami, C. & X. R. Co. v. City of Dayton*, 23 Ohio St. 510), except it may be in cases where a public exigency requires that it be taken. If the property sought to be condemned is already devoted to railroad purposes, then the facts which we consider as established by the record, or as claimed to exist by counsel, do not authorize the petitioner to take the property of the respondents. As we understand the record, the property to be condemned is claimed as a right of way for railroad purposes by the Colorado Southern and Rio Grande Companies, or at least wholly includes lands which these companies claim for such purposes; and that it is the intention of petitioner to utilize those lands by the construction and maintenance of a dam and reservoir, which will submerge them for a distance of seven or eight miles. It is claimed that the railroad companies can build a line of railroad around the proposed reservoir site at some additional cost, which will be equally as good as one constructed over their present rights of way; that the necessity of the reservoir company to such site is absolute, because it must take the bed of the stream or abandon its enterprise. Conceding that petitioner has the right, under the laws of the state, to ordinarily exercise the right of eminent domain in acquiring property held for railroad purposes, no statute is pointed out which would authorize it to take such property to an extent which would totally deprive the railroad companies of its use. No public exigency is shown to exist of a character which demands the location of a reservoir site at the point selected by petitioner. It may be true that the site thus selected is convenient, or it may even be true that it is the only available one on the stream; but that is a matter which affects the rights of petitioner, and not the public. It is not claimed that, in order to serve the needs of any community, it is necessary that the reservoir site be located at this par-

ticular point, or in fact at any. While it may be true that the enterprise of petitioner is public in its nature, the public necessity which must be shown to exist before it can entirely deprive respondents of their lands is the necessity of the public to be in some manner served by the projected enterprise, and not the necessities of the projector, in order to make such enterprise a success. So far as the authority to exercise the right of eminent domain for public uses is concerned, it is based upon the theory that the property granted the subject is upon the condition that it may be retaken to serve the necessities of the sovereign power (*Mills, Em. Dom.* § 1; *U. S. v. Jones*, 109 U. S. 513, 3 Sup. Ct. 346, 27 L. Ed. 1015), and to this end agencies created by the state, the purposes of which is to serve the public, may exercise this right. Where, however, land is already devoted to a public use, it would be wholly unreasonable to permit it to be taken for another public use which would nullify and defeat the one to which it is already devoted, except in cases where the overwhelming necessities of the public were such that, in order to serve their needs, or supply their necessities, the taking of such property became necessary. Unless so limited, no rule governing the rights of those engaged in conducting a business for the benefit of the public could be formulated which would afford them protection against others desiring to also engage in the transaction of a public business. While corporations engaged in business of a nature which requires them to serve the public are said to be public corporations, they are, in fact, but private enterprises, inaugurated for the benefit of their stockholders; and if one such corporation may take the property of another so as to deprive the latter of the use to which it is devoted, except public necessity demands such taking, there would be no reasonable limit to the conditions under which the power of eminent domain might be exercised. Without the limitation suggested, the most absurd results could follow. The second might take from the first, others take from the latter, and the first turn about and retake, and thus the process go on ad infinitum. *Lake Erie & W. R. Co. v. Board of Commissioners*, supra. The taking of property already devoted to a public use to an extent which wholly defeats such use, for another public use, cannot be justified when it would merely result in a change of ownership, without in any manner tending to meet or serve the exigencies of public needs, or where the change of ownership would become a mere matter of private concern. *Chicago & N. W. Ry. Co. v. Chicago & E. R. Co.*, 112 Ill. 589, 25 Am. & Eng. R. Cas. 158. In the circumstances of this case neither comparative convenience, benefits, nor cost to the respective parties can be taken into consideration.

The next point urged is that the Colorado Southern has no interest in the property in dispute as a right of way for railroad purposes. In support of this contention two proposi-

tions are urged: (1) That parallel and competing lines of railroad cannot be consolidated under the constitution and laws of this state; and (2) that neither the Colorado Southern nor its grantors have complied with the law of the United States relative to the steps which must be taken in order to hold a right of way for railroad purposes obtained from the general government, and that a failure on the part of the grantors of the Colorado Southern to comply with the law of the state with respect to the construction of railroads by corporations organized under the laws of this state resulted in a dissolution of their corporate existence before the Colorado Southern purchased such right of way from those companies. We do not deem it necessary to state the facts upon which these claims are based. It is averred in the petition that the Rio Grande Company owns a right of way through the lands which it is intended to include in the reservoir site, and that the Leadville, Cripple Creek, and Colorado Southern Companies each claim an interest in the property sought to be condemned, the nature and extent of which is unknown. These several parties are made respondents. The prayer is to the effect that the right and interest of the several respondents be assessed according to the statute; for a decree that petitioner have the right to appropriate and occupy the premises for a reservoir site; and that the compensation of respondents and each of them be fixed, when ascertained. One whose rights are not injuriously affected cannot complain that a corporation has acted in excess of its powers, or without warrant of law. *Thomp. Corp.* § 6030; *Tayl. Priv. Corp.* (3d Ed.) § 281; *Railroad Co. v. Ellerman*, 105 U. S. 166, 26 L. Ed. 1015; *New England R. Co. v. Central R. & E. Co.*, 8 Am. & Eng. R. R. Cas. (N. S.) 261. The ultimate object of this action, so far as petitioner is concerned, is to acquire the title of respondents in the right or rights of way through the reservoir site. Petitioner has no interest in these premises. In compliance with the statute, it has made all claimants to any interest in them parties respondent in order that they may have an opportunity to establish the damages which they will sustain by taking the land in question. It is wholly immaterial to petitioner what the respective interests of these parties may be. If the law under which these rights were acquired by the respondents has been violated, or not complied with, certainly no rights of petitioner have thereby been invaded, because at no time has it had any interest to be affected. It cannot assume the inconsistent positions of conceding, by commencing an action to condemn, that it has no interest in the premises in dispute, and then, after bringing in the parties whom it says do own or claim to own some interest, assert that they have none. Its right to condemn depends primarily upon the fact that the land thus sought to be taken belongs to another. *Railway Co. v. Croman*, 16 Colo. 381, 27 Pac. 256. It must pay for the land taken. As to

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which respondent may be the owner of such land, the petitioner has no interest, further than to bring before the court those claiming an interest. If any dispute exists between these parties as to which may be the owner, that is a matter which they must settle between themselves. When the damages are assessed for taking the disputed premises, if the case reaches that stage, the amount which must be paid on this account can be turned into the registry of the court by the petitioner, and the parties who claim to be entitled to it can have that matter adjudicated. Petitioner cannot convert the action into one to quiet title or forfeit corporate or property rights. So far as it is concerned, it must remain an action to condemn, and no issue can be injected into the case by it which will change its character in this respect. *Railway Co. v. Croman*, supra. Many authorities are cited by counsel in support of the propositions just considered, but they are not in point. They were cases brought either directly for the purpose of testing such questions, or to forfeit corporate rights, or where the authority of a corporation seeking to exercise the power of eminent domain was challenged.

In this connection we shall dispose of the petition of intervention. Since the cause was brought here, the people, through the attorney general, have filed a petition, and ask to be permitted to intervene. In this petition facts are alleged from which it is claimed the conclusion can be deduced that the railroad companies have no interest in the premises embraced in the proposed reservoir site. The evident purpose and object of the intervention is to forfeit the corporate rights and franchises of the respondent railroad companies in the premises sought to be taken. The Leadville, Cripple Creek, and Colorado Southern Companies move to strike this petition from the files. We are cited to decisions of this court where parties have been permitted to intervene in condemnation proceedings. In those cases the intervenors were interested in the subject-matter of controversy. No such interest is exhibited by the people in this instance. They have no claim whatever to any part of the premises sought to be condemned, and are entitled to no damages which may be awarded. It is only parties who have an interest in the subject-matter of dispute between litigants who are entitled to intervene. Aside from these considerations, an intervention cannot be permitted when the result would be to change the entire character of the action,—as in this instance, from proceedings in condemnation to that of *quo warranto*. Cases are cited from this and other courts where language has been employed to the effect that the sovereignty conferring a franchise may at any time and in its own appointed way and form inquire into the manner in which the franchise granted is used. Those cases, however, were where the court had under consideration the method provided for direct proceedings in *quo warranto*, and have no application whatever to the case

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at bar, in view of the fact that it is a condemnation proceeding pure and simple, and cannot be converted into one of an entirely different character and nature, which would eliminate that feature as between petitioner and either of the respondents.

At the oral argument it was suggested that the Colorado Southern could not successfully object to the condemnation of the right of way in question, for the reason that it has never been used for railroad purposes. The trial judge found that at the time the petition in condemnation was filed the Colorado Southern "was in possession of the premises sought to be taken, and had constructed thereon, and had in operation, a line of railroad," and concluded "the lands so occupied and used were by such occupation and use devoted to public purposes." This finding and conclusion are not supported by the evidence, in the circumstances of this case. It appears from the pleadings and evidence and the claims of the respective parties that the predecessor in interest of the Rio Grande Company made claim to this right of way about 1883, and subsequently constructed a railroad grade thereon. According to the answer of the respondents the Leadville, Cripple Creek, and Colorado Southern Companies, the Leadville Company, about 1889, made claim to the same right of way; that by virtue of an act of congress passed in 1896 the Cripple Creek Company claims to have acquired this right of way, or an interest therein; and that the Colorado Southern, organized in 1898, purchased from the Leadville and Cripple Creek Companies their rights therein. Neither of the railroads, except the predecessor of the Rio Grande Company, ever did any work in the way of grading or constructing a road on this right of way until in September, 1899, at which time the Colorado Southern did lay rails and ties substantially or partially on the old grade belonging to the Rio Grande Company, and through the lands embraced in the reservoir site. The petition in condemnation was filed in November, 1899. It does not appear that the Colorado Southern at this time was using the line constructed, or ever intended to use it, for railroad purposes. No claim is made that trains were run over such road for the purposes of traffic, or that it is the intention of the company to utilize this track for such purposes, or to extend its line of road beyond the point reached about the time these condemnation proceedings were instituted and heard below. In short, so far as advised from the present record, the laying of the rails and ties upon the right of way through the reservoir site appears to have been for the one purpose of merely showing the existence of a railroad at this point by putting in place the materials from which a railroad is usually constructed. We have said that property already devoted to a public use cannot be taken under the exercise of the power of eminent domain to an extent which will wholly

defeat or supersede that use; but land which is not employed in or needed for such use is not within the reason or operation of this rule. *Cincinnati, S. & C. R. Co. v. Village of Belle Center*, supra. Corporations like railroad companies are organized for the transaction of public business, and to further this end it is the policy of the national and state governments to permit them to acquire rights of way over the public domain. Such rights, however, cannot be held indefinitely. They must, within a reasonable time, be subjected to the use for which they were granted. The general government, as well as this state, has provided laws which are intended to require railroad companies to complete their lines of road over a designated way within a definite period; otherwise the rights in the right of way to the incompleting part of the road shall revert or be forfeited. We refer to these, not for the purpose of establishing a forfeiture, but as indicating an intent on the part of congress and the legislature of the state to prevent railroad companies from indefinitely holding a right of way to the exclusion of others who may desire to appropriate it to some other use. For something like 16 years the right of way in question has been held by different companies for railroad purposes. During all that period it does not appear that it has ever actually been devoted to any such use. The fact that ties and rails were laid by the Colorado Southern a short time prior to the commencement of these proceedings is not sufficient to show conclusively, or even *prima facie*, after the lapse of so many years, that it is the bona fide intention of the company to construct or maintain a railroad over this right of way. True, the Colorado Southern had not been in existence a year at the time it did this work, but that is immaterial, in view of the fact that its rights to such right of way were acquired from other companies, which never made any attempt to construct a railroad over it. The mere laying of rails, in the absence of a showing of a bona fide purpose to construct and maintain a railroad, is of no avail. The right of way must actually be devoted to or needed for railroad purposes, and the outward semblance of the existence of a road which is not used is of no more avail than if none had been constructed.

The further point is made by the respondent railroad companies that petitioner has no power to condemn the right of way, because it is only a private corporation, and that a corporation of this character cannot condemn lands held for a public purpose. Whether petitioner is a public or private corporation is immaterial. As a private corporation, it is authorized, under the constitution, as we have already pointed out, to condemn lands for a reservoir site. By the provisions of section 1716, 1 Mills' Ann. St., it is provided that under the act of eminent domain private property may be taken for private use for reservoirs for agricultural, min-

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ing, milling, domestic, or sanitary purposes. Property held by a public corporation, which is not devoted to or needed for a public use, is so much private property as though held by an individual. Hence it follows that, if the right of way is neither used nor needed for railroad purposes, it is private property, and petitioner, though a private corporation, may, under the provisions of the law on the subject of eminent domain, condemn for the purposes for which it is sought to be taken.

On behalf of the respondents the Leadville, Cripple Creek, and Colorado Southern Companies a motion to dismiss was filed in this court, based upon the ground that it is without jurisdiction to hear or determine this case on error. No brief has been filed in support of this motion, but at oral argument it was suggested that final judgment had never been entered in the court below. The effect of the judgment rendered was to deny the right of petitioner to take the premises by condemnation proceedings. This was determined on the issues made by the pleadings, and the testimony introduced by the respective parties at the time when a motion had been interposed by petitioner for the appointment of commissioners, and the motion of respondents to dismiss, were heard, and was a final judgment, because it denied the right of petitioner to condemn, and effectually settled the rights of the respective parties, so far as the proceedings in condemnation were concerned. The motion to strike the petition of intervention is sustained, and the motion to dismiss denied.

The judgment of the trial court is reversed, and the cause remanded for further proceedings not in conflict with the views expressed, as though no trial had been had. Reversed and remanded.

CAMPBELL, C. J., not participating.

On Petition for Rehearing.

(July 5, 1902.)

PER CURIAM. In determining what the evidence establishes with respect to the appropriation or need of the premises in dispute for railroad purposes, the record as a whole must be considered. Over three years elapsed between the date the Power Company commenced actual operations in the way of constructing a dam and the time when either of the respondents asserted any claim or objected to such use of these premises. During that period the Power Company expended many thousands of dollars in carrying on these operations. These are important features to consider in determining the good faith of the use and needs of the Colorado Southern Company. The question of whether or not there has been such an appropriation by that company as will preclude the Power Company from now condemning the premises is not foreclosed. We have merely held that in the circumstances

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of this case a use and need for railroad purposes have not been established, and these questions are remitted to the trial court for determination in connection with such others as may be proper and in harmony with the views expressed in this and the principal opinion. The petition for rehearing is denied. Petition for rehearing denied.

CAMPBELL, C. J., not participating.

SCHAAF *et al.* v. CLEVELAND, M. & S. RY. CO. *et al.*

(*Supreme Court of Ohio, April 22, 1902.*)

[64 N. E. Rep. 145.]

Eminent Domain—Interurban Railway as an Additional Burden on Highway.*

The construction and operation of an interurban railroad laid with T rails, entirely on the side of a public highway next to the abutting improved farms owned and occupied by the plaintiffs, and entirely between their lands and the traveled part of the highway,—the company having authority to run an unlimited number of cars and trains for the carrying of passengers, and the transportation of freight, express matter, and government mail,—is an additional burden on the public highway, and obstruction to and interference with the plaintiffs' easements and rights therein, not substantially different from those that are imposed by the construction and operation of steam railroads under like conditions.

Same—Electric Plant—Additional Burden.

The construction and operation of an electric plant in connection with such railway, and on the same side of the traveled public roadway, for supplying heat, power, and light to consumers for profit, constitutes another additional burden, which is an invasion of the plaintiffs' property rights.

Same—Compensation—Injunction.†

The plaintiffs are entitled to injunction, in such case, to prevent the construction and operation of such railroad and of such electric plant, or either, until compensation and damages shall be assessed them in a proper appropriation proceeding, and paid, or secured to be paid.

(Syllabus by the Court.)

Error to circuit court, Cuyahoga county.

Action by Schaaf and others against the Cleveland, Medina & Southern Railway Company and another. Judgment for defendants, and plaintiffs bring error. Reversed.

The plaintiffs in error brought their action in the Cuyahoga common pleas against the Cleveland, Medina & Southern Railway Company and John Davis to enjoin the construction and operation of a railroad along and over a public highway known as the "Wooster Pike." The plaintiffs are the owners of improved farms which abut on this public road, and their titles in fee extend to the center of the road. They reside on these farms, and in connection therewith make all the uses of

*See *Pennsylvania R. Co. v. Montgomery County Pass. Ry. Co.* (Pa.), 1 Am. & Eng. R. Cas., N. S., 190.

†See note, 15 Am. & Eng. R. Cas., N. S., 834.

the road that abutting proprietors are accustomed to do. The road has been improved, and constitutes their means of access to their lands, and they have never consented to the construction of the railroad thereon. The petition alleges that "they are the owners of, and are seised as of estates in fee simple of, certain tracts of land located in Middleburg township, Cuyahoga county, state of Ohio, and which tracts of the land abut on the western side of what is known as the 'Wooster Pike,' which is a road or highway dedicated to public use for the purpose of a road or highway; that these plaintiffs are the owners of the fee to the center of said road on the portion of said road upon which the lands of these plaintiffs abut, subject only to the right of the public use as such road or highway; that the board of commissioners of Cuyahoga county have heretofore granted to another corporation, to wit, the Wooster, Medina & Cleveland Street Railway Company, the right of way in said Wooster pike, so far as the said board of commissioners have power to grant the same, to construct and build a railway over and along said Wooster pike, and especially on the portion of said Wooster pike upon which the lands of the plaintiffs above described directly abut, and the title to which is in these plaintiffs, subject only to said public uses above set forth; that the defendant the Cleveland, Medina & Southern Electric Railway Company claims to be entitled to all the rights of the said the Wooster, Medina & Cleveland Street Railway Company so acquired from said board of commissioners; that the said defendant railway company, without having acquired the right from these plaintiffs, or under the statute in such cases made and provided, is about to, and, unless prevented by order of this honorable court, will, through its agents, contractors, and servants, wrongfully and unlawfully erect large wooden poles on the land of these plaintiffs along said highway, for the purpose of supporting electric trolley wires to be used in connection with the proposed electric railway, and the said defendant railway company also threatens, through its agents, contractors, and servants, to proceed to lay and construct a railroad suitable for the use of operating electric cars on the side of said highway, the title to which is vested in these plaintiffs as above set forth, and when the said railroad is completed the defendant railway company, through its agents and servants, will operate and run over said railroad electric cars at a very high rate of speed, and said cars it is proposed to have carry passengers and freight from various points through the counties south of Cuyahoga county. Plaintiffs further say that the defendant railway company has entered into a contract with the defendant Joseph Davis for the furnishing and erecting of said wooden poles, and the said defendant Joseph Davis has already distributed the poles along the lands of these plaintiffs, and is about to erect and set them along the lands of these plaintiffs in the manner above set forth. Plaintiffs

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further say that the erecting of said poles, and the construction of said railroad, and the laying of the tracks along said highway, as contemplated in the manner above set forth, and as provided for in the grant of the right of way by the said county commissioners, and the running of the electric cars thereon, will have the effect of seriously interfering with plaintiffs' enjoyment of their property above described, and will result in great diminution of the value thereof, and of the value of the private rights and easements which they now respectively have in said highway, and especially will seriously interfere with their means of access to and from their respective tracts of land, and will render it absolutely impossible to hitch their teams along that side of the highway, or to allow them to stand in said highway. Plaintiffs further say that such contemplated use of the said highway by the said defendants in the manner hereinbefore set forth is an essential and great diversion of the said property to uses and purposes other than those for which it was acquired by the public use, as to accumulate materially additional burdens upon the lands, and as to destroy and impair the incidental rights of the plaintiffs appurtenant to their lands on said highway, and that the damages resulting therefrom will be irreparable, and that said defendant railway company is insolvent, and unable to pay its obligations, or any judgment for damages which these plaintiffs might recover against them by virtue of the premises. Plaintiffs further say that these defendants have been notified by all the plaintiffs herein, or by their agents, that these plaintiffs objected to the proposed acts of the defendant Joseph Davis, who has only accelerated the work, and has been laying telegraph poles by day and night, and, without any right whatsoever to do it, is unlawfully distributing them along the front of the land of these plaintiffs; and, if the court should require any notice to be given of an application for a restraining order in this case, such notice will only give the said defendant Joseph Davis and the said defendant railway company opportunity to erect all of said poles before the said restraining order can be granted on notice to these defendants. Wherefore, plaintiffs pray that an order may issue from this honorable court forthwith restraining these defendants, their officers, agents, contractors, and servants, from further carrying on any portion of their work in the manner above set forth, and that such order be issued without notice to these defendants, for the reason that the object for which this injunction is prayed may in great measure be defeated by the giving of any notice to said defendants, and that on the final hearing of this case a perpetual injunction may be granted, forever restraining these defendants, or either of them, or their officers, agents, contractors, or servants, from carrying on any portion of said proposed work; and plaintiffs ask for such other and further relief as, in good conscience, they may be entitled to." The only material part of the

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answer is a denial that the building of the railway will interfere with plaintiffs' enjoyment of their property, or depreciate its value, or become an additional servitude upon the highway. The circuit court dismissed the petition, and rendered judgment against the plaintiffs for costs, from which error is prosecuted here. That court made a finding of the facts, the substance of which will appear in the opinion.

Herrick & Hopkins, for plaintiffs in error.

G. R. McKay and A. I. Newman, for defendants in error.

WILLIAMS, C. J. (after stating the facts). The circuit court found, as the plaintiffs allege in their petition: That they are the owners of improved farms, on which they reside, that front and abut for considerable distances on the public road in question, and that they own the fee of their lands to the center of the road. This road has long been used by them as their means of ingress and egress to and from their farms, and for all the purposes of a public highway. That "the said highway, upon the westerly side of which these plaintiffs' lands are located, is sixty feet wide from fence to fence. The width of the sidewalk between ditch and fence on each side is eight feet, and the width of the roadway as established is thirty-two feet. Upon each side of said roadway, and immediately adjacent thereto, is a ditch six feet wide, from two to three feet deep, the entire frontage of plaintiffs' land, except seventy-five feet in front of the house on the land of said John Hurst, and about forty feet in front of the blacksmith shop on said land, and except, also, about 125 feet in front of the house on Daniel Hutchinson's property, in all of which said places said ditch has been tiled and filled in; and upon the easterly side of said traveled roadbed, immediately next to the ditch, is a brick pavement eight feet wide. And upon the extreme westerly side and edge of said roadway defendant railway company purposes to construct a railway by laying ties, and placing thereon T rails, such as are ordinarily used by suburban railways, the nearest part of which shall not be nearer to the center of said roadway than eleven feet, in accordance with the terms of said franchise, and nineteen feet from the nearest edge of the brick pavement upon the extreme opposite side of the said traveled roadbed, and to maintain upon the westerly side of said highway poles for the carrying of trolley wires, feed wires, and wires for the carrying of electric power to be sold to parties desiring electric light, heating, or power, and to operate on said railway cars propelled by electricity, and further to carry upon same passengers and freight." That the railway company, having presented to the board of county commissioners the written consent of the owners of more than half of the feet front of the lands abutting upon the public highway, but without the consent of any of the plaintiffs, obtained from that board the grant of a franchise to construct, lay, maintain, and operate

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for a period of twenty-five years, along and over this public highway, in all respects according to the plans and purposes of the railway company as hereinabove stated and set forth, "a single-track street railway, with all suitable convenient side tracks, switches, turnouts, turntables, stations, and appurtenances; also for the right to construct and maintain all necessary wires to connect its feed wires with adjacent property along the route therein petitioned for, necessary to supply light, heat, or power to such adjacent property, and all other things necessary to operate a street railway with electricity, or other approved motive power acceptable to the county commissioners. The right herein granted is, to operate a street railway for the transportation of passengers, baggage, packages, boxed and barreled freight, farm produce, express matter, and United States mail." The grant fixes a time within which the railway shall be commenced and completed, requires cars to be run over it "as often as three times each way daily," and contains some regulation relating to the fare. The board of commissioners reserved the right to grant similar franchises to other companies.

The court announced as its conclusion of law that upon this state of facts the plaintiffs were not entitled to the relief they sought, and rendered judgment accordingly. In that conclusion we are unable to concur. In our opinion, the construction and operation of the railroad, as authorized and proposed, must necessarily constitute a serious obstruction to the plaintiffs' use of the public highway as a means of access to their farms, and an additional burden on the highway, not contemplated in its originally intended uses. The whole burden of the railway, with all of its authorized appurtenances, is thrown entirely upon the side of the public road next to the plaintiffs' lands, and between them and the traveled part of the roadway. The nature of that burden is not different in any material respect from that imposed by the construction and operation of a steam railroad. The difference, if any, is merely in the degree of the burden, and not in its character, and can scarcely be less in any degree. It may become more onerous and injurious. As shown by the findings of the court, the railroad is to be built and maintained on the "extreme westerly side and edge" of the traveled way of the public road (that is, between the traveled roadway and the plaintiffs' lands), and the tracks are to be laid with the ordinary T rails, which project some distance above the ties,—the same kind of rails usually employed in the construction of steam railroads through the country. While public crossings and extensions of farm lanes are required to be planked to a certain extent, it often becomes convenient and necessary to drive onto and off the traveled roadway, elsewhere, with loaded and empty vehicles, to which this railway will present the same obstructions, and cause the same hindrance, delay, and annoyance, that attend the crossing of steam railroads. Then this

railroad company is authorized to construct and use, on the same side of the public road between its traveled way and the plaintiffs' lands, "all suitable and convenient side tracks, switches, turnouts, turntables, stations, and appliances," without limit to their extent, other than as the company may deem them convenient and suitable. And in addition to this, the company is given authority to erect and maintain on the same side of the public roadway, and next to the plaintiffs' lands, all poles, which are of large dimensions, and all wires and other appliances, necessary to enable it to operate an electric plant for supplying light, power, and heat to consumers, for profit. Besides, this company is authorized not only to carry passengers, but also to transport over the road "baggage, packages, boxed and barreled freight, farm produce, express matter, and United States mail"; and, though it is required to run cars over its road at least three times each way daily, it is not limited as to the number of cars or trains for freight or passengers, or both combined, or the size or make-up of the trains. All things considered, it is reasonably certain, from the facts found, that the practical operation of such a road, within its capacity, must necessarily produce annoyance and inconvenience to the plaintiffs, and interfere with their property rights as abutting owners, of the same general character that result from the operation of steam railroads, and become an additional burden on the public highway, and taking of the plaintiffs' property, in the same sense. The law governing the rights of parties in such cases is well settled in this state, and we need only to refer to the case of *Railroad Co. v. Williams*, 35 Ohio St. 168, for a clear and satisfactory statement of the law. It is there held that: "As between the public and the owner of land upon which a common highway is established, it is settled that the public has a right to improve and use the public highway in the manner and for the purposes contemplated at the time it was established. The right to improve includes the power to grade, bridge, gravel, or plank the road in such a manner as to make it most convenient and safe for use by the public for the purposes of travel and transportation in the customary manner, which is well understood to be by the locomotion of man or beast, and by vehicles drawn by animals, without fixed tracks or rails to which such vehicles are confined when in motion. These constitute the easement which the public acquires by appropriating land for the right of way for a highway, and these, in legal contemplation, are what the owner is to receive compensation for when his land is appropriated for this purpose. The fee of the land remains in the owner; he is taxed upon it; and, when the use or easement in the public ceases, it reverts to him free from incumbrance. In the exercise of the right of eminent domain, the state, through the general assembly, may delegate to a railroad corporation the power to appropriate a right of way for its road along

and upon a public highway. But the appropriation for this purpose cannot be constitutionally made without making compensation to the public for the injury thereby occasioned to its easement in the highway, and also making compensation to the owner of private property taken for the use indicated. In such case the rights of the public and the rights of the owner are entirely distinct, and the consent, express or implied, of one to the appropriation, would not bind or affect the rights of the other. But we are not dealing with the public right. It has already been said that the plaintiff in the probate court was the owner in fee of the land covered by the highway. This was her private property, within the meaning of the constitution, subject only to the easement of the public therein. The nature and extent of this easement was above shown. The railroad company, by occupying the highway, constructing its track, and operating its trains thereon by steam motive power, completely diverted the highway from the uses and purposes for which it was established. This new use to which the highway has been diverted imposes burdens on the land that are entirely different from, and in addition to, those that were imposed by the highway. The right to so divert the use, and impose additional burdens on the land, could only be acquired by the corporation by agreement with the owner, or by appropriating and making compensation therefor in the mode prescribed by law."

We are aware that decisions in other states may be found which do not entirely agree with ours; but the Ohio rule above announced has been established for many years, going back to *Crawford v. Village of Delaware*, 7 Ohio St. 459, and has never been departed from. We are entirely satisfied with it. And it is obvious, also, that within this rule the construction and operation of an electric plant, with its appliances, in connection with such railway, and on the same side of the traveled public roadway, for supplying heat, power, and light to consumers for profit, constitutes another and additional burden, which is an invasion of the plaintiff's property rights. The relative rights of an owner of land, and of a private electric company which seeks to erect and maintain electric poles and wires in a public way on which such land abuts, without the owner's consent, or without the compensation guaranteed to him by the constitution, were thoroughly considered in the case of *Callen v. Light Co.*, 66 Ohio St. —, 64 N. E. 141.

The right of the owner to injunction against the threatened invasion and subjection of his property rights for the benefit of the corporation in such case is so logically and satisfactorily maintained in the opinion of Spear, J., that the citation of other authorities is not deemed necessary. The case on that subject is equally decisive of this one.

It being ascertained that such an additional burden as has been stated will be imposed on this public highway and the

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plaintiffs' abutting right and property, the extent of the burden and its effect on the value of the property, including the damages which the owners will sustain, are not questions for the determination of the court, but belong, under the constitution, to a jury, unless that mode of assessment is waived. Nor is it any objection to the relief sought in this case that the plaintiffs might have brought an action for damages. They are entitled to injunction against the threatened invasion of the property rights. That is the primary remedy, long established, and best adapted to the preservation of their rights. They are not required to wait until the threatened injury is done, and then undergo the vexations and expense of a protracted litigation, that in the end may afford but incomplete and inadequate relief. It was the primary duty of the railway company, before attempting to take from the plaintiffs property rights which the constitution guaranties to them, to institute in a proper tribunal the necessary appropriation proceedings, to obtain an assessment of compensation and damages to them. The company cannot interpose its violation of that duty as a defense to the plaintiffs' injunction.

Judgment reversed, and judgment for plaintiffs in error for an injunction against the construction and operation of either the said railroad or electric light plant; and, in case the defendants in error have commenced work on either, it is ordered and decreed that within 30 days from the entry of this decree they remove all material and obstructions placed in the public highway by them, and restore the said public highway to the condition it was in at the time and before the commencement of said work.

BURKET, SPEAR, DAVIS, and PRICE, JJ., concur.

SEABOARD AIR LINE RY. v. LEADER *et al.*

(*Supreme Court of Georgia, June 9, 1902.*)

[42 S. E. Rep. 38.]

Railroads—Liability on Contracts of, or for Torts of, Predecessor.

The mere fact that a railroad company is in possession of and operating a line of railway which formerly belonged to another company does not render the company so in possession liable for damages growing out of the breach of a contract which had been entered into by the other company, or for a tort committed by it, before the change of possession took place. In order to render a railroad company liable upon the contracts of, or for torts committed by, its predecessor in title, it must appear either that it has assumed the liability of its predecessor sought to be imposed upon it, or that the law charges it with such liability.

Same—Same.

There is nothing in Civ. Code, § 1863, construed in the light of the decision of this court from which it was codified, which renders a corporation purchasing the line of railway of another corporation liable either upon the contracts or for the torts of its predecessor in title, in the absence of an agreement to be so liable.

(Syllabus by the Court.)

Seaboard Air Line Ry. v. Leader

Error from superior court, Montgomery county; D. M. Roberts, Judge.

Action by Leader & Rosansky against the Seaboard Air Line Railway. Judgment for plaintiffs, and defendant brings error. Reversed.

J. B. Geiger, for plaintiff in error.

W. M. Lewis, for defendants in error.

COBB, J. The plaintiffs sued the Seaboard Air Line Railway, as successor to the Georgia & Alabama Railway Company, in a justice's court, for damages claimed to have resulted from the loss of the defendant of two dozen pairs of pants of the value of \$29.50. The trial resulted in a verdict in favor of the plaintiffs, and the case was carried by certiorari to the superior court, where the judgment of the justice's court was affirmed, and the certiorari dismissed. To this ruling the defendant excepted. It appears from the answer of the magistrate that the evidence at the trial showed that L. Goldman delivered to the Baltimore & Ohio Railroad Company, in New York, a case of clothing, which, according to the bill of lading issued, was to be transported by the railroad company just named and its connecting carriers to the plaintiffs at Vidalia, Ga. The box referred to in the bill of lading was delivered to the Georgia & Alabama Railway Company, and by it transported to Vidalia. When delivered by that company to the plaintiffs, the box was in a damaged condition, and two dozen pairs of pants were gone. There was evidence that the missing pants were worth the amount sued for. It appears from the testimony of one of the plaintiffs that after they received the box from the Georgia & Alabama Railway Company that line of railway went into the possession of the Seaboard Air Line Railway. The goods were received by the plaintiffs in 1899. The plaintiff further testified as follows: "This change took place, I think, about July 1, 1900. I do not know how the Seaboard Air Line Railway Co. got possession of the G. & A. Ry. property. I do not know what contract, if any, was entered into between the G. & A. Ry. Co. and the S. A. L. Ry. Co. when the change took place. Don't know whether the S. A. L. Ry. Co. assumed the liabilities of G. & A. or not. I simply sued the S. A. L. Ry. Co. because they appeared to be operating the railroad as successors of the G. & A. Ry. Co., and I didn't know how else to get pay for my pants. I do not know whether the missing pants was ever delivered to the G. & A. Ry. or not." There was evidence showing that the case of goods referred to in the bill of lading issued by the Baltimore & Ohio Railroad Company was received by the Georgia & Alabama Railway Company in bad order, and that exceptions to the condition of the box were taken at the time it was received. We do not think, under the evidence, the verdict against the defendant was authorized. Even if the evidence

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was sufficient to authorize a finding against the Georgia & Alabama Railway Company, there is nothing in the record to show that the Seaboard Air Line Railway is liable upon the contracts of, or for the torts committed by, the Georgia & Alabama Railway Company, entered into or committed by it before the Seaboard Air Line Railway came into possession of the line of railway of the Georgia & Alabama Railway Company. While the Seaboard Air Line Railway is sued as successor to the Georgia & Alabama Railway Company, there is nothing in the record to indicate how it succeeded the former company,—whether by purchase, by lease, by merger, or otherwise. It was possible for the Seaboard Air Line Railway to become the owner of the line of the Georgia & Alabama Railway Company without at the same time becoming responsible for its then existing liabilities, and one who claims that it did assume the liabilities of that company must establish this fact by competent evidence. The mere fact that the Seaboard Air Line Railway is operating a line formerly owned by the Georgia & Alabama Railway Company would not render the former company liable upon a contract entered into by the latter, or for a tort committed by it, or subject the former to damages growing out of a breach by the latter of a contract made by it, or the commission of a tort by it before the change of possession took place. It is contended, however, by counsel that the defendant is liable under the provisions of Civ. Code, § 863. That section is as follows: "All corporations, foreign or domestic, operating the franchise of a corporation chartered by this state, are subject to its burdens, and can be sued when and where and for like causes for [of] action for which suits could have been maintained against such other corporation, were it in possession of the franchises so acquired or usurped." It will be noticed that this section was codified from the decision of this court in *Railroad Co. v. Fulghum*, 87 Ga. 263, 13 S. E. 649, and the section must be construed in the light of that decision. *Calhoun v. Little*, 106 Ga. 336, 32 S. E. 86, 43 L. R. A. 630, 71 Am. St. Rep. 254 (3). In the *Fulghum* Case it was simply held that when one railroad company is in possession of and exercising the franchises of another railroad company it is liable to one who sustained a personal injury growing out of the running of a train to the same extent that the railroad company which owned the line would be liable. Nothing in that decision, or in the section of the Code construed in the light of that decision, would render a railroad company which purchased the line of another company liable for the breach of a contract of its predecessor in title, or for damages growing out of a tort committed by it, in the absence of an agreement on its part to pay such claims against its predecessor in title.

Judgment reversed. All the justices concurring, except LEWIS, J., absent on account of sickness.

STATE *ex rel.* FENSELL *v.* ALDRIDGE, Auditor, *et al.*

(Supreme Court of Ohio, June 24, 1902.)

[64 N. E. Rep. 562.]

Taxation—Rolling Stock—Apportionment among Counties.

The words, "belongs to * * * any one of such division or branches," in section 2774, Rev. St., has reference to cases in which a division or branch of a railroad is separately equipped; and in such cases its rolling stock, while owned by the company, is regarded as belonging to such division or branch for operating purposes, and the value thereof is required by said section to be apportioned for taxation among the counties through or into which the track of said division or branch extends.

Same—Same—Same.

If the rolling stock does not so belong to a division or branch, but is used solely thereon, the value thereof is required by said section to be apportioned for taxation the same as if such rolling stock so belonged to said division or branch.

Same—Same—Same.

The value of so much of the rolling stock as does not so belong to the main line or to a division or branch, and is not solely used thereon, is required by said section to be apportioned for taxation among all the counties through or into which the road extends, in the same proportion that the length that such road in each county bears to the entire length thereof in all said counties, including main line, divisions, and branches.

Same—Same—Same.

In apportioning the value of rolling stock, the board, composed of the county auditors, should first ascertain the value of the rolling stock which belongs to or is used solely on the main line, division, or branches, and then ascertain the value of all the other rolling stock, and then apportion their valuations upon a mileage basis, as required by said section 2774.

Evidence.

The minutes of a taxing board are not conclusive, and the real facts may be shown by parol, unless otherwise provided by statute.

(Syllabus by the Court.)

Application by the state, on the relation of Conrad C. Fensell, against Madison Aldridge, auditor, and others. Writ awarded.

The Cleveland & Pittsburg Railroad has a main line, a River division, and a Tuscarawas branch. The railroad is operated by the Pennsylvania Company, and part of the rolling stock belongs to or is used solely upon said main line, part on said river division, part on said Tuscarawas branch, and the remainder belongs to and is used generally and indiscriminately upon the whole road, including the division and branch. On May 10, 1901, the auditors of the different counties through or into which said railroad and its division and branch pass met at the city of Cleveland, in compliance with sections 2770 to 2776, Rev. St., to fix and apportion the taxable valuation of said railroad, as required by said sections. The rolling stock was appraised by said board at \$7,000 per mile, and the amount for rolling stock was apportioned by the secretary of the board of auditors 77 per cent. to the main line, 19 per cent. to River division, and 4 per cent. to

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Tuscarawas branch; and the amounts arising from these per cents. were apportioned to the respective counties upon a mileage basis according to the number of miles of track in each county. The auditor of Tuscarawas county claimed that this percentage apportionment of the value of the rolling stock was in violation of the provisions of section 2774, Rev. St., and filed his petition in mandamus in this court against the auditors of all the other counties composing said board of appraisement, praying that writs of mandamus might issue commanding said auditors and said board to again meet, and distribute and apportion the valuation of said item of rolling stock in the proportion that the total length of the main track of said road in said county of Tuscarawas bears to the entire length thereof in all of said counties. The auditor of Jefferson county, by cross petition, prayed, first, that the apportionment be made according to law, and then prayed that the valuation of the rolling stock be distributed in proportion that the total length of the main track in Jefferson county bears to the entire length thereof in all of said counties. The auditor of Belmont county, in a cross petition in behalf of his county, joined in the prayer for like relief. The auditor of Carroll county, by cross petition in behalf of his county, also asked for a redistribution and apportionment as provided in said section 2774. The auditors of the counties of Columbiana, Cuyahoga, Portage, and Summit filed a joint answer, in which they claimed the apportionment upon said percentage basis to be lawful, and prayed judgment accordingly. It is claimed by those in favor of the percentage basis of distribution that that method of distribution was ordered by the board at its meeting, and the minutes of the secretary bears out this claim. On the other hand, it is claimed that only the valuation of the rolling stock was fixed by the board, and then the secretary was to make inquiry as to the legality of distributing by a percentage basis, and make such distribution if found to be legal; and that the secretary found such method to be legal, and made the distribution accordingly. The master to whom this case was referred finds this latter contention to be true, and that the minutes of the secretary do not correctly state what actually occurred at the meeting.

John M. Sheets, J. F. Greene, and V. H. Mowls, for relator.

P. H. Kaiser and R. M. Wanamaker, for defendants.

BURKET, J. (after stating the facts). The statute which governs the apportionment of the value of the rolling stock of a railroad among the several counties for purposes of taxation is section 2774, Rev. St. That section is as follows:

"Sec. 2774. The value of such property, moneys and credits, of any railroad company, as found and determined by such board, shall be apportioned by said board among the several counties through which such road, or any part thereof,

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runs, so that to each county and to each city, village, township and district, or part thereof therein, shall be apportioned such part thereof as shall equalize the relative value of the real estate, structures, and stationary personal property of such company therein, in proportion to the whole value of the real estate, structures, and stationary personal property of such railroad company in this state; and so that the rolling stock, main track, roadbed, supplies, moneys and credits of such company shall be apportioned in the same proportion that the length of such road in such county bears to the entire length thereof in all said counties or county, and to each city, village, and district, or any part thereof therein, provided that if the line of any railroad company is divided into separate divisions or branches, so much of the rolling stock of such company as belongs to or is used solely upon any one of such divisions or branches shall be apportioned in the same manner to the county or counties, and to each city, village and district, or any part thereof therein, through which such branch or division runs, and the board shall certify to the county auditor of each county, and to each city, incorporated village, township and district, or any part thereof therein interested, the amount apportioned to his county, and the board shall make and forward a like certificate together with all the reports of the various railroad officers, and other papers and evidence which formed the basis of their valuation, to the auditor of state, for the use of the state board of equalization of railroad property. It shall be the duty of the county auditor, upon receiving the certificate aforesaid, to apportion the amount therein stated to the cities, villages, townships, districts, or parts thereof; but the auditor shall not put the same on the tax list until he shall have been advised of the action of said state authority, when the proper amounts shall be entered on the tax lists."

It is conceded on all hands, and found by the master as a fact, that the railroad in question has a main line, a River division, and a Tuscarawas branch, and that part of its rolling stock is used solely upon the main line, part on the River division, and part on the Tuscarawas branch, and the remainder of the rolling stock is used indiscriminately upon the whole road, including the division and branch. The above section of the statute requires the board of appraisers to apportion to the main line the value of the rolling stock which belongs to or is used solely thereon, and to the River division the value of the rolling stock which belongs to or is used solely upon that division, and to the Tuscarawas branch the value of the rolling stock which belongs to or is used solely on that branch, and then to ascertain the value of the remaining rolling stock, the whole valuation being \$7,000 per mile, and distribute and apportion the value of this remaining rolling stock among the counties according to the number of miles of track in each, whether such track be main line,

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division, or branch. The value of the rolling stock which belongs to or is used solely on the main line is required to be apportioned among the counties through or into which the main line passes according to the number of miles of such track in each county, and the same rule applies to the division and branch. A division or branch cannot separately own any part of the rolling stock, because all the rolling stock is owned by the company; but it often occurs that a branch or division is constructed, equipped, and financed by itself, and separate books and accounts kept of the earnings, running expenses, equipage, interest, bonds, etc.; and in such cases the rolling stock, while owned by the company, is regarded as belonging to such branch or division for operating purposes, and in such cases its value is required by said section 2774 to be apportioned to the counties through or into which the track of such branch or division passes, according to the number of miles of track in each county. If there is no such separate construction, equipage, or accounts, but still certain parts of the rolling stock are used solely upon such division or branch, the same result would follow as if such rolling stock belonged in the above sense to such division or branch. But, if none of the rolling stock so belongs to any division or branch, and is not used solely thereon, then the whole value of the rolling stock upon the whole road is, by said section, required to be apportioned among all the counties according to the number of miles of track in each, whether main line, division, or branch. While it does not positively appear from the facts found by the master that any injustice was done in the apportionment made by the board upon such percentage basis, it clearly appears that the apportionment was made upon a wrong and unlawful basis, and that in all probability injustice was done, as it is not likely that a correct result would arise from a wrong basis or method. It is urged that the minutes of the meeting of the auditors is a record conclusive in its nature, and that proof cannot be received to show the real facts, as such proof would be contradicting the record. This claim is not tenable. In matters of taxation the real facts may be shown, even though such facts add to or contradict the record of a taxing board. *Lewis v. State*, 59 Ohio St. 37, 51 N. E. 440; *Hagerty v. Huddleston*, 60 Ohio St. 149, 53 N. E. 960. A writ of mandamus will therefore be awarded commanding the auditors of the several counties through or into which said railroad passes to reassemble, and as a board apportion the valuation of \$7,000 per mile among said counties by the method and upon the basis as required by said section 2774 as above construed.

Writ of mandamus awarded.

SPEAR, DAVIS, SHAUCK, and PRICE, JJ., concur.

LOUISIANA & N. W. R. CO. *v.* STATE BOARD OF APPRAISERS
(PARISH OF CLAIBORNE *et al.*, Interveners).

(*Supreme Court of Louisiana, April 14, 1902.*)

[32 So. Rep. 184.]

Taxation—Exemption—“Road Substantially Completed.”*

The words “substantially completed,” as used in article 230 of the constitution, apply to a railroad, the “roadbed” of which was in such condition that the most that is now claimed for it is that it lacked 20 per cent. of completion, as also possibly a total of 815 feet of bridge and trestlework in a distance of some 18 miles, when the constitution was adopted; and hence such road is not entitled to exemption from taxation under that article.

Same—Same.

If the question were more doubtful than it is, the claim for exemption would be denied, as the case belongs to a class in which every reasonable doubt is resolved adversely to the claimant.

(Syllabus by the Court.)

Appeal from judicial district court, parish of Claiborne;
Benjamin P. Edwards, Judge.

Action by the Louisiana & Northwestern Railroad Company against the state board of appraisers. The parish of Claiborne and another intervened. Judgment for defendant, and plaintiff and interveners appeal. Affirmed.

John A. Richardson, for appellant railroad company.

McClendon & Seals, for appellant interveners.

Walter Guion, Atty. Gen., and John C. Theus, Dist. Atty. (McClendon & Seals and Lewis Guion, of counsel), for appellee.

MONROE, J. Plaintiff, having been assessed for the years 1899 and 1900 upon 18.48 miles of railroad (main track) and 62-100 of a mile of siding and switch track, lying between Homer, in the parish of Claiborne, and the Arkansas state line, brings this suit to annul the assessment, on the ground that the property sought to be taxed is exempt under so much of article 230 of the constitution as provides that “there shall also be exempt from taxation for a period of ten years from the date of completion any railroad or part of such railroad that may hereafter be constructed, and completed prior to January 1st, 1904.” The defense is, practically, that the stretch of road in controversy falls rather within the meaning of a subsequent clause of the same article, which reads: “Nor shall the exemption hereinbefore granted apply to any railroad, or part of such railroad, the construction of which was begun and the roadbed of which was substantially completed at the date of the adoption of this constitution.” The police jury of Claiborne parish and the town of Homer have intervened, and claim that, even though it should be held that the

*See note, 14 Am. & Eng. R. Cas., N. S., 192; 20 Am. & Eng. R. Cas., N. S., 21.

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road is exempt from state taxes, it is nevertheless liable for parish and municipal taxes. There was judgment in the district court rejecting the demand of the plaintiff and dismissing the intervention, and the plaintiff and the interveners have appealed.

Whether the roadbed of the road for which the exemption is claimed was "substantially completed," within the meaning of the constitution, at the date of the adoption of that instrument, is the only serious question in the case. The constitution was adopted May 12, 1898. Article 326. From the pleadings and evidence in the record before us it appears that prior to 1897 the plaintiff owned and operated a railroad from Homer, in the parish of Claiborne, to Bienville, in the parish of Bienville, a distance of about 36 miles, in a southerly direction, and that in June, 1897, it located an additional 36 miles from Homer northward to Magnolia, in the state of Arkansas; and that, of this extension the 18.48 miles which is the subject of the present controversy, with the sidings and switches hereinbefore referred to, lie within the state of Louisiana and the parish of Claiborne. It also appears, at least as a fair inference from the evidence, that the work of construction followed the location of the extension, and went on continuously until its completion. The only witnesses examined were those called by the plaintiff. T. D. Beardsley was its general manager in 1897 and 1898, and has been ever since. He testifies that, with the exception of that part of the road which runs through the town of Homer, a little more than a mile in length, the work of building the extension was done by contractors, from whom it was accepted July 26, 1898, and that they were paid in full upon the following day, though he also states that the road was not then completed, and that in some places it was still incomplete at the time that he was testifying. Being asked, "Aside from the work done by the company in or near Homer, what was the dirt work, or other dirt work to be done, on the 12th of May, 1898, in Louisiana?" to which he replied: "I could not give that of my own knowledge. I depended entirely upon the engineer's reports, and their testimony gives a summary of all the information I have." J. C. Allen was assistant engineer during the period of construction, and is so at present. He testifies that they reached the Louisiana state line in the construction of bridges and track laying about August 1, 1898, up to which time no work of that character had been done in Louisiana, except, perhaps, within the corporate limits of Homer. He does not pretend to know the amount of earthwork done for the purposes of the road, but states that they were still grading after the 12th of May, 1898. G. Knoble is an engineer. He testifies that the roadbed of a railroad is the foundation upon which the superstructure rests, and that it includes everything from the bottom of the cross-ties down to the natural surface, and to the foot of the driven pile in bridges. The

following are two of the questions propounded to him under commission, and his answers thereto: "Q. Is the roadbed of a railroad substantially completed that has no piling delivered on the road and none driven, no bridges or trestling built, and, say, one-tenth of the earthwork done? A. A roadbed of a railroad cannot be called completed until all the work and material necessary for grading and bridging such road is placed in the proper position, as shown by the established grade line. Q. Is a roadbed of a railroad substantially completed that is wanting in any of these requisites? A. It is not." W. M. Washburn is a civil engineer, and was in charge of the work of constructing the road from Homer, in Louisiana, to Magnolia, in Arkansas, a distance of 36 miles; and we understand him to testify that there are 41 bridges on the entire line, and that the total length of the bridges and the trestles is 1,680 feet. He also testifies that the roadbed between the corporate limits of Homer and the state line, about 17 miles long, contains 212,291 cubic yards of earth, and that the work done by the company in the town amounts to 60,000 yards, making a total of 272,000 or 273,000 yards. He says: "I made monthly estimates of all the work done on the line during construction. I have no copy of monthly estimate for April, 1898. My recollection is that less work was done in April than was done in March. Up to the 1st of April 136,767 yards had been moved. During April, and up to the 12th of May, in the neighborhood of 40,000 yards were moved. No bridging or trestling was done on that part of the line prior to May 12, 1898. * * * My estimate would be that 20 per cent. of the grading on that part of the line remained to be done May 12, 1898. * * * I should not consider a deficiency of 20 per cent. very near completion. * * * The amount of grading, in cubic yards, was in the neighborhood of 270,000 yards, of which between 50,000 and 60,000 yards was done subsequent to May 12, 1898." He further testifies that, whilst some right of way was probably cut in Louisiana in August and September, the work of grading did not begin until December, 1897. The only testimony as to the proportion of bridging on that end of the road is the statement of the witness that about 600 piles were required. The maximum grade of the road is shown to be about 1 per cent., and, as the witness Knoble estimates the cost of "clearing and grubbing the right of way and the grading and bridging of the roadbed" at only \$2,000 per mile, it is evident that the average grade was very light. This testimony leaves much to be desired in the way of convincing force. The only witness who undertakes to be at all definite as to the proportion of the roadbed which had been constructed prior to May 12, 1898, is the engineer, Mr. Washburn, and whilst he is specific enough as to the total quantity of earth to be moved, and no doubt testified upon that subject from his records, he seems to have fallen back upon his recollection when attempting to state the proportion of

the work which had actually been moved prior to May 12, 1898, and has, apparently, fallen into some confusion in giving the percentage. Thus, if it be true, as he states at one time, that 136,767 yards had been moved up to April 1st, and that about 40,000 yards were moved between that date and May 12th, the total would be 176,767 yards; and if we put the whole amount at 273,000 yards, the highest figure stated by him, there would still be 96,000 yards, or over 35 per cent., to be moved, whereas at another time he states that the amount moved after May 12th was between 50,000 and 60,000 yards, which he estimates to have been 20 per cent. of the whole. Several years had elapsed between the time at which the work was done and the date of the giving of the testimony, and it was not to have been expected that the witness could have carried figures of that kind in his memory. It may be, therefore, that the amount of work done after May 12th was less than 50,000 yards, or over 60,000, but, as it is not suggested that the monthly estimates upon which the contractor was paid have been lost or destroyed, the question which presents itself to us is why, in a matter of this kind, should the important fact upon which the plaintiff relies be left in such uncertainty? The same condition exists with regard to the bridges and trestles. We are informed that there are 41 bridges and 1,680 feet of bridges and trestles on the line,—meaning, as we understand it, the entire line from Homer to Magnolia; but we are not informed what proportion of this work is on the Louisiana side. The witness Knoble makes no distinction between a roadbed that is completed and one that is “substantially” completed; for, whilst he testifies that it is “completed” when all the work and material required for grading and bridging is placed in its proper position, he also testifies that it is not “substantially completed” if it lacks any of these requisites, so that, according to his view, it must be completed in order to be substantially completed. The framers of the constitution evidently intended, however, that the distinction which we think exists should be recognized, otherwise the participle “completed” would have been used without the qualifying adverb. As is very justly said by the learned judge of the district court, “the intention of the framers of the constitution * * * was to encourage the building of railroads throughout the entire state,” but it was not the intention, and the fact is made manifest, to exempt from taxation roads already established, or the work upon which had so far progressed as to render it reasonably certain that they would be established without such encouragement, and we agree with our learned Brother that the road in question was in the latter condition. If, however, the question were more doubtful than we think it is, we should still be constrained to affirm the judgment rejecting plaintiff’s demand. The case belongs to a class of which it has been said: “The rule of construction in this class of cases is that it should be most strongly

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construed against the corporation. Every reasonable doubt is resolved adversely. Nothing is taken as conceded but what is given in unmistakable terms, or by an implication equally clear. Silence is negation, and doubt is fatal to the claim." *Northwestern Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 24 L. Ed. 1036; *Railroad Co. v. Thomas*, 132 U. S. 185, 10 Sup. Ct. 68, 33 L. Ed. 302; *Ford v. Land Co.*, 164 U. S. 666, 17 Sup. Ct. 230, 41 L. Ed. 590; *City of New Orleans v. Robira*, 42 La. Ann. 1098, 8 South. 402, 11 L. R. A. 141. The police jury and the town of Homer had an interest which justified their intervention, since, if the claim for exemption had been sustained, it would have applied to parish and town as well as to state taxes. Code Prac. art. 390.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be annulled, avoided, and reversed in so far as it dismisses the intervention of the parish of Claiborne and the town of Homer, and that there now be judgment maintaining said intervention, at the cost of the plaintiff in the suit; and it is further ordered, adjudged, and decreed that in all other respects said judgment be affirmed.

TOWNSEND *v.* NORTHERN PAC. RY. CO.

(*Supreme Court of Washington, July 18, 1902.*)

[69 Pac. Rep. 750.]

Railroads—Fences—Cattle—Injuries—Trial—Evidence—Competency.

In an action against a railroad for killing cattle, plaintiff claimed that they went through an insufficient fence maintained by the railroad, and defendant claimed they went through a gate left open by plaintiff. Plaintiff testified that on the morning following the accident, on an examination of the fence, he found boards nailed on with new nails; found fresh breaks in the boards, that the wire had been newly stretched, and that there was hair on the boards and wire: *held*, that the evidence was proper, as tending to show that the cattle had gone through the fence; a contention that it was to show repairs, as an admission of negligence, being of no merit.

Appeal from superior court, Lewis county; A. E. Rice, Judge.

Action by S. F. Townsend against the Northern Pacific Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Jas. F. McElroy, B. S. Grosscup, and A. A. Booth, for appellant.

Forney & Ponder, for respondent.

REAVIS, C. J. Action for damages against railway company for killing cattle. The negligence charged in the complaint was in the construction of engine, cars, and appliances of the train operated by defendant, and fences, crossings, gates, and bars; failure to keep same in repair upon the right of way; careless operation of the engine and cars, and that

near the place where the killing occurred the railroad track was not properly fenced, and the cattle therefore strayed upon the improperly and negligently guarded right of way. The answer denied the material allegations of the complaint, except the killing of the cattle by its train on the right of way, and affirmatively alleged due care on the part of defendant, and carelessness and negligence by the plaintiff in allowing the cattle to wander and stray where it was dangerous to go, and in carelessly failing to guard and protect his cattle from the moving trains upon the track of defendant. Judgment was given in favor of plaintiff.

Three assignments of error are made by defendant: (1) That the court received evidence, over the objection of defendant, tending to show repairs in the fence subsequent to the accident; (2) that the court erred in denying defendant's motion for a verdict in its favor at the conclusion of the trial; (3) error in denying motion for a new trial. A question propounded to the plaintiff, as witness, as to the fence upon the right of way the morning following the accident, was: "You may describe the fence there at that time,—what you found?" Answer: "Right between the gate and corner fence there were signs plain of new—" Here counsel for defendant interposed: "I object now to 'signs plain.'" There was no ruling. The witness then continued: "Well, there was boards that had been nailed on, with fresh breaks in the boards, and fresh nails drove in the boards, and also the wire that had been stretched up afresh on the posts in different places, and up tight, and hair on the edge of the boards where they had been broken, and hair also on the wire as the cattle went over. Q. What kind of hair was it? A. There was some red hair and some white. Q. How far was that from the gate, and which way? Mr. McElroy: If the court please, I move to strike out all of the answer as given by the witness, as not being responsive to the question, and, further, as being based on conjecture, and, further, it is given to indicate possible repairs, and it is incompetent, irrelevant, and immaterial, and not proper testimony, under the decisions of our own supreme court. I could not gather what the witness would testify to in answer to that question, so as to object to it at the time. The Court: I think I will let that answer stand, and give you the exception." The contention of plaintiff was that the cattle had broken through the insufficient fence maintained by defendant, which was out of repair and broken. The manner of the construction of the fence had been given, which was said to be inferior; and the question went to the quality of the fence there when the accident happened, from an examination immediately after the accident. The defendant contended that the cattle were allowed to stray on the track through a gate carelessly left open by the plaintiff or his servants. Thus a most material question of fact was whether the cattle went through the gate, or, as urged by plaintiff, through

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the fence. So important was this fact, that a special interrogatory was submitted to the jury as follows: "Where, from the evidence in case, do you find that animals entered on right of way?" Answer: "Through the fence." It will thus be seen that the condition of the fence, as well as that of the gate, was material, at the time the examination was made by the witnesses who were testifying. It incidentally appeared that it had been put up after it was broken down by the cattle, according to the evidence of plaintiff. It is apparent the evidence was given to show the cattle had gone through the fence at the place insisted upon by plaintiff, and left marks thereon. The objection urged by defendant that the object of the evidence was to show repairs by defendant, as an admission of negligence, cannot be maintained. The question does not fall within the rule announced in the cases cited by defendant from this court. *Bell v. Shingle Co.*, 8 Wash. 27, 35 Pac. 405, and *Carter v. City of Seattle*, 21 Wash. 585, 59 Pac. 500. Counsel for defendant could doubtless have procured an appropriate instruction that the evidence was confined to the object mentioned.

The other assignments of error may be considered together. The evidence relating to the operation of the freight train, and the distance it ran after the cattle should have been discovered, was conflicting, and the case was properly submitted to the jury.

The judgment is affirmed.

ANDERS, FULLERTON, HADLEY, MOUNT, and WHITE, JJ., concur.

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(*Supreme Court of Georgia, July 18, 1902.*)

[42 S. E. Rep. 220.]

Evidence.

Where the testimony of a witness relating to a particular matter is in part material and pertinent, though in part irrelevant, a general objection to the whole of this testimony is not well taken, since the inadmissible part should be distinctly pointed out, and specific objection thereto made. *Maynard v. Association*, 37 S. E. 741, 112 Ga. 443, 447, and cases cited; and see *Chambers v. Weasley*, 38 S. E. 848, 113 Ga. 343.

Stock, Injuries to—Negligence—Damages.

The evidence, though conflicting, was sufficient to support a finding that the killing of some of the plaintiff's stock was caused by the negligence of the defendant company, and the amount named in the verdict was not greater than the proved value of such stock.

(Syllabus by the Court.)

Error from superior court, Washington county; H. M. Holden, Judge.

Action by George Gilmore against the Southern Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

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Jos. B. & Bryan Cumming and Evans & Evans, for plaintiff in error.

Rawlings & Howard and T. W. Hardwick, for defendant in error.

PER CURIAM. Judgment affirmed.

LEWIS, J., absent on account of sickness.

VILLAGE OF RIVER FOREST v. CHICAGO & N. W. R. Co.

(*Supreme Court of Illinois, June 19, 1902.*)

[64 N. E. Rep. 364.]

Railroads in Streets—Local Assessments—Benefits.*

Real estate owned by a railroad company as a part of its right of way, and which is not used, nor intended to be used, for any other purpose, cannot be assessed for benefits for paving a street on which it borders, unless the right of way is benefited as such.

Same—Same—Same.

A village, in an action to enforce a special assessment against a railroad right of way, introduced the assessment roll, and the certificate and affidavit of the commissioner who made the assessment, and the testimony of a real estate broker that the property would be benefited in the amount named in the assessment, but his estimates were based on its value for depot or freight house purposes. A civil engineer employed by defendant company testified that the property was only used as a right of way, and would not be benefited by the special assessment: *held* sufficient to sustain a finding that the railroad received no benefits from the improvement warranting an assessment, even though the certified and verified assessment roll is prima facie evidence of such benefit under Hurd's Rev. St. 1901, c. 24, par. 55, the latter statute providing that such assessment roll shall not be counted as the testimony of any witness or witnesses.

Magruder, C. J., dissenting.

Appeal from Cook county court, O. N. Carter, Judge.

Application by the village of River Forest for the confirmation of a special assessment against the Chicago & Northwestern Railroad Company. From a judgment sustaining objections filed by the company, the village appeals. Affirmed.

F. J. Griffen, for appellant.

A. W. Pulver (Lloyd W. Bowers and Samuel A. Lynde, of counsel), for appellee.

WILKIN, J. Appellant prosecutes this appeal from a judgment of the county court of Cook county sustaining objections to a special assessment made by the village of River Forest on certain property of the appellee railway company for the improvement of Thatcher and Hawthorne avenues, in said village. The land was assessed \$389.40. On the appli-

*As to whether railroad property is subject to local assessments, see *In re Pennsylvania R. Co.* (N. J.), 22 Am & Eng. R. Cas., N. S., 178, and foot-note.

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cation of the village for a confirmation of the assessment appellee appeared, and filed numerous objections, all of which were overruled except two, as follows: "(65) Said assessment upon the property of said objector exceeds the benefits which will accrue to the said property from the proposed improvement." "(84) Said property is not benefited by said proposed improvement." Hawthorne avenue extends east and west through the village, and is immediately south of appellee's railroad tracks. Thatcher avenue extends from the north across the right of way and tracks of the railroad company to Hawthorne, and then runs south from a point further west on said Hawthorne avenue. The property assessed is adjacent to and west of Thatcher avenue and immediately north of Hawthorne. It is 100 feet wide north and south, and about 185 feet long east and west. It is inclosed as right of way by a fence. The depot is east of Thatcher avenue, on the north side of the railroad tracks. The platforms are 500 feet long on the north side and about 300 feet long on the south side, both being east of Thatcher avenue.

James S. Robinson, a civil engineer employed by the railroad company, testified that the property in question was used simply as right of way for the two tracks of the company, and had no connection whatever with the depot or depot grounds, and he described the location as above stated. He testified that there was no railroad structures on the property, and that it was devoted to no other use than that of right of way, and that the property would in no way be benefited by the proposed improvement of Hawthorne and Thatcher avenues. The village relied upon the assessment roll, with the certificate and affidavit of the commissioner who made the assessment, and the testimony of one F. C. Smith. Smith testified in chief: "I reside at River Forest. I am in the real estate business, and have been for twenty years. I am acquainted with the value of real estate in River Forest in the vicinity of Hawthorne and Thatcher avenues. I have bought and sold considerable real estate, and have observed the effect of local improvements, such as contemplated, upon the value of real estate,—the general effect upon values. It makes it more valuable. You have to pay more for property on improved streets, always. I am acquainted with the property of the objector, assessed \$389.40. In my opinion, that property is increased in value to the amount of the assessment." From his cross-examination it appears that his opinion as to the benefits which the property will derive from the improvement is based upon the supposition or conjecture that it will be in the future needed for depot or freight house purposes, not upon its present condition and uses. In *Illinois Cent. R. Co. v. City of Chicago*, 141 Ill. 509, 30 N. E. 1036, speaking of a special assessment, we said (page 515, 141 Ill., and page 1037, 30 N. E.): "In a proceeding to condemn lands, as a general rule, the owner is entitled to recover the

fair market value of the lands taken; and in a proceeding by special assessment, as a general rule, the inquiry is to what extent the market value of the premises has been increased by the improvement. If, therefore, in the former case, where the owner is restricted to a particular use, the measure of compensation will be its value for the special use to which he is restricted, upon the same principle it must follow, in a special assessment proceeding, where land is restricted by statute to a particular use, and cannot be applied to any other, the true measure of benefit which an improvement will confer on the land is its increased value for the special use to which it may, by statute, be restricted. In a proceeding by special assessment, in no case can the assessment exceed the benefit which will be conferred on the property by the construction of the improvement. The benefit must be a real, actual benefit, not one resting in conjecture." In *Chicago, B. & Q. R. Co. v. City of Chicago*, 149 Ill. 457, 37 N. E. 78, 3 Am. & Eng. R. Cas., N. S., 188, in a condemnation proceeding, we again said (page 462, 149 Ill., and page 79, 37 N. E.): "In such a proceeding as this 'nothing should be allowed for imaginary or speculative damages, or such remote or inappreciable damages as the imagination may conjure up and which may or may not occur in the future.' *Jones v. Railroad Co.*, 68 Ill. 380; *Peoria & P. Union Ry. Co. v. Peoria & F. R. Co.*, 105 Ill. 110, 10 Am. & Eng. R. Cas. 129. Possible or imaginary uses are to be excluded. Nor can the owner show the probable future use of the property. *Pierce, R. R.* 217; *Lewis, Em. Dom.* § 480." See, also, *Chicago & N. W. Ry. Co. v. Town of Cicero*, 157 Ill. 48, 41 N. E. 640, 3 Am. & Eng. R. Cas., N. S., 187, 188; *Illinois Cent. R. Co. v. Village of Lostant*, 167 Ill. 85, 47 N. E. 62. In *Illinois Cent. R. Co. v. City of Chicago*, 169 Ill. 329, 48 N. E. 492, 3 Am. & Eng. R. Cas., N. S., 187, we said (page 338, 169 Ill., and page 494, 48 N. E.): "The present, and not the probable future, use of the land, or the intention of the owner as to such use, is the test of market value to be shown by the evidence." The question, then, here must be, in the absence of proof tending to show that the property in question is devoted to other than right of way purposes, or is about to be so devoted, will it, for the purposes of right of way for the two tracks of appellee, be benefited by the improvement of the street upon which it borders? It must be borne in mind that a railroad right of way cannot be put upon the market by a railroad company for general business purposes, as can private property. Circumstances may arise under which a railroad right of way can be said to be benefited by a local improvement, but, as a general rule, it cannot be. *Chicago, M. & St. P. Ry. Co. v. City of Milwaukee*, 89 Wis. 506, 62 N. W. 417, 9 Am. & Eng. R. Cas., N. S., 537, 28 L. R. A. 249, and cases cited. Here, however, the question whether or not this right of way will be benefited is purely one of fact, and, unless we can say that the conclusion of the trial court (sitting as a jury) is so man-

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ifestly contrary to the weight of the evidence as to indicate a mistaken or prejudiced view of the testimony, we cannot interfere. So far from the weight of the evidence being against his judgment, it clearly preponderates in favor of it, when considered in the light of the foregoing rule for estimating benefits. It is true that the assessment roll, together with the certificate and affidavit of the commissioner, makes a prima facie case for the petitioner; but the present statute contains the peculiar qualification that "it shall not be counted as the testimony of any witness or witnesses in the case." Hurd's Rev. St. 1901, c. 24, par. 55. The statute, notwithstanding that provision, we think, casts the burden upon the objector to overcome the prima facie case so made; but here, in view of the undisputed testimony of the objector's witness as to the present and future use of the property in question, his testimony is reasonable, while that of the witness Smith has no proper application to the case.

Cases cited by counsel for the appellant holding that depot grounds may be assessed for street improvements have no application to the facts in this case. Also cases to the effect that lands near a depot, used for the purpose of loading and unloading cars (as *Chicago & N. W. Ry. Co. v. Village of Elmhurst*, 165 Ill. 148, 46 N. E. 437), may be specially taxed, are not here in point. Nor can the decisions of this court holding that a railway contiguous to a proposed street improvement may be specially taxed therefor have any controlling influence in the decision of this case, for the reason that at the time those decisions were rendered the question of benefits in special taxation was conclusively determined by the passage of the ordinance for the improvement by the municipality.

It is said by counsel for appellant that the court overruled certain objections, by which it in effect held that the property was liable to assessment, and properly assessed, the argument being that the rulings of the court in that regard were inconsistent with its final judgment sustaining the first-named objections. For the purposes of this decision it is sufficient to say that the only ruling of the court here assigned for error is sustaining the two objections above set out, and in that, we think, there was no reversible error.

The judgment of the county court will be affirmed. Judgment affirmed.

MAGRUDER, C. J., dissenting.

CITY OF WORCESTER v. WORCESTER CONSOL. ST. RY. CO.
(three cases).

(*Supreme Judicial Court of Massachusetts, Worcester, July 15, 1902.*)

[64 N. E. Rep. 581.]

Street Railways—Duty to Repair Street.

Under St. 1898, c. 578, §§ 4, 7, 10, 13, providing that street railroads shall be subject to a certain tax, levied according to mileage, to be

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adjusted so that the amount collected shall correspond to the amount formerly paid by the company for the repair of the streets, and providing the street railroads shall not be required to keep any portion of the streets and highways in repair, but declaring that such railroads shall remain subject to all legal obligations imposed in original locations granted to the company in the city or town (defined by section 1 to mean the first location granted to the company in the city or town), such railroads are not bound to repair streets over which their lines run which are not embraced in their original location.

Same—Same—Impairment of Obligations of Contract—Relieving from Obligations Imposed by City.

Laws 1898, c. 578, providing that street railroads shall not be required to repair any portion of the streets or highways, is not unconstitutional, as impairing contracts, in relieving the roads from such obligations imposed on them by a city in granting locations to them.

Appeals and cases reserved from superior court, Worcester county.

Action at law by the city of Worcester against the Worcester Consolidated Street Railway Company to recover the expenses of repairing streets on which defendant's tracks were located, two mandamus proceedings by the same plaintiff against the same defendant to compel the defendant to keep such streets in repair, and two suits in equity by the same plaintiff against the same defendant asking similar relief. Judgments and decrees were rendered for defendant in the action at law and suits in equity, and plaintiff appeals. The mandamus suits were reserved for determination by the full bench. Judgments and decrees affirmed, and petitions for mandamus dismissed.

Warren & Fairfield, for plaintiff.

Arthur P. Rugg and Ernest I. Morgan, for defendant.

BARKER, J. One of the cases is an action of contract, brought to recover expenses incurred by the city in renewing or repairing the pavement or other surface of some of its streets in which are tracks of the defendant. Two of the cases are petitions for writs of mandamus to compel the railway company to maintain and keep in proper repair certain portions of the petitioner's streets. The two other cases are bills in equity asking for similar relief. The action of contract comes here by the plaintiff's appeal, the defendant's demurrer having been sustained and judgment ordered for the defendant in the superior court. The two equity cases are here upon the plaintiff's appeals from decrees of the superior court sustaining demurrers and dismissing the bills. The other two cases were reserved by the chief justice for determination of the full court, with an agreement of the parties that no question of the form of procedure or of the proper parties should be insisted upon. The question in all the cases is whether the railway company, since the passage of St. 1898, c. 578, has been under the legal obligation to maintain and keep in repair the paving or surface material of certain portions of certain of the streets of Worcester in which some of the company's tracks are located.

Towns and cities do not necessarily own the soil of the streets, and are not the proprietors of the right to use them for travel. Unless otherwise provided, each municipality, at its own expense, must keep the highways, townways, causeways, and bridges within it in repair. Under the power to make by-laws and ordinances, a town or city may, to some extent, regulate the use of streets by travelers. The first street railway was authorized in the year 1853. From that time to the passage of St. 1898, c. 578, every company was obliged, by the terms of its charter or by general law, to keep in repair some portion of the street. See St. 1853, c. 353, § 3, and the other early charters; St. 1864, c. 229, § 18; St. 1871, c. 381, § 21; St. 1881, c. 121, § 1; Pub. St. c. 113, § 32. From the year 1864 boards of aldermen and selectmen, in granting locations, have been authorized to impose "such restrictions as they deem the interests of the public may require." St. 1864, c. 229, § 14; St. 1871, c. 381, § 14; St. 1874, c. 29, § 6; Pub. St. c. 113, §§ 7, 21. Before the year 1898 very many street railways had been built, not only in the more densely populated places, but to connect different places by lines running long distances. Aside from the ordinary property and franchise taxes, and the specific obligation imposed by their charters or the general laws to keep in repair some small portion of those streets and bridges occupied by their track, the only method of compelling the companies to contribute to the burden imposed upon the municipalities with respect to roads and bridges was the indirect one of imposing obligations upon the company in the guise of restrictions upon grants of locations. In many quarters there was also a feeling that the companies should pay the public for the right to make money by the use of the streets. The result was that many different obligations were imposed on the companies as restrictions in grants of locations, and the grants accepted and acted upon by the companies. The situation was called to the attention of the legislature of 1897 in the annual message of the governor, with a recommendation that authority should be granted to require "that a direct return shall be made to the treasury of the municipality, either by a fixed rental or tax, by a toll upon the cars using the streets, or by a percentage of receipts or profits," and that, on the other hand, "the company, under a proper agreement, should, for a limited period, have the assurance that its franchise should not be revoked through caprice, unreasonable hostility, or the lure of a higher bid from would-be competitors." Upon this the legislature, by St. 1897, c. 509, provided for the creation of a commission to investigate the subject of the relations between cities and towns and street railway corporations, the taxation of street railways and their franchises in this commonwealth and in other states and countries, and the need, if any, of legislation in this commonwealth to establish a more fixed tenure of franchises of street railways, and an equitable method of tax-

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ing the same. The report to the legislature of 1898 was accompanied by the draft of a bill, which, with a few, but some important, amendments, became St. 1898, c. 578. See Leg. Doc. 1898, House, 475. The report made it clear that very many different obligations, which the report considered as indirect taxes, commonly had been imposed in the guise of restrictions in grants of locations, among which had been that of paving and keeping in repair more of the street than was required by the general law, and also that there was a serious question whether the imposition of such obligations under the guise of restrictions was valid. The general scheme recommended in the report and embodied in the draft bill was to free the companies from all obligation to keep any portion of the surface material of streets, roads, and bridges in repair, and in return to give to the municipalities where the tracks were the benefit of certain new taxes imposed upon the companies. The legislature imposed the taxes recommended, but added to the clause which enacts that "street railway companies shall not be required to keep any portion of the surface material of streets, roads and bridges in repair," a declaration that "they shall remain subject to all legal obligations imposed in original grants of locations." The effect of this legislation was to free the companies from all obligation thereafter to keep any portion of the surface material of streets, roads, and bridges in repair, unless the obligation so to do had been imposed in a grant of an original location, which the statute defined to mean the first location granted to the company in the city or town as to whose streets, roads, or bridges there might be a question. St. 1898, c. 578, § 1; *City of Springfield v. Springfield St. Ry. Co.*, 64 N. E. 577. As none of the locations in question in these cases were original locations, the company was relieved by the statute of all the obligations which the city seeks to enforce.

It is contended by the city that it was not within the constitutional power of the legislature to free the company from the obligations imposed upon it by the locations in question. But this contention is disposed of adversely to the city by the decision in *City of Springfield v. Springfield St. Ry. Co.*, *supra*.

Whether the obligations sought to be enforced originally were valid as "restrictions," within the meaning of the statutes in force when the grants of locations were made, is not essential to the determination of these cases, and we express no opinion upon the question.

The result is that in the action at law the order of the superior court sustaining the demurrer is affirmed, and also the order for entering judgment for defendant; in the equity suits the decrees of the superior court sustaining the demurrers and dismissing the bills are affirmed; in the petitions for mandamus the demurrers are to be sustained and the petitions dismissed. So ordered.

VILLAGE OF HARLEM v. SUBURBAN R. CO.

(*Supreme Court of Illinois, Oct. 25, 1902.*)

[64 N. E. Rep. 1010.]

Appeal—Jurisdiction—Freehold—Perpetual Easement in Street.

A suit, by one claiming the right to perpetually maintain and operate its railroad in a street by virtue of an ordinance, to perpetually enjoin the village from interfering with the right, involves a freehold, so that the appellate court has not jurisdiction of an appeal therein.

Appeal from appellate court, First district.

Suit by the Suburban Railroad Company against the village of Harlem. From a judgment of the appellate court dismissing a writ of error to reverse a decree for complainant, defendant appeals. Affirmed.

F. J. Griffen and Frank Little, for appellant.

Clarence A. Knight and William G. Adams, for appellee.

HAND, J. This is a bill in chancery filed by appellee in the circuit court of Cook county against the appellant to enjoin the village of Harlem, and its president and board of trustees, from forfeiting the rights of the appellee to maintain and operate its railroad upon Sterling street and Mizner avenue in said village, and to enjoin said village, its officers and agents, from interfering with or destroying the railroad property of the appellee located upon said street and avenue, and to enjoin its lessor, the Chicago Terminal Transfer Railroad Company, from forfeiting the lease under which it is operating its railroad in and through said village of Harlem, and for a construction of the ordinances under which it is operating its railroad in and through said village. The issues were made up, and upon a trial the court entered a decree in favor of the appellee, perpetually enjoining the village of Harlem, and its officers and agents, from forfeiting the rights of appellee to operate its railroad upon said street and avenue, and from interfering with or destroying its railroad property located thereon, and enjoining said lessor, the Chicago Terminal Transfer Railroad Company, from forfeiting the lease to appellee under which it was operating its railroad, and construing the ordinances under which said railroad was being operated in and through said village in such manner as to permit and allow the appellee to continue the maintenance and operation of its railroad upon said street and avenue. The village of Harlem sued out a writ of error from the appellate court for the First district to reverse said decree, whereupon the appellee moved the appellate court to dismiss the writ of error for want of jurisdiction in that court to hear and determine the same. The appellate court sustained the motion and dismissed the writ of error, and the village of Harlem has brought the record by appeal to this court for further review, and has assigned as error that the appellate court erred in adjudging that the writ of error be dismissed.

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One ground urged for a dismissal of the writ of error in the appellate court was that the court was without jurisdiction to hear and determine the cause, as a freehold was involved. The appellee claims the right to perpetually maintain and operate its railroad in Sterling street by virtue of an ordinance passed October 10, 1887, and in Mizner avenue by virtue of an ordinance passed June 20, 1894, by the village of Harlem, while the village disputes the existence of such right. The suit having been brought to perpetually enjoin the village from interfering with the right of the appellee to maintain and operate its railroad upon said street and avenue, the right of the appellee to perpetually use and enjoy said street and avenue for the purpose of maintaining and operating its railroad thereon is directly involved; the claim of appellee being that it has a perpetual easement in said street and avenue for railroad purposes. A perpetual easement in lands, or any interest in lands in the nature of such easement, when created by grant, or by any proceeding which in law is equivalent to a grant, constitutes a freehold. *Chaplin v. Commissioners*, 126 Ill. 264, 18 N. E. 765; *Oswald v. Wolf*, 126 Ill. 542, 19 N. E. 28; *Tinker v. Forbes*, 136 Ill. 221, 26 N. E. 503; *Town of Brushy Mound v. McClintock*, 146 Ill. 643, 35 N. E. 159; *Waggeman v. Village of North Peoria*, 160 Ill. 277, 43 N. E. 347. In *Chaplin v. Commissioners*, on page 273, 126 Ill., page 767, 18 N. E., Mr. Justice Baker, while speaking on behalf of the court, said: "In *Lucan v. Cadwallader*, 114 Ill. 285, 7 N. E. 286, and *Eckhart v. Irons*, 114 Ill. 469, 6 N. E. 15, this court held that a mere easement did not constitute a freehold estate. We are now of the opinion that those decisions were pronounced without sufficient consideration. A perpetual easement in lands, or any interest in lands in the nature of such easement, when created by grant, or by any proceeding which is in law equivalent to a grant, constitutes a freehold. A legal interest in lands is to be deemed a freehold, not because of the kind or quantity of the interest, but by reason of its sufficient, legal, indefinite duration. An easement for life or in fee is a freehold, and to this extent the cases above referred to must be regarded as overruled."

We are of the opinion that a freehold is involved in this case, and that the order of the appellate court dismissing the appeal to that court was properly entered. The judgment of the appellate court will be affirmed. Judgment affirmed.

CHICAGO, ST. P., M. & O. RY. CO. v. LAGERKRANS.

(Supreme Court of Nebraska, July 10, 1902.)

[91 N. W. Rep. 358.]

Contributory Negligence—Pleading.

In an action for damages for personal injuries, resulting from the alleged negligence of the defendant, in order to negative contributory

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negligence it is not necessary to set out in the petition the specific steps taken by the injured party to avoid the injury; the general allegation that such injuries were received without fault or negligence on his part is sufficient.

Same—Passenger Walking to Station on Track.*

Where the railroad track is the usual and only practicable route by which a passenger may go from the station to his train, the railroad company will not be heard to say that a passenger by taking such route becomes guilty of negligence.

Sufficiency of Evidence.

Evidence examined, and held sufficient to warrant the submission of the questions of negligence and contributory negligence to the jury.

Assignments of Error.

An assignment of error based on the reception or exclusion of evidence, to be considered, must point out the evidence the reception or rejection of which is complained of; a mere reference to the subject-matter is insufficient.

Death by Wrongful Act—Damages—Effect of Wife's Remarriage.

In an action by an administrator to recover damages resulting to a wife on account of the death of her husband, alleged to have been caused by the negligence of the defendant, the fact that such wife has subsequently remarried is immaterial, and should not be submitted to the jury, nor considered by them, in fixing the amount of the recovery.

Special Findings.

Whether to submit special findings to the jury is largely within the discretion of the trial court, and, in the absence of an abuse of such discretion, the refusal to submit such findings will not be reviewed.

Sedgwick, J., dissenting.

(Syllabus by the Court.)

Commissioners' opinion. Department No. 3. Error to district court, Burt county; Estelle, Judge.

Action by A. Lagerkrans, administrator of Walfred Hegglund, against the Chicago, St. Paul, Minneapolis & Omaha Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

J. B. Barnes, for plaintiff in error.

F. S. Howell and Gillis & Bowes, for defendant in error.

ALBERT, C. This is an action brought by the administrator of the estate of Walfred Hegglund, deceased, to recover damages for the death of the deceased, alleged to have been caused by the negligence of the defendant. A trial to a jury resulted in a verdict for the plaintiff. From a judgment rendered thereon the defendant prosecutes error to this court. The facts sufficiently appear in the body of the opinion.

It is first insisted that the court erred in overruling a demurrer ore tenus to the petition. The petition, so far as is material at present, is as follows: "That at all of said times said defendant was a common carrier of freights, live stock, and passengers over said line of railway between said named points, and on said date, to wit, May 22, 1899, said defendant, in consideration of the sum of \$——, agreed to be paid

*As to the carrier's duties with respect to stations and stopping places, see monograph appended to *Muhlhaue v. Monongahela St. Ry. Co.* (Penn.), 2 R. R. R. 131, 25 Am. & Eng. R. Cas., N. S., 131.

by said deceased to said defendant, received from and undertook to ship for said deceased one car load of cattle, and safely carry said cattle and said deceased upon its freight train from said Oakland to said South Omaha, carrying said deceased in its caboose in said freight train for the purpose of caring for and looking after said stock. In pursuance of said agreement, and preparatory to shipping said cattle, said deceased loaded said cattle on a freight car furnished for that purpose to said deceased by said defendant, said defendant receiving the same so loaned, and placed the same in its freight train, which was due to leave said Oakland at about the hour of ten o'clock p. m. of said date. That said deceased, after so loading said stock, and before the arrival of said freight train at said Oakland, remained and waited in and about the office and waiting rooms of said defendant at its depot at said Oakland, and upon the arrival of said freight train at said Oakland was informed by the agent of the defendant having charge of said depot that the caboose attached to said train, and in which said deceased was to ride to said South Omaha, would not stop at said depot for plaintiff to take passage therein, but the said caboose would be stopped in the yards of said defendant in said Oakland at a point about 15 rods north of said depot, upon the main track of said line or railroad. That said caboose did stop as aforesaid about said distance from said depot, and in order to take passage on said caboose said agent directed and told said deceased that it would be necessary for him, said deceased, to go to said point where said caboose was so stopped. That pursuant to said directions, and while attempting so to do, said deceased went upon and along the track of said defendant from said depot in the direction of said caboose, that being the usual and only reasonable way of going from said depot to cabooses in stock trains, and being the way usually taken and followed by other shippers of stock over said line of road at all times, with full knowledge thereof on the part of the defendant. That at the point where said caboose and train were standing at the time aforesaid there were three tracks, one being the main line, and upon which said train and caboose was then standing, and the other two being side tracks or switches on either side of said main line. That on one of said side tracks at said time there was a locomotive standing still, which said locomotive was in charge of an engineer of defendant's company. That while said deceased was going along the tracks as aforesaid the night was very dark, and after said deceased had passed where said engine was standing on said side track, and after said deceased had reached a point about midway between where said engine and said caboose were standing, the said engineer, without any warning, either by whistle, ringing of the bell, signal light, or otherwise, started up said engine on said side track behind and following after said deceased at a rapid rate, to wit, at

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about ten miles per hour, and said engineer carelessly, recklessly, and negligently caused said engine to run against, upon, and over said deceased, and thereby carelessly and wrongfully and negligently caused the death of said deceased, without any fault, carelessness, or negligence of said deceased."

The specific grounds upon which the petition is assailed, as taken from the defendant's brief, are substantially as follows: (1) It fails to allege any excuse for the deceased being on the railroad track. (2) It fails to allege that he took any precaution or exercised any of his faculties to protect himself from injury. (3) It fails to allege that the defendant's servants knew of his dangerous position in time, by the exercise of due care, to have prevented the accident which resulted in his death.

As to the first, we think the allegation to the effect that the deceased had arranged for passage on one of the defendant's trains, and in order to reach it he was obliged to go some 15 rods north of the passenger depot, and that the railroad track was the usual route taken by passengers, and the only reasonable one, is a sufficient excuse for his being on the track.

As to the second, we do not understand the rule to be that, in order to negative contributory negligence, the plaintiff is required to set out the specific steps and precautions taken to avoid injury. We think the general allegation, "without any fault, carelessness, or negligence of the deceased," covers the ground in this case.

The third is based on the theory that the petition affirmatively shows negligence on the part of the deceased. The theory is unsound. If the allegations of the petition be true, —and we must assume that they are when the petition is assailed by demurrer,—the deceased may be said to have been on the track on defendant's implied invitation. That being true, the defendant cannot now be heard to say he was guilty of negligence in going where it had invited him to go. In our opinion, the petition is good as against a demurrer.

Another ground urged for a reversal of the judgment is that the court erred in overruling the defendant's motion for the direction of a verdict in its favor. In support of this position the defendant again challenges the sufficiency of the petition. We have already gone into that question, and will only add that it is involved to some extent in the question of the sufficiency of the evidence admitted in support of the allegations of the petition to warrant the submission of the case to the jury; consequently what we may say on that question will apply, to some extent, to that of the sufficiency of the petition.

Another ground upon which the defendant insists it was entitled to the direction of a verdict is that there was a failure to prove the alleged omission of the defendant to sound the bell, blow the whistle, or display light on the engine which caused the death of the deceased. Some of the witnesses on

behalf of the plaintiff testify they were in a position to have observed these warnings had they been given, and that they observed none. On the other hand, some on behalf of the defendant testify that they heard the bell and saw the light on the engine. As a rule, positive testimony is more satisfactory than that which is purely negative. But whether such warnings were given was a question of fact for the jury to determine from all the evidence. They were the sole judges of the credibility of the witnesses, and of the weight to be given their testimony. For the court to have assumed, in the face of the testimony, that the giving of such warnings was conclusively established would have been a usurpation of the province of the jury.

But the defendant urges that it was entitled to the direction of a verdict for the reason that the evidence conclusively shows contributory negligence on the part of the deceased. As the question is raised in this case, every fact favorable to the plaintiff which the evidence proves, or tends to prove, must be taken as true. With this rule in mind, we shall not be misunderstood when in the determination of the question before us we deal with such facts as the established facts in the case. Such facts, so far as material at present, are substantially as follows: The deceased had arranged with the defendant for the shipment of a car load of stock and passage for himself over the defendant's road from Oakland to Omaha, on a certain train which usually left the former place about 11 o'clock at night. He loaded his stock and went to the defendant's passenger depot shortly before the time for his train to leave, where he was informed by the person in charge of the depot that the caboose of the train on which he had taken passage would not stop at the depot, and that in order to get on he would have to go to where it was then standing, and where passengers were usually taken on, some distance north of the depot. The most practicable route from the depot to the caboose, and the one usually taken by passengers, was on the defendant's right of way, and for a part of the distance on the track or one of the side tracks. On receiving such information the deceased and some other passengers started for the caboose, walking on one of the side tracks, the deceased between the rails. On the way they passed an engine, standing on a space of road which led from a turntable to the side track on which they were walking. As they were thus making their way to the caboose the engine which they had passed backed from the spur onto the side track on which they were walking, and, moving backward in the direction of the caboose at the rate of about ten miles an hour, struck and killed the deceased. There is also evidence tending to show that no warning was given the deceased of the approach of the engine by bell, whistle, the display of lights, or otherwise. The night was dark; so dark, the defendant insists, that its engineer could not have seen deceased and

his companions in time to warn them had he been looking. For the greater part of the distance from the depot to the caboose, and at the point where the accident occurred, there was a space between the tracks where the deceased might have walked; but it was not wholly free from obstructions more or less formidable to those walking after night.

We think that the foregoing fairly reflects the facts which the evidence proves, or tends to prove, so far as they throw light on the present inquiry. We might add that there is no evidence that the deceased at any time looked or listened for the approach of an engine or train.

The question presented at this stage is whether the facts stated show such negligence on the part of the deceased as to preclude a recovery in this case. The facts relied upon as showing such negligence are that there was a space at the point where the deceased was killed, and for some distance before he reached that point, where he might have walked, instead of walking the track, and that, being on the track, he failed to look or listen for approaching trains. While a railroad track is a place of danger, to walk on such track is not always negligence. Whether it is negligence in a given case depends largely on the attendant circumstances. In this case the defendant was under contract with the deceased to carry him by one of its trains from Oakland to Omaha. Through no fault of his, in order to get on the train the deceased was obliged to walk some distance in the dark on the defendant's right of way, and a part of the distance on one of its tracks. While it is true that at the place he was killed, and for some distance before reaching that point, there was a space between the tracks where he might have walked, and which, as a matter of fact, was reasonably safe, it was of such a character that one walking in the dark, as was the deceased, might reasonably hesitate in making choice between it and the track as a place of safety. One threading his way among the tracks in a railroad yard is surrounded by dangers. In his effort to avoid one he is liable to run into another. The best and safest course is largely a matter of conjecture. A mere error of judgment in choosing under such circumstances cannot be said, as a matter of law, to constitute negligence. What we have just said applies, in part, to the omission to look and listen. On that point we may add that this court cannot say, as a matter of law, how often or at what intervals the deceased was required to use his senses to determine whether an engine was approaching him from behind on the side track. He had passed over that portion of it, and found it clear. The track in front of him, another engine in the yard, his own steps, and other matters, all claimed his attention. Besides, it is conceded that it was so dark that the engineer, had he been on the lookout, could not have seen the deceased in time to warn him. As we have seen, we must assume that no lights were displayed on the engine. The companions of the deceased

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did not hear the approach of the engine until it was so near that they had barely time to save themselves. Under such circumstances, his failure to look and listen is not conclusive on the question of negligence. In our opinion, the motion for the direction of a verdict was properly overruled.

The following are among the assignments argued at length: "The court erred in overruling the defendant's objections to the questions put by the plaintiff's counsel to the witnesses as to whether or not there was any light on the rear end of the engine No. 104, and as to whether or not any bell was ringing on said engine just before it struck the deceased, because said questions were leading and suggestive, and were incompetent and immaterial, under the issues in this case. The court erred in receiving the evidence of plaintiff's witnesses as to conversations between the deceased and others present, and the Western Union Telegraph Company, Walter Rindquist, in regard to going to the caboose, over the objections of the defendant, because the same was incompetent and immaterial, and there was no evidence to show that said operator had any power to bind the defendant by any statement whatever." The briefs are equally obscure as to the witnesses referred to, and the portion of the voluminous record where the alleged errors occurred. The assignments are too indefinite. *Wondelick v. Walker*, 41 Neb. 816, 60 N. W. 103; *Eagle Fire Co. v. Globe Loan & Trust Co.*, 44 Neb. 380, 62 N. W. 895; *City of Omaha v. Richards*, 49 Neb. 244, 68 N. W. 528; *Bloedel v. Zimmerman*, 41 Neb. 695, 60 N. W. 6.

It is next urged: "The court erred in excluding the evidence of the witnesses, offered by the defendant, as to the condition of the grounds and traveled paths, from the depot to the north end of the defendant's yards, both on the east and west side of the defendant's main line track." This assignment is no more definite than those last referred to, but the brief points out the page of the bill of exceptions where the rulings complained of may be found. In one instance the evidence was sought to be elicited by the defendant on cross-examination by the following question: "Then a person would travel from the depot between the main line track and the passing track, without obstruction, from the depot clear back to the north end of the yard at Oakland?" This question followed a rigid cross-examination in which the facts were laid bare. The offer, following the rulings on the question, was not to show that a person could travel as indicated by the question, but to show the same state of facts as had already been drawn out on cross-examination. The offer was properly rejected.

The next question referred to is one addressed to defendant's own witness. It was objected to, and the objection sustained. No offer showing what the defendant expected to prove by the witness was made. The settled rule is that

without such offer the ruling on such objection will not be reviewed.

The defendant tendered the following instructions, all of which were refused, and such refusal is now assigned as error:

"(1) In this case the plaintiff, as administrator of the estate of Walfred Hegg Lund, deceased, sues to recover damages from the defendant on account of the death of the said Hegg Lund, claiming that said death was caused by the negligence of the defendant, and that said Hegg Lund was free from any negligence on his part. The defendant denies that Hegg Lund's death was caused by its negligence, denies that said Hegg Lund was free from negligence on his part, and alleges that his death was caused by the carelessness and negligence of the deceased himself. The burden of proof is on the plaintiff to establish the following facts: First, that deceased came to his death on account of the negligence of the railroad company; second, that such death occurred under such circumstances and in such a manner that deceased, if he had lived, could have recovered damages against the defendant for his injuries. The jury are therefore instructed that, unless you are satisfied by the preponderance of the evidence of the truth of both of these propositions, the plaintiff will not be entitled to recover, and your verdict should be for the defendant."

"(3) You are instructed that negligence which in law will entitle the plaintiff to recover is the omission to do and perform some act or duty which a reasonable man would do, or the doing of some act which a reasonable and prudent man would not do, under the same or similar circumstances. Measured by this rule, if the plaintiff has failed to establish such negligence on the part of the defendant by a preponderance of all the evidence your verdict should be for the defendant."

"(6) The undisputed facts established by the evidence in this case are that the deceased at the time of the accident knowingly, and without any cause or excuse therefor, went upon the defendant's railroad track, and between the rails of said track, upon which an engine was standing, fired up and ready to move; that he walked along on said track, between the rails, in the nighttime, with his back to said engine, and without making any effort to ascertain if said engine was moving or in which direction the same was moving; such action on his part was gross contributory negligence. And unless you find from the evidence that the person or persons in charge of said engine knew, or by the exercise of ordinary diligence might have known, of the dangerous position in which deceased had placed himself, and having such knowledge carelessly and without warning ran said engine over him and killed him, the plaintiff cannot recover, and you will find for the defendant."

"(7) The plaintiff in this case can only recover for the

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pecuniary loss sustained by the widow of Walfred Heggland occasioned by his death. Such pecuniary loss is the loss of her means of support for the period during which he would probably have lived, but for his injury and death, on the 22d day of May, 1899. If you find that his widow has married again since his death, and is not now dependent upon his labor for her support, then, if you find for the plaintiff, you may take this fact into consideration in estimating the pecuniary loss, if any, which she has sustained, and in fixing the damages in this case."

As to the first, it is faulty because by it the defendant sought to submit a question of law to the jury, namely, whether the deceased, had he lived, could have recovered damages of the defendant for his injuries. It was properly refused.

As to the third, the court on its own motion gave one numbered 3, in the same language, adding thereto the following: "It is for you to fix the standard for reasonable, prudent, cautious men under the circumstances of this case, as the evidence discloses such circumstances to you, according to your judgment and experience of what reasonable, prudent, and cautious men would do under the same circumstances, and test the conduct of the deceased involved in this case and try it by that standard." The defendant insists that the foregoing addition renders the instruction obscure. It does not so appear to us. It simply gives the jury the standard by which they are to test the conduct of the deceased. The standard given is the one they should have applied in the absence of any instruction on that point. As the instruction tendered was included in the one given by the court on its own motion, which included other matters upon which it was proper to instruct the jury, there was no error in refusing the one tendered.

As to the sixth, it does not truly reflect the facts, and was properly refused.

As to the seventh, it appears in evidence that the deceased was a married man, but died without issue, and that his widow had remarried before this case was tried below. The question raised is not free from difficulty. We have found no authority directly in point. The statute provides that "in every such action the jury may give such damages as they shall deem a fair and just compensation, with reference to the pecuniary injuries resulting from such death, to the wife and next of kin of such deceased person, not exceeding the sum of five thousand dollars." The recovery is thus limited to the pecuniary injuries resulting from the death of the deceased. The defendant insists that the pecuniary loss to the widow is loss to her means of support, and, having married again, she thereby acquired new means of support, and that such fact should have been submitted to the jury, and by them taken into account in arriving at a verdict. That the pecuniary benefits resulting to a wife from her relationship to her husband gives her a pecuniary interest in his life

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will be conceded. Such benefits are not general, but specific, benefits, resulting from a specific relationship. His death ends that specific relationship, and deprives her of such specific benefits. The pecuniary injury resulting to her from his death, in our opinion, is to be measured by the probable value of such specific benefits, unaffected by the fact that subsequently she may have entered into new relations which will result in benefits similar to those she has lost by his death. The instruction was properly refused.

Complaint is made of the first instruction given by the court on its own motion. It is long, and it must suffice to say that it is a clear statement of the issues in the case and of the facts the plaintiff was required to prove to entitle him to a verdict. No error in it is pointed out, nor do we discover any.

The third instruction is complained of, but we have considered it under the assignment of the refusal to give the third instruction asked by the defendant.

The sixth instruction given by the court on its own motion is as follows: "If you find from the evidence, under the instructions of the court, that the deceased, Walfred Hegglund, went upon the right of way and tracks of the defendant company for the purpose of getting upon the caboose of the train which was to transport his stock, and while so doing conducted himself and acted as an ordinarily reasonable, prudent, and cautious man would have acted under the same circumstances, and while so upon said right of way and tracks received injuries which caused his death by and through the negligent act of said defendant company or its agents or employees, which negligence must be shown by a preponderance of the evidence, and must be the negligence complained of, then, and in that event, your verdict should be for the plaintiff for such sum as the evidence shows to have resulted therefrom, not to exceed the sum of \$5,000." The defendant insists that this instruction is erroneous, because "the jury should have been told that it must have been either necessary or proper for the deceased to have placed himself on the railroad tracks." The question was not exactly whether it was necessary or proper for the deceased to have placed himself on the railroad track, but, rather, whether in doing so he did that which a man of ordinary care and prudence would not have done under like circumstances. By the instruction under consideration the jury were told that if the deceased went—that is, walked or traveled—on the right of way and tracks for the purpose of getting on the caboose, and while doing so conducted himself and acted as an ordinarily reasonable, prudent, and cautious man would have acted under the same circumstances, etc. We think a fair construction of this instruction on this point is that it required the jury to find that in walking on the track the deceased was doing that which a man of ordinary care and prudence might have done under like circumstances. If a more explicit statement on that point was

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desired by the defendant, it should have tendered an instruction to that end. The instruction as it stands is not erroneous.

The defendant complains of the refusal of the court to submit certain special findings. This is a matter largely within the discretion of the trial court. Such discretion does not appear to have been abused in this case. We discover no error in the record.

It is recommended that the judgment of the district court be affirmed.

AMES and DUFFIE, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment of the district court is affirmed.

SEDGWICK, J. (dissenting). I think that to walk with one's back to a live engine between the tracks of a road on which that engine may readily be moved, on a dark night, in a switch yard where it is well known that switching is being done, and it is well known that engines are standing ready to be moved at any time, and without any attempt to ascertain if an engine is approaching, is of itself such *prima facie* negligence as to make it necessary for the plaintiff to prove that there was no other reasonable and proper route upon the roadbed and right of way or otherwise whereby deceased could have gone from the depot to the caboose, and in the absence of such proof the plaintiff could not recover.

2. Under such conditions the question put to one of plaintiff's witnesses upon cross-examination, as to whether a person could travel to the north end of the yard from the depot between the main line track and the switch track, was a proper question upon cross-examination, and to exclude this line of cross-examination was error which calls for a reversal of the judgment.

3. I think the sixth instruction given by the court on its own motion was erroneous. It purports to tell the jury what facts must necessarily be found in order to find a verdict for the plaintiff, and it omits an essential element of the plaintiff's case. It may under the circumstances have been prudent to have traveled over the defendant's right of way, or even over the roadbed, and imprudent to have traveled upon the track between the rails, and the distinction should have been made plain to the jury. The phrase, "went upon the right of way and track of the defendant company," uniting the two together, may well have led the jury to suppose that they were not to make any distinction, so that unless it was negligent to go upon the right of way at all it would not have been negligent to walk between the rails of the track, and I think the jury should have been told that, unless circumstances were such that it was necessary for the deceased to place himself between the tracks, such act must be considered negligent on his part.

CHICAGO, B. & Q. R. CO. v. MARTELLE.

(Supreme Court of Nebraska, July 10, 1902.)

[91 N. W. Rep. 364.]

Pleading—Amendments.

The question of the right to file amended pleadings during the trial is one which is confided to the discretion of the trial court, and, unless the record clearly shows an abuse of discretion, the rulings thereon will be sustained.

Same.

The third subdivision of section 92 of the Code of Civil Procedure provides that the petition shall contain "a demand of the relief to which the party supposes himself entitled, if the recovery of money be demanded the amount thereof shall be stated." Will a petition to recover damages for a personal injury, which contains no demand for any relief whatever, sustain a verdict and judgment therefor,—*quære?*

Injury to Passenger—Carried beyond Destination—Contributory Negligence—Jumping from Moving Car.*

A passenger who has been carried past his place of destination by a train which did not stop for him to alight, and who, without notice to or knowledge of those in charge of the train, simply to avoid being carried to the next station, jumps from the steps of the car to the ground while the train is in rapid motion, and is injured thereby, cannot maintain an action against the railroad company to recover damages therefor. *Railroad Co. v. Landauer*, 54 N. W. 976, 36 Neb. 642, approved and followed. *Railroad Co. v. Chollette*, 49 N. W. 1114, 33 Neb. 143, *Railway Co. v. Porter*, 56 N. W. 808, 38 Neb. 226, and *Railroad Co. v. Hyatt*, 67 N. W. 8, 48 Neb. 161, distinguished and approved.

Sullivan, C. J., and Oldham, C., dissenting.

(Syllabus by the Court.)

Commissioners' opinion. Department No. 2. Error to district court, Butler county; Bates, Judge.

Action by E. H. Martelle against the Chicago, Burlington & Quincy Railroad Company. Judgment for plaintiff. Defendant brings error. Reversed.

J. W. Deweese and F. E. Bishop, for plaintiff in error.

Matt Miller, for defendant in error.

BARNES, C. This case was tried in the district court of Butler county, and resulted in a verdict and judgment against the defendant railroad company for the sum of \$3,500. A motion for a new trial was overruled, and the case comes to this court on a petition in error. The amended petition, upon which the case was finally submitted to the jury, is as follows (omitting title): "The plaintiff complains of the defendant, and for cause of action alleges and says: (1) That said defendant is a corporation duly organized and existing under and by authority of the laws of the state of Nebraska, and is operating a railroad from Ashland, Nebraska, to Schuyler, Nebraska, and is a common carrier of passengers and freight for hire on

*See foot-note appended to *Comerford v. New York, etc., R. Co.* (Mass.), 3 R. R. R. 130, 26 Am. & Eng. R. Cas., N. S., 130; *Pence v. Wabash R. Co.* (Iowa), 3 R. R. R. 77, 26 Am. & Eng. R. Cas., N. S., 77; *Lindsay v. Southern Ry. Co.* (Ga.), 3 R. R. R. 748, 26 Am. & Eng. R. Cas., N. S., 748.

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said railroad. (2) That on the 9th day of January, 1898, and while the defendant was so operating said railroad, it received the plaintiff as a passenger in one of its cars at Schuyler, Nebraska, to convey him from said place to Edholm, Nebraska, for the sum of thirteen cents paid by the plaintiff to the defendant. (3) That on said day, in managing and conducting the train and cars on which the plaintiff herein was a passenger, the defendant and its employees were so negligent and careless that said train on approaching the station at Edholm commenced to slow up to stop at said station, but on arriving at said station did not come to a standstill, but nearly stopped just after arriving, at a slow rate of speed passing the platform at said station; and the plaintiff herein, believing he could get off said car on which he was riding, started to alight from said car, and, just as he was about to alight and started to alight from said car, the said train was given a sudden jerk, which then and there caused the plaintiff, when alighting on the ground on his feet, to fall over, and, then falling over, he was injured by having his back and spinal cord hurt. (4) By reason of which the plaintiff was sick, and has been lame and weak and lame in his back for a space of nine months, and unable to attend to his business, and is still in such condition, and has expended for medical attendance before the commencement of this suit, to Dr. Murphey, of Octavia, Nebraska, the sum of \$25, in all to his damage in the sum of \$5,000." To this petition the railroad company filed the following answer (omitting title): "Now comes the defendant above named, and, for answer to the petition filed by the plaintiff, says that it is a corporation duly organized and existing under and by virtue of the laws of the state of Illinois, and that as such it owns and operates the line of railroad referred to in said petition, and did own and operate the same at the time referred to in said petition. Further answering said petition, this defendant says that it is informed and believes that the plaintiff was a passenger on defendant's train running from the station of Schuyler to Edholm at the time stated in said petition; but the defendant denies each and every allegation stated in said petition, except such facts as are stated in this answer. The defendant further says that if the plaintiff got off of said train while the same was in motion, as stated in his petition, or otherwise, and injured himself in getting off, that such injury was sustained by reason of his own carelessness, negligence, and misconduct, and without any fault of this defendant. Wherefore the defendant prays judgment against the plaintiff for costs." The reply was a general denial. The plaintiff in the court below was allowed to file his amended petition after the evidence on his part was introduced, to which the defendant company objected, and had its exceptions allowed, and this ruling is assigned as error.

1. The question of amendments to pleadings is one which calls for the exercise of the discretion of the trial court, and,

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unless it is shown that there was an abuse of such discretion, the rulings upon such matters will be sustained. In this case the defendant company made no application for a continuance on account of the filing of the amended petition, and the record fails to show that the amendment caused any surprise, or was the occasion of any injury to the rights of the company, or in any manner necessitated a change in the trial. We hold that there was no error in allowing the amended petition to be filed.

2. It is contended that the court erred in overruling the objection to the introduction of any evidence on the part of the plaintiff, for the reason that the petition did not state facts sufficient to constitute a cause of action. It is urged that, inasmuch as the amended petition contains no prayer for a judgment, it is faulty and defective, and will not support or sustain the verdict and judgment in this case. We are satisfied that the judgment of this court must turn upon another question, and therefore we do not decide this point. We will say, however, that in all of the cases cited in support of the amended petition there was some kind of a prayer for judgment, however defective it may have been. In this case there is no prayer for any judgment whatever. It is true that the prayer for relief is no part of the facts constituting the cause of action, yet the Code requires that the petition shall contain a prayer for such relief as the plaintiff deems himself entitled to. Will a petition which contains no prayer for any relief whatever sustain a verdict and judgment,—quære?

3. The defendant company at the close of all of the evidence moved the court to instruct the jury that, under the pleadings and the evidence, the plaintiff was not entitled to recover, and to return a verdict for the defendant. This motion was overruled. The ruling was excepted to, and is now assigned as a ground for a reversal of the judgment of the lower court. Giving to the amended petition in this case a fair and reasonable construction, we find that it charges the railroad company with negligence in not stopping its train of cars at Edholm, the destination of the plaintiff, a sufficient length of time to permit him to alight therefrom in safety. It is true that the petition contains an allegation that "just as the plaintiff went to alight from the car, and just as he was about to alight and started to alight therefrom, the train was given a sudden jerk, which then and there caused the plaintiff, when alighting on the ground on his feet, to fall over, and he was injured thereby"; but the charge of negligence is not based on this allegation. An examination of the evidence shows that it was not sufficient to sustain an allegation of negligence on this ground. Without considering any of the evidence of the defendant company, and giving the most liberal construction to that introduced by the plaintiff in support of his cause of action, we find it fairly established that the plaintiff in the court below purchased a ticket and became

a regular passenger on the defendant's train from Schuyler to Edholm; that it was dark when the train reached that place; that the company did not stop its train so as to allow him to alight at his place of destination; that it slowed its train as it passed the station, so that the plaintiff's companion, Streeter, got off, at a place about 20 feet beyond the depot platform; that the speed of the train was accelerated with a sudden jerk, which is the jerk complained of by the plaintiff, and thereafter continually increased its speed until the plaintiff finally jumped off at a point some 150 feet east of the station; that the jerk spoken of occurred just as the plaintiff commenced to get off; that he remained on the steps of the car platform from that time until he passed several obstructions which he saw, and when clear of them he stepped or jumped from the steps to the ground; that by this time the train was going with such speed as to cause him to fall down after alighting on his feet, and in that manner he sustained the injuries of which he complains. It is shown that he did not request the conductor to stop the train and allow him to alight, and that none of the persons in charge thereof knew of his intention to get off while it was in motion. The undisputed evidence of the plaintiff having established the foregoing facts, we are required to determine whether or not, as the pleadings and the evidence stood at the close of the trial, the instruction tendered by the company should have been given. It was clearly the duty of the company to stop its train and allow the plaintiff to alight at his place of destination, and in not doing so it was guilty of negligence, but this negligence was not the proximate cause of plaintiff's injuries. "Proximate cause" is defined to be that cause which is the nearest, most immediate to, and is the direct cause of injury complained of. The negligence of the railroad company in carrying the plaintiff past his place of destination was not the proximate cause of his injury. An act is the proximate cause of an event when in the natural order of things, and under the circumstances, it would necessarily produce that event; when it is the first and direct power producing the result. Beach, Cont. Neg. § 31. The act of plaintiff in stepping or jumping from the train while it was in motion answers to the above definition, and was in fact the proximate cause of his injury. In this matter no negligence of the defendant company is shown. It is not claimed that any one in charge of the train knew that plaintiff was about to or did jump from the car steps at the time he claims to have been injured. In *Railroad Co. v. Landauer*, 36 Neb. 642, 54 N. W. 976,—a case where the plaintiff jumped from a moving train without as much time for reflection as plaintiff had in the case at bar,—this court held that there could be no recovery, and that one who jumped from a rapidly moving train of cars under such circumstances as exist in this case was

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guilty of criminal negligence, within the meaning of section 3, art. 1, c. 72, of the Compiled Statutes of this state.

The plaintiff in the court below testified on trial as follows:

"The train was going slower as it got past the platform. When I jumped I lit on my feet, and fell down afterwards; struck on my feet first, and then from the force fell over. I lit on my feet at the bottom of the grade. Q. You had been trying to get off all the way from the station to where you did get off? A. Yes, sir. Q. That was the first time you could succeed in getting off? A. Yes, sir. Q. And you knew the train hadn't stopped? A. Yes, sir. Q. Knew it was running all the time you were trying to get off? A. I knew it was moving along, because I could see the piles of ties there. That is why I didn't get off at the time Mr. Streeter did. I could see the piles of ties and piles of rails, and when I thought it was safe to get off, at the end of these, I got off. I did not try to get off until I could see the end of these ties and rails. Q. After you passed them, then you tried to get off? A. Yes, sir; I got off." He also testified that he knew the trainmen were in the front end of the same car, but made no effort to let them know that he wanted to alight, nor did he ask them to stop the train and let him off. The witness Streeter says that he stepped off the car about 20 feet east of the station platform when the train was going the slowest, "and then I thought it wasn't going to stop, so I stepped off, and after I stepped off I saw it started up faster. I heard it going faster. I heard it jerk as though it was going faster. I knew it started up faster. Q. You stated that you heard the cars jerk up. How soon was it after you got off? A. Right away. I heard it jerk up right away after I stepped off." The plaintiff was a man possessed of his ordinary faculties, and knew at the time he stepped or jumped from the moving train that he had been carried past his place of destination, and that the train would not stop until it reached the next station. He could have remained in the car, where he was perfectly safe from injury, and would only have been subjected to the inconvenience of being carried to the next station. For this wrong he had an adequate remedy in an action for damages against the company. He could have called the conductor, and requested him to stop the train and allow him to alight in safety. Such request would probably have been complied with. Instead of adopting either course he concluded to take his chances and alight from the moving train. He was confronted by no immediate danger which would impel him to leap therefrom. There was no sudden emergency requiring instant action, without opportunity for deliberation. He went to the rear platform, calculated his chances to alight, and deliberately waited until he thought his opportunity was good, when he stepped or jumped from the car steps. In so doing he must be held to have known the danger, and to have deliberately accepted the risk. Such action on his part was gross negli-

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gence, and amounted to an utter disregard of the danger into which he blindly plunged. It seems to us that there is no room for any other conclusion among men of reasonable intelligence and prudence than that to attempt to alight from a moving train under such circumstances amounted to criminal recklessness. It is an established rule of law that in the absence of anything to create excitement or alarm, to attempt to leave a car while in motion by jumping from the steps of the car platform to the ground is evidence of such negligence on the part of the passenger that he cannot recover for any injuries resulting from such action. *Butler v. Railroad Co.* (Minn.), 2 Am. & Eng. R. Cas., N. S., 261, 60 N. W. 1090; *McDonald v. Railroad Co.* (Me.), 2 Am. & Eng. R. Cas., N. S., 293, 32 Atl. 1010; *Jacob v. Railroad Co.* (Mich.) 63 N. W. 502; *Rothstein v. Railroad Co.* (Pa.), 2 Am. & Eng. R. Cas., N. S., 258, 33 Atl. 379; *Burgin v. Railroad Co.*, 115 N. C. 673, 20 S. E. 473, 2 Am. & Eng. R. Cas., N. S., 259. It was held in the *Landauer Case* that, when the carrier shows that the passenger was injured by stepping from its running train, the presumption of liability raised by law against the carrier is overthrown, and it then devolves upon the passenger to show some justification necessary for such action, to relieve himself from the imputation of gross negligence. Plaintiff in this case failed to make any such showing, and it is demonstrated by the testimony that he was guilty of criminal negligence, and has not sustained the burden of justification put upon him, by stepping or jumping from a running train. It is contended on part of plaintiff that he is entitled to recover in this case by reason of the rule of law announced in *Railroad Co. v. Chollette*, 33 Neb. 143, 49 N. W. 1114, 2 Am. & Eng. R. Cas., N. S., 225. An examination of that case shows us that the plaintiff attempted to alight from the train at the place of her destination; that the train did not stop a sufficient length of time to enable her to so do, but started up suddenly, thus throwing her to the platform. The facts in that case authorized a recovery. The decision in *Railroad Co. v. Porter*, 38 Neb. 226, 56 N. W. 808, is cited to support the plaintiff's right to recover. In that case the train had stopped to take water. The plaintiff, supposing, of course, that it would pull up to the station and stop a sufficient length of time to allow him to alight, stood upon the steps of the car platform, waiting until it should reach the depot. On arriving there he suddenly discovered that the train was not going to stop, and instantly, without opportunity for reflection, stepped off onto the platform of the station, and was injured thereby. The court very properly held that he was entitled to recover. We approve of the decisions in both of these cases, but the facts in each of them are so unlike those in the case at bar that they are of no assistance to us in deciding this question. Upon principle and precedent we hold that, as the pleadings and the evidence stood at the close of the trial, the plaintiff was not

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entitled to recover, and the court erred in refusing to so instruct the jury. For this error the judgment of the district court should be reversed and the case remanded for a new trial. There are many other errors complained of in this record, but as we deem this one decisive of the case, as it stands, it is unnecessary to consider them.

For the foregoing reasons, we recommend that the judgment of the district court be reversed, and the cause remanded for a new trial.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment of the district court is reversed, and the cause remanded for a new trial.

POUND, C. I concur in recommending an absolute judgment of reversal. In my opinion, there was nothing for the jury, and the trial court should have directed a verdict. It is settled that, where but one reasonable inference can be drawn from the facts the question of negligence is for the court. *Brady v. Railway Co.*, 59 Neb. 233, 80 N. W. 809; *Guthrie v. Railway Co.*, 51 Neb. 746, 71 N. W. 722; *Railroad Co. v. Talbot*, 48 Neb. 627, 67 N. W. 599. The same rule must apply to the question whether there has been "criminal negligence," within the meaning of section 3, art. I, c. 72, Comp. St. *Railroad Co. v. Landauer*, 36 Neb. 642, 54 N. W. 976. Of course, it is not necessarily and inevitably criminal negligence to get off a moving train. *Railroad Co. v. Chollette*, 33 Neb. 143, 49 N. W. 1114, 2 Am. & Eng. R. Cas., N. S., 225; *Railway Co. v. Porter*, 38 Neb. 226, 56 N. W. 808; *Railway Co. v. Baier*, 37 Neb. 235, 55 N. W. 913; *Railroad Co. v. Hedge*, 44 Neb. 448, 459, 62 N. W. 887, 2 Am. & Eng. R. Cas., N. S., 220, 300. But there may be cases where such course was so manifestly hazardous, was so entirely unnecessary, and was taken so deliberately that no reasonable man can say it was not grossly and criminally negligent. I think this is such a case. The injuries against which the statute makes the railroad company an insurer are those resulting "from the operation and management of the road," whether the result of negligence or not. *Railroad Co. v. Hedge*, *supra*; *Railway Co. v. Porter*, *supra*. In no sense does an injury which results from the deliberate recklessness of the passenger come within its purview. In this case the passenger had ample opportunity to make up his mind. He did so deliberately, chose his time and place, and, at night, while the speed was increasing, got off a moving freight train. Every one knows that freight trains are subject to jerks and jolts as the speed is increased. Every one knows that the facilities for getting on and off such trains are poor. Every one knows that the night is no time to get off moving trains. Undoubtedly the plaintiff thought he could get off safely. Every one, when he does a rash act, proceeds in the hope that chance will operate in his favor. But if he chooses to put his trust in the chapter

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of accidents, and deliberately risk life or limb, he does so at his peril. The law makes the company an insurer against all accidents or injuries growing out of the operation of the road. It does not make the company an insurer against the deliberate carelessness of the passenger himself.

SULLIVAN, C. J. (dissenting). There is in the evidence room for a considerable difference of opinion as to the speed of the train at the time in question. And it is not certain whether it was the rate of regular motion,—an element of danger which the plaintiff was bound to consider,—or a sudden jerk, which he did not have reason to anticipate, that caused the accident. But in any view of the case, I think the trial court did not err in submitting the question of contributory negligence to the jury. There was, of course, some risk in getting off the train while in motion, but the act was not so obviously rash and foolhardy as to amount necessarily to criminal negligence. "Criminal negligence" is a convenient phrase to indicate that the degree of care required of the passenger is small. As defined by this court, it means such "gross negligence as amounts to a reckless disregard of one's own safety, and willful indifference to the consequences liable to follow." In my judgment, it was for the jury to determine, from its knowledge of men and of the motives that influence and control human conduct, whether the act of the plaintiff was, under all the circumstances, within the definition quoted. To say that a strong, active, and experienced man, who, to avoid being carried beyond his destination, gets off a slowly moving train, or a train moving with small velocity, is in every case foolishly heedless of consequences, and willfully indifferent to his personal safety, is to assert what every man accustomed to travel knows from his own experience and observation to be untrue. I readily concede that, from the facts which the evidence in the record tends to prove, criminal negligence might be reasonably inferred, but I deny that the inference is a necessary and inevitable one. If the plaintiff had not attempted to alight, and had gone on to the next station, I think his conduct would be generally regarded as unusual. It would probably stamp him in the opinion of most people as overcautious and somewhat deficient in ordinary courage. It would perhaps be better that passengers should submit to the inconvenience of being carried beyond their destination, rather than take the chance of being injured by alighting from a moving train; but we are dealing now with conditions, and not with theories. It is a question of what men actually do in the situation in which the plaintiff was placed by the fault of the company's servants, not what the theorists think they ought to do. It seems to me perfectly plain that the criterion by which the plaintiff's conduct has been tried in this court is a false criterion. The standard man set up by the majority is, in my opinion, a mythical character. He is a man we do not meet in real life. He is

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wholly a creation of the judicial mind, and has no objective existence anywhere. I think it is doubtful whether the evidence in this case shows want of ordinary care, and I am very sure that it does not conclusively show on the part of the plaintiff that extreme degree of indifference to his own safety that constitutes criminal negligence. It was the business of the jury to fix the standard of commensurate care in the circumstances disclosed by the evidence, and to test the plaintiff's conduct by that standard. If in the discharge of this duty they did not reason irrationally and contrary to common sense, their decision should be final. *Railroad Co. v. Landauer*, 36 Neb. 642, 54 N. W. 976. Upon questions of the kind here considered, the opinion of a judge, however eminent, is, as every one knows, seldom, if ever, better than that of the average juror. And for this reason it seems to me that the court has gone to an extraordinary, if not to an unprecedented, length in setting the verdict aside.

A more elaborate and perspicuous presentation of the views here expressed will be found in the following opinion.

OLDHAM, C. (dissenting). Not being able to fully concur in all the conclusions reached by my learned associate in his able opinion in this case, I deem it my duty to express my views in this separate and dissenting opinion. I agree with all that is said in the first paragraph of his opinion. With reference to the quære propounded in the second paragraph of his opinion, I would say that in the case of *Fox v. Graves*, 46 Neb. 812, 65 N. W. 887, this court has said: "Although the prayer for relief is a part of the petition, it is no portion of the statement of facts required to constitute a cause of action. The entire omission of any demand for judgment would not subject the petition to general demurrer." It would follow from the rule thus announced that plaintiff's omission of any demand for judgment in his petition would not and did not make the petition obnoxious to a general demurrer, and, as the petition was not demurrable for having failed to state facts sufficient to constitute a cause of action, its defect was aided by answer and judgment.

I cannot agree to the third syllabus of the opinion of my learned Brother, in which he seeks to establish the rule that where "a passenger, who is being carried past his place of destination by a train which did not stop for him to alight, and who, without notice to or knowledge of those in charge of the train, simply to avoid being carried to the next station, jumps from the steps of the car to the ground while the train is in motion, and is injured thereby, cannot maintain an action against the railroad company to recover damages therefor." It does not seem to me that the reason for such a rule as this can be deduced from anything that was said by this court in the case of *Railroad Co. v. Landauer*, 36 Neb. 642, 54 N. W. 976, for in that case the train had stopped at the station a reasonable length of time for passengers to alight, and had

started in motion again after the station had been called, and the passengers had all been given an opportunity to alight in safety before the accident had occurred. So that nothing determined in that case would warrant this court in declaring, as a question of law, that a passenger who is being carried past his place of destination by a train which did not stop for him to alight, and is injured while leaving the train while it is in motion, cannot maintain an action against the railroad company for damages for the injuries so sustained. For in the case just cited the court, referring to section 3, art. 1, c. 72, Comp. St., says, "It is not such contributory negligence for a passenger to jump from a moving train as will in every case prevent a recovery under the statute above cited; but where the circumstances are such as to render it obviously and necessarily perilous, and to show a willful disregard of the danger incurred thereby, such act amounts to criminal negligence, as above defined." In the case at bar, plaintiff's testimony showed that the train on which he was a passenger for hire at the time the injury was received did not stop at the station of Edholm, for which he was bound, at all, but that when it reached the station it slowed down so that he and Streeter, the only passengers who were on the train, thinking that the train was about to stop, went out on the platform to get off, and Streeter, who preceded the plaintiff, alighted from the train in safety. Plaintiff says he was deterred from immediately following Streeter in alighting from the train by reason of the fact that there were ties and rails along the side of the track when he had descended to the lowest step of the car platform, and on this account, according to his testimony, he did not alight from the train until it had gone about 150 feet east of the station platform; and he says that the train was not going at a rapid rate of speed when he started to alight from it, but that it gave a sudden jerk just as he was in the act of alighting, and this jerk, according to his theory, caused the fall from which his injuries were received. Plaintiff was corroborated in his testimony as to the fact that the train did not stop at the station at all by Streeter, the other passenger on the train, and three bystanders who were at or near the depot at the time the train came in. It is true that the testimony of defendant's witnesses, the conductor, engineer, and brakeman of the train, all tended to show that the train did stop at the station for about a minute before this accident occurred. But this disputed question of fact must have been found by the jury in favor of the plaintiff, for the trial court told the jury, in paragraph No. 8 of instructions given on its own motion, that if they believed from the evidence "that the defendant's train stopped at the station at Edholm, and that plaintiff had a reasonable and sufficient time to alight from said train in safety while said train was at rest, then the defendant would not be liable in the action, and you should find for the defendant." The court also told the

jury, in paragraph No. 10 of instructions given on its own motion, that "if you find the defendant's train stopped near the station of Edholm long enough to let the plaintiff get off the train, and he did not get off, but remained on until the train had gone some distance, and then got off the train while it was running, and, on account of so getting off, received the injury complained of, that then he was guilty of negligence such as, under the circumstances, prevents his recovery against the defendant." In addition to these instructions, the trial court, after defining "criminal negligence" in the exact language used by this court in its definition of that term in *Railroad Co. v. Landauer*, supra, told the jury, in the ninth paragraph of instructions, "that if they found that the train did not stop at the station platform in Edholm, but that plaintiff was guilty of gross or criminal negligence in alighting while the train was in motion, they would find for the defendant." It seems to me that these instructions fairly stated every defense that was offered by the railroad company under the pleadings and evidence in the case. No instructions were requested by plaintiff at the trial below, and those which were requested by the railroad company and denied by the court each sought to ignore the liability entailed upon the company for injuries to its passengers under the provisions of section 3, art. 1, c. 72, Comp. St.; and for that reason, as well as for the reason that the court on its own motion gave everything to which defendant was reasonably entitled under the issues, I do not think that any error was committed in the refusal of instructions.

I have thus far examined the liability of the railroad company under the facts and circumstances proven in this case solely in the light of the principles announced in *Railroad Co. v. Landauer*, supra, not unaware of the fact that this decision was rendered by a divided court, and that, in subsequent decisions of this court involving the liability attaching to a railroad company for injuries to its passengers, this case, and much of the dicta which it announced, have either been distinguished or entirely ignored. This is particularly noticeable in the subsequent case of *Railroad Co. v. Hyatt*, 48 Neb. 167, 67 N. W. 8, 4 Am. & Eng. R. Cas., N. S., 44, in which it is held that: "It is not per se gross negligence for a passenger to alight from a moving train. Whether to do so constitutes such negligence as will defeat a recovery for injuries received is for the jury to determine, under proper instructions, from a consideration of all the evidence in the case." The doctrine of this case is fully supported in principle by the more recent cases of *Railroad Co. v. Zerneck*, 59 Neb. 689, 82 N. W. 26, 17 Am. & Eng. R. Cas., N. S., 76, 55 L. R. A. 610; *Railroad Co. v. Young*, 58 Neb. 678, 79 N. W. 556, 14 Am. & Eng. R. Cas., N. S., 343; and *Railroad Co. v. Wolfe* (Neb.) 86 N. W. 441. I am therefore of the opinion that the question as to whether or not the plaintiff was guilty of gross

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or criminal negligence in alighting from the train was, under the facts and circumstances proved in the case at bar, a question of fact, to be submitted, under proper instructions, to the jury.

A more serious question is suggested, in my judgment, by the complaint urged in the brief of defendant railroad company (plaintiff in error) that the damages awarded are excessive under the allegations of the petition and all the evidence submitted at the trial. After a description of the injury, the petition alleges: "(4) By reason of which the plaintiff was sick and has been lame and weak in his back for the space of nine months, and unable to attend to his business, and is still in such condition, and has expended for medical attendance the sum of \$25, before the commencement of this suit, to Dr. Murphy, of Octavia, Nebraska, in all to his damage in the sum of \$5,000." It will be noticed that no permanent injury is alleged to have been occasioned by the fall which the plaintiff received in alighting from the train. The proof offered by the plaintiff tended to show, at the most, that the plaintiff had sustained an injury to his spine by the fall, and that he had suffered considerable pain from the injury for four or five weeks after the accident, and that he had been totally or partially disabled from engaging in his avocation as a blacksmith for about a year after the injury. It is also showed that he has been compelled to spend about \$25 for medical attendance on account of the injury. While the testimony of the physician showed plaintiff to have received a severe and painful injury, it is very vague as to the probable lasting effect of the injury. It seems to me that under this testimony, and the allegations of the petition above set forth, the verdict of the jury awarding the plaintiff \$3,500 damages was clearly excessive. I would therefore recommend that unless plaintiff enters a remittitur of \$1,500 of the damages so assessed, within 30 days, this cause be reversed and remanded, but that, if such remittitur be entered, the judgment of the district court be affirmed.

NEWCOMB v. NEW YORK CENT. & H. R. R. Co.

(*Supreme Court of Missouri, Division No. 1, June 18, 1902.*)

[69 S. W. Rep. 348.]

Injury to Passenger—Negligence—Platform.

The tracks in a railway station were laid in pairs; between each pair there being platforms about 7 or 8 inches above the rails; and at intervals there were "cross-overs," or places where the platforms were even with the rails, such depressions being accomplished by inclining the platforms, the inclines being 15 feet long, and the rise about half an inch to the foot: *held*, in an action for injuries sustained by a passenger on jumping from a moving train in the station, that there was no negligence in the construction of the platforms.

Same—Same—Same.

Where a passenger jumps from a moving train in a station and slips

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on the platform, and there is a conflict of evidence as to whether the platform was greasy, he is entitled to go to the jury.

Same—Same—Same—Concurrent Negligence of Two Carriers.

A passenger on his way to New York inquired of a porter standing beside a train whether it was the New York one, and, receiving an affirmative answer, and an invitation to get on, boarded it, but then, learning that it was a train on another road, jumped off while it was in motion. He alighted on the platform at a point where it was greasy, slipped, and was injured. The train from which he jumped was operated by a different road than the one owning and conducting the depot: *held*, in an action against the latter road, that it was error to charge that, before plaintiff could recover, the jury must find defendant's negligence to be the sole cause of the injury, it being liable if its negligence concurred with that of the other road.

Same—Contributory Negligence in Jumping on Greasy Platform.*

A passenger jumping from a moving train and slipping on a greasy platform could not recover if his negligence directly contributed to the injury, though his negligence was only slight.

Same—Evidence.

On an issue whether a platform on which plaintiff slipped while jumping from a moving train was greasy at the time, evidence as to whether there was grease on it five months before was too remote.

Same—Same.

Evidence as to whether there was grease on the platform a week afterwards was inadmissible.

Same—Same.

Where a passenger, by mistake, boarded the wrong train, and was injured by jumping from it while in motion, evidence as to whether there were signs or placards on the car five months previous was too remote to afford a basis for an inference as to the condition at the time of the accident.

Appeal from St. Louis circuit court; Franklin Ferris, Judge.

Action by George A. Newcomb against the New York Central & Hudson River Railroad Company. From a judgment for defendant, plaintiff appeals. Reversed.

On August 7, 1897, the plaintiff purchased a ticket at St. Louis for transportation to New York, over the Wabash, Michigan Central, and New York Central Railroads. At 6:30 p. m. on Sunday, August 8th, he arrived at Buffalo, N. Y., over the Michigan Central Railroad, where a stop of 20 minutes was provided for supper. From Buffalo to New York the plaintiff was to go over the New York Central Railroad. The defendant's depot at Buffalo, into which the Michigan Central train came, and out of which the New York Central train was to go, fronts north on the south side of Exchange street. Next to the street are the ticket office, waiting room, baggage room, and restaurant. In the rear thereof, to the south, are tracks numbered 1 to 6 from north to south. There is a platform for passengers to use running parallel with the track between the building and track No. 1, and similar platforms between tracks 2 and 3 and 4 and 5; in other words, the tracks are constructed in pairs, with platforms between each pair for passengers to use in reaching the trains on the several tracks. There are three cross-overs or runways across the

*See preceding case and foot-note.

tracks inside of the station. The first is 100 feet east of the west end of the station. The second is 450 feet east of the west end of the station, and directly opposite the waiting room. The third is 550 feet east of the west end of the station, and is on a prolongation of the exit from the station to Exchange street, between the waiting room and the restaurant. The platforms were elevated about 7 or 8 inches above the rails. These cross-overs are made to enable passengers to conveniently cross over the tracks, and also so that the train men can run the baggage trucks across the tracks to the several trains. To reach the cross-overs there are inclines in the platform. They are 15 feet and 3 inches long, and the rise is less than 8 inches, so that the incline is about half an inch to the foot. The incline is in the line of the platform; that is, from west to east the cross-ways extend from north to south. The whole construction is what is called by the witnesses "the standard plan," adopted by the engineers of the New York Central Railroad, and in use at all stations along its line. The Michigan Central train upon which the plaintiff arrived in Buffalo entered the station from the west, upon track No. 6, the track furthest from the station buildings. Learning that he had 20 minutes for supper, the plaintiff left the sleeper, in which he had been traveling, and, without noting the name of the sleeper, although it was upon his sleeping car ticket,—he went across one of the three cross-overs (he does not know which) to the restaurant. After eating his supper, he started back across the tracks, by way of one of the three cross-overs, to his sleeper. In doing so he met a friend from St. Louis, Mr. Knox, and they walked along together. Some one stopped Mr. Knox, and the plaintiff proceeded alone. He crossed the platform between the restaurant and track No. 1; he crossed the first pair of tracks, numbered 1 and 2; he crossed the platform between tracks 2 and 3; he crossed the next pair of tracks, numbered 3 and 4; and when he reached the platform between track No. 4 and track No. 5 he turned west, and walked along the platform. There was a train standing on track No. 4 (which was the West Shore train), and a train standing on track No. 5 (which was the New York Central train, to which his sleeper had been transferred from the Michigan Central train). It was then 6:45 p. m., the regular schedule leaving time of the West Shore train. The New York Central train was not to leave until 6:50 p. m. While walking west along said platform, with the West Shore train on his right and the New York Central train to his left, the two trains being separated only by the platform, which was about 15 feet wide, he noticed that the train on his right was moving. The porter of the sleeper attached to that train had left the platform, and gotten onto the step of the sleeper. The plaintiff stepped up to the train and asked the porter of the sleeper if that was the train for New York. The porter replied, "Yes, sir; jump on." The plain-

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tiff did so. This was at a point about 50 feet east of the west end of the station, and about 50 feet west of the first or most western cross-over. After thus getting on the train, the plaintiff noticed that it was not the same sleeper in which he had traveled to Buffalo, and so he said to the porter, "Did you say this was the New York train?" The porter replied, "How do you want to go?" The plaintiff answered, "I want to go by the New York Central." The porter said, "This is the West Shore; get off." It seems that both the West Shore and New York Central trains run from Buffalo to New York, but over different routes. But of this the plaintiff was ignorant. When the porter told the plaintiff to get off, the train was running slowly,—from two to six miles an hour according to the various witnesses. The grade is heavy inside of the station towards the east, and hence the trains cannot run fast upon starting. By this time the sleeping car on which the plaintiff was had crossed the first and second cross-overs, and was within about 20 feet of the third cross-over, which was nearly opposite the restaurant; that is, the train had traveled about 580 feet from where the plaintiff boarded it. The plaintiff then got off of the train. He says he did so of his own volition, and not because the porter told him to do so, or because he was ordered to get off; that "it was a deliberate, voluntary act on his part. He took his time. He looked first on the north side of the train, and saw there were tracks on that side. He then looked on the south side, and calculated that that was the safer side to jump on. Before jumping he took a glance on one side and then on the other." He then describes his manner of getting off and how he was injured as follows: "Q. Did you get down on the bottom step? A. I do not think I did. Q. You don't think you got down on the bottom step? A. No, I am not positive. I went and took hold of that rail. Q. That is, the hand rail that is attached to the body of the car? A. Yes, sir; the hand rail of the front car of those two cars that inclosed this platform; and I got hold of that, and got off the train,—jumped off the train; and when I got off, of course, simultaneously, I let go of the rail, as one naturally would do. Q. You got hold of the hand rail attached to the body of the front sleeper? A. Yes, sir. Q. Now, you say you do not think you got down on the bottom step. From what point did you jump? A. Why, I got down on the step but I don't think I went to the bottom. I am not positive. Q. Well, your best recollection is that it was not the bottom step? A. Yes, sir. Q. Is your memory perfectly clear in regard to letting go of the rails as you jumped? A. Yes, sir. Q. Did you look to see whether the place you were going to alight on was a reasonably safe one, and clear from obstructions? A. I took it to be the platform. I presumed it was a straight platform. I didn't see anything where I was going to jump. Q. You had walked across one of these runways, hadn't you? A. Yes, sir.

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Q. Twice? A. Yes, sir. Q. So you knew there were runways in the station, lower than the platform? A. Yes, but not very much lower. Q. Seven or eight inches lower, though? A. Yes, sir. Q. So you were familiar with that fact? A. Those inclines did not impress themselves particularly on me, when I walked across them. Q. But you knew they were there? A. I could not have told you at that time if it had not been for this accident, about these runways,—the incline,—how much incline there was. Q. You walked down from the platform on the incline, and up again? A. Yes, sir. Q. So that you did know they were there? A. Yes, sir; but I did not take any special notice. Q. Now, when you jumped, did you look at the place where you expected to alight, before jumping? A. Yes, sir; I looked at the platform. Supposed it was a level, straight platform. Q. Your eyesight at that time was good? A. Fairly good; yes, sir. Q. Good enough? A. It is an ordinarily good eyesight. Q. And at that time the station was fairly well lighted? A. Yes, sir; fairly well. Q. The sun had not set? A. I think not. It might be just about sunset. Q. Well, it was before seven o'clock. The sun was not entirely down, in any event? A. No, I don't think it was; but I am not positive. Q. But, at all events, it was light enough for you to see? A. Yes, sir. Q. Did you notice the incline at all, before you jumped? A. No, sir. Q. Did you see any grease at the place where you expected to alight? A. No, sir; I wasn't looking for grease. Q. No; but if there had been this mass of grease there, you would have seen it, wouldn't you? A. Why, if there had been a mass of grease, yes, sir, I think very likely I should have seen it. I was not looking for grease. Q. Were you not looking to see whether the place you expected to alight on was reasonably safe for that purpose? A. Why, yes; that is the reason I took the platform instead of the track. Q. When you walked from the restaurant down to retake your train, did you notice any grease about the station? A. No, sir. Q. Have you any recollection about how far from the train the spot was that you chose to jump on? In other words,—my mind is not clear,—about how far from the car did you intend to jump? A. Why, I intended to jump on the platform, about two feet from the edge, or thereabouts. I didn't select any particular spot. I saw the platform, and jumped on it. Q. You did not notice that at that point it was one of the inclines? A. No, sir. Q. You say about two feet. Do you mean two feet from the edge of the platform or two feet from the side of the car? A. Well, about two feet from the edge of the platform. Q. When your foot struck the platform, what happened? A. It slipped. Q. Do you know whether both feet struck together, or whether one struck first? A. I do not know that. Q. But as you struck the platform, your feet went from under you? A. Yes, sir; and I was run over in the twinkling of an eye. Q. You do

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not know yourself, really, what happened from the time you struck until the accident occurred? A. No, from the time I struck until the running over of my leg by the wheel. It was an awful shock. Q. Do you know whether or not you were down on the track at any time? A. I was down on the track, because I was lifted up. I know that. Lifted up, and placed higher up on the platform by somebody that came to my rescue, or came to relieve me. I recollect that distinctly. I recollect a sensation of an incline in my back. I recollect that distinctly. Q. Then you were down on the part where the rail is, and some people came and lifted you up on the platform? A. How far down I don't know, but they lifted me only a small distance. I recollect that sensation. Q. That was the only place that was lower than any other,—the part of the station that the tracks were on was the only part lower than the platforms, except the runways? A. Certainly, one part of the incline would be lower than a higher part of the same incline. Where I was exactly, I could not tell. Whether I was part on the incline and part on the track I cannot tell. How much I was on the incline I could not tell, for at that time I was shocked. Q. Have you any recollection of being down inside the rail? A. No, sir. Q. You don't know whether, when they lifted you up, they lifted you up from where the rail is, or from a lower part of the incline to a higher part? A. I do not know. Q. Do you recollect whether you rolled over or not, Mr. Newcomb? A. I do not recollect of any rolling over. That was the injury, here (pointing to his foot). If I had rolled over, it is to be presumed I would have had other serious injuries. It would look so to me. Q. As I understand you, when the men came and lifted you up, you were conscious of being on an incline, where your head was higher than your feet? A. Yes, sir." In consequence of the injuries the plaintiff's left leg had to be amputated.

The petition does not state the case as it is here stated, but simply states that while the plaintiff was endeavoring to find and get upon the train, by direction of one of the defendant's employees he "*stepped from a car on said West Shore Line* [the italicized words were added during the trial] upon one of the platforms in said station on his way to take the car on which he was to ride over defendant's main line to New York, and his foot slipped upon the grease or other slippery material upon said platform, thereby contributing to produce his said misfortune." The petition charges four acts of negligence on the part of the defendant, as follows: First. That defendant did not use ordinary care to arrange, manage, and construct its station at Buffalo so as to afford reasonable facilities for the use of passengers, and failed to take reasonable precautions in the construction and maintenance of the station to avoid injury to passengers. Second. That defendant did not use ordinary care to keep the platforms and approaches

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to its cars in a reasonably safe condition for use by passengers wishing to step upon or off its train. Third. That defendant did not use reasonable care to keep the platform free of grease and other slippery material, in consequence of which, when, by direction of one of defendant's employees, plaintiff stepped upon one of the platforms in the station on his way to take his car, his foot slipped upon such greasy or other slippery material. Fourth. The defendant did not exercise reasonable care to make proper, suitable, and reasonable arrangements for directing a passenger in the position of plaintiff where to go to take his train. The answer is a general denial, an admission that the plaintiff was being transported from St. Louis to New York, and a plea of contributory negligence. There was no evidence to support the first or second charges of negligence as to the construction and arrangement of the station, or the condition of the platforms and approaches in the station, and the trial court withdrew those from the jury by an instruction, and no serious complaint is made of this ruling by the plaintiff. The trial court also withdrew the fourth charge of negligence, relating to there being no suitable arrangements in the station for directing passengers which train to take, and the plaintiff assigns this as error. The trial court limited the case to the third ground alleged, to wit, the grease on the platform. It is conceded that there was a conflict in the evidence as to whether there was or was not grease upon the platform, and therefore the plaintiff was entitled to go to the jury. The court gave all the instructions asked by the plaintiff. Those instructions predicate a right to recover solely upon the ground that the defendant was negligent in permitting grease to be upon the platform, which caused the plaintiff to fall when he got off the moving West Shore train; tell the jury that it was not necessarily negligence for the plaintiff to get off of a moving train; tell the jury that they are the judges of the credibility of the witnesses; define the meaning of ordinary care and negligence and contributory negligence, and fix the measure of damages. For the defendant the court gave six instructions, and then gave one instruction (No. 13) of its own motion. Of these it is only necessary to set out in full the third, which is as follows: "(3) The jury are instructed that the duty of exercising care was not limited to one of the parties to this suit, but that such duty devolved upon both. Each party, plaintiff and defendant, was under obligation to exercise such care and vigilance in the particulars mentioned in these instructions as an ordinarily prudent person would exercise under like circumstances. Therefore, before plaintiff can recover in this case, it must appear to your satisfaction from the evidence that his injury was caused solely by the negligence of defendant, without any fault, neglect, or want of ordinary care and prudence on his part. If there was mutual negligence, plaintiff is not entitled to recover. There-

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fore, even if you believe that the defendant was guilty of negligence, yet if you further believe from the evidence that plaintiff was also guilty of negligence in jumping from a train while it was in motion, and that such negligence directly contributed to his injury, your verdict must be for the defendant." The jury returned a verdict for the defendant, and after proper steps the plaintiff appealed.

Thomas T. Fauntleroy, for appellant.

Everett W. Pattison, for respondent.

MARSHALL, J. (after stating the facts). The third instruction given for the defendant is assigned as error, in this: that it instructed the jury: "Therefore, before plaintiff can recover in this case, it must appear to your satisfaction from the evidence that his injury was caused solely by the negligence of the defendant, without any fault, neglect, or want of ordinary care and prudence on his part." The vice claimed to be present in this instruction is that it limits the defendant's liability to the sole negligence of the defendant, and that it precludes the plaintiff from recovering if he was guilty of "any fault, neglect, or want of ordinary care and prudence," it being contended that the defendant is liable even if its negligence was not the sole cause of the accident, while the plaintiff could recover if his fault, neglect, or want of ordinary care was only slight and remote. A defendant may be liable even if the accident was not caused by his sole negligence. He is liable if his negligence concurred with that of another, or with the act of God, or with an inanimate cause, and became a part of the direct and proximate cause, although not the sole cause. 1 Thomp. Neg. § 75, thus states the rule: "If the concurrent or successive negligence of two persons, combined together, result in an injury to a third person, he may recover damages of either or both, and neither can interpose the defense that the prior or concurrent negligence of the other contributed to the injury. Thus A. leaves his horse and cart standing in the street, without any person to watch them, and a passer-by strikes the horse, in consequence of which damage ensues. A. is answerable for such damage. An omnibus overturns, precipitating a passenger into the lock of a canal. A third person, for whose acts the proprietor of the omnibus is not responsible, lets the water into the canal, in consequence of which the passenger is drowned. The proprietor of the omnibus must pay damages for the death of the passenger. This is also illustrated by that numerous class of cases where travelers are injured by reason of defects in highways. As elsewhere seen, the traveler may maintain an action either against a municipal corporation or against the private wrongdoer who caused the defect; and the municipal corporation, if compelled to pay damages, may maintain an action against the private wrongdoer for reimbursement. Consequently, a defendant, whose negligence was a procuring

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cause of an injury, cannot excuse his negligence by setting up the concurring negligence of a third person. For example, where A. negligently placed on a sidewalk an iron post, used as a barber's pole, and B. negligently backed his wagon against it, whereby it was knocked over, striking C., and injuring him, it was held that the negligence of A. did not prevent C. from recovering damages of B. So if, through the negligence of a railway company, the employee of another company receives an injury, the fact that the negligence of other employees of the latter company, who were fellow servants with the injured employee, also contributed to the injury, does not relieve the former company from liability." In respect to the concurrent negligence of a carrier and a third person, the same author, in volume 3, § 2779, says: "But it does not at all follow from the foregoing that the carrier will be exonerated in every case where the negligence of a third person concurs with his negligence in producing the hurt to the passenger. It is elsewhere shown that, where an injury proceeds from the concurring negligence of two different persons, under such circumstances that the negligence of either is to be deemed an efficient cause of the injury, the person injured has an action for damages against either or against both. This rule is of application in the relation of carrier and passenger. Thus, where the evidence tended to show that the conductor of a street railway car had ordered a boy to stand on the front platform, and that, while the boy was so standing, another passenger jostled him from the car, whereby he received a fatal hurt, and there was no evidence that he would have received the hurt but for the intervening wrong of the passenger, the company was nevertheless held liable; the court saying: 'It is no justification for the defendant that another party, a stranger, was also in the wrong. It is necessarily a part of this doctrine that a railroad company cannot defend against an action by its own passenger for a negligent injury received by him while on the vehicle of the defendant by setting up that another railroad company was guilty of greater negligence, if the defendant company might have averted the injury to the plaintiff by the exercise of that measure of care which the policy of the law puts upon it. Nor need it be said that, where a passenger on a railway train is injured by a collision between such train and the train of another company, at a point where the two lines cross each other at a grade, and brings an action against his own carrier, the defendant cannot defend against its own liability on the ground that the other company was also negligent. If the defendant company was negligent, that is enough, and it must pay damages.' In the application of the doctrine of the foregoing text it has been well held that in the case of a collision between a street car and a locomotive on a steam railway at the intersection of the two railways, whereby a passenger on the horse car is injured, if he brings his action

against both companies, charging concurrent negligence, the burden will be upon the horse car company to show proper care; because the fact of the injury to its passenger creates a presumption of negligence on its part, and the burden will be upon the plaintiff to show negligence upon the part of the steam railway company, because that company was a stranger to him." Bish. Noncont. Law, § 39, says: "When the injury proceeds from two causes operating together, the party putting in motion one of them is liable the same as though it was the sole cause. This is one form of a universal principle in the law that he who contributes to a wrong, either civil or criminal, is answerable as doer. And it is immaterial to this proposition whether that to which he contributes is the volition of a responsible person, or of an irresponsible one, or whether it is a mere inanimate force, or a force in nature, or a disease." Again, the same author, in treating of negligence combining with other causes, in sections 450, 451, and 452 lays down the rule as follows: "Sec. 450. Governing this subtitle has already been stated, namely, that where two or more causes operate together—not where, after one has begun, an independent one comes in to produce its own different result—the party putting any one in motion is responsible for the entire consequence the same as though it were the sole cause. And it is not necessary that the beginning of their operation should be simultaneous." "Sec. 451. It is no defense by one sued for negligence that, though his negligence contributed to the injury, another's contributed also. For example, in a case of collision between stage coaches, if the driver of the defendant's coach was wanting in skill and prudence, no recklessness of the other driver will exempt him from liability to another. So, in a suit against a railroad for setting fire to the plaintiff's elevator by sparks carelessly thrown from the locomotive, if it appears that they fell, not upon the elevator, but upon a third person's building, which was consumed, it will not avail the defendant that the fire was communicated thence through the carelessness of the third person. The reason of this has already been stated, and it has been shown that a contrary doctrine, incautiously held in Massachusetts and one or two other states, is utterly without support either in general adjudication or in just legal principles." "Sec. 452. The same rule applies also when some irresponsible force or inanimate thing co-operates with the defendant's negligence to produce the harm. Thus, where a city had carelessly left in excavation in the street, and a person attempting to avoid the threatened kick of a mule fell into it, and was injured, the city was held to be liable." The illustration last given of the defect in the street and the kicking mule is founded upon the case of *Bassett v. City of St. Joseph*, 53 Mo. 290, 14 Am. Rep. 446. Other illustrations of such combinations of causes are shown in the cases of *Brennan v. City of St. Louis*, 92 Mo. 482, 2 S. W. 481, where a ditch in a

street combined with the accidental fall of a third person against a child who was pushing a baby buggy, thereby causing them to fall into a ditch, and *Vogelgesang v. City of St. Louis*, 139 Mo. 131, 40 S. W. 653, where a slight depression at the end of a bridge in a street combined with the steam emitted from an engine under the bridge to cause a gentle team to run away, throw the plaintiff out of the wagon and injure him. *Bish. Noncont. Law*, § 518, gives the reason underlying the rule as follows: "Sec. 518. Since the habitations and life of man are in the midst of constantly active forces in nature, and his necessities compel him to be perpetually active also, it is not possible in jurisprudence, nor would it be just, to limit one's responsibility for harm inflicted on another through his acts to the particular injuries whereof those acts are the sole cause. Indeed, a sole cause is a thing seldom found in our complicated world. Nor would it be practicable, nor yet it is demanded by any principle of justice, to take into the account all the combining causes of an injury, and charge the author of each cause with simply his proportion of the damage. Therefore the rule of the law is that a person contributing to a tort, whether his fellow contributors are men, natural, or other forces or things, is responsible for the whole, the same as though he had done all without help. The limit to this rule in civil jurisprudence is simply what is required by another rule, namely, that the injured person is only entitled to one compensation."

In *Brash v. City of St. Louis*, 161 Mo., loc. cit. 437, 61 S. W. 809, the negligence of the city combined with the act of God. The verdict against the city was sustained. *Brace, J.*, said: "The general doctrine on the question in issue on the instruction is thus stated in 1 *Shear. & R. Neg.* (5th Ed.) § 39: 'It is universally agreed that, if the damage is caused by the concurring force of the defendant's negligence and some other force for which he is not responsible, including "the act of God," or superhuman force intervening, the defendant is nevertheless responsible, if his negligence is one of the proximate causes of the damage, within the definition already given. It is also agreed that, if the negligence of the defendant concurs with the other cause of the injury in point of time and place, or otherwise so directly contributes to the plaintiff's damages that it is reasonably certain that the other cause alone would not have sufficed to produce it, the defendant is liable, notwithstanding he may not have anticipated the interference of the superior force, which, concurring with his own negligence, produced the damage. But if the superior force would have produced the same damage whether the defendant had been negligent or not, his negligence is not deemed the cause of the injury.' And this is the prevailing doctrine in this state. *Wolf v. Express Co.*, 43 Mo. 421, 97 Am. Dec. 406; *Read v. Railroad Co.*, 60 Mo. 199; *Pruitt v. Railroad Co.*, 62 Mo. 527; *Davis v. Railway Co.*, 89 Mo. 340,

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1 S. W. 327; *Haney v. City of Kansas*, 94 Mo. 334, 7 S. W. 417; *Association v. Talbot*, 141 Mo. 674, 42 S. W. 679, 64 Am. St. Rep. 538. There is nothing in the rulings in *Flori v. City of St. Louis*, 69 Mo. 341, 33 Am. Rep. 504, or *Turner v. Haar*, 114 Mo. 335, 21 S. W. 737, inconsistent with this doctrine." *Shear. & R. Neg.* (5th Ed.) § 122, says: "Persons who co-operate in an act directly causing injury are jointly and severally liable for its consequences if they acted in concert, or united in causing a single injury, even though acting independently of each other." In *Nagel v. Railway Co.*, 75 Mo., loc. cit. 661, 42 Am. Rep. 418, a railroad company was held liable for concurrent negligence in that it left a turntable unfastened, and children playing with it caused it to revolve and injure the plaintiff. In *Payne v. Railroad Co.*, 129 Mo., loc. cit. 419, 31 S. W. 885, 6 Am. & Eng. R. Cas., N. S., 291, the converse of the proposition was presented. There the court instructed the jury, at the request of the plaintiff, that "it is not sufficient that the jury may believe from the evidence that the plaintiff was simply guilty of negligence, but that the negligence of the plaintiff, and not that of the defendant, must be the proximate or immediate cause of the injury to excuse the defendant from liability." Speaking of this instruction, this court, per Macfarlane, J., said: "The jury may as well have been told that, to defeat a recovery on the plea of contributory negligence, it was necessary to find that the negligence of plaintiff was the sole proximate cause of the injury. The instruction ignored entirely concurring or contributory negligence of both parties, which is one essential element of contributory negligence. There are no degrees which distinguish the negligence made necessary by law to defeat a recovery, and negligence which is proximate or a cause of the injury is sufficient. It does not matter that the concurring and co-operating negligence of defendant was negligence per se,—such as the violation of an ordinance, as in this case, or statute law. The instruction is also misleading wherein it informs the jury that, in order for the defendant to establish its plea of contributory negligence 'it is not sufficient that the jury may believe from the evidence that plaintiff was simply guilty of negligence,' and, as qualified or explained by what follows, does not correctly state the law. The negligence to defeat a recovery must be a proximate cause for the injury, but need not be the sole proximate cause." The reason for this rule, as applied to the contributory negligence of the plaintiff, is thus stated in 1 *Shear. & R. Neg.* (5th Ed.) § 96: "It is not essential to this defense that the plaintiff's fault should have been in any degree the cause of the event by which he was injured. It is enough to defeat him if the injury might have been avoided by the exercise of ordinary care. The question to be determined in every case is not whether the plaintiff's negligence cause, but whether it contributed to, the injury of which he complains." Because the

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doctrine of concurrent negligence prevails in this state a defendant is liable notwithstanding his negligence was not the sole cause of the accident, and because the doctrine of comparative negligence does not obtain in this state (*Hurt v. Railway Co.*, 94 Mo., loc. cit. 264, 7 S. W. 1, 4 Am. St. Rep. 374; *Hogan v. Railway Co.*, 150 Mo., loc. cit. 55, 51 S. W. 473), the contributory negligence of a plaintiff will defeat a recovery if it directly contributes to the accident (*Oates v. Railway Co.* [not yet officially reported] 68 S. W. 906), even though it is not the cause or sole cause of the accident, and even though such contributory negligence was only slight or remote.

The plaintiff contends that the defendant owned and operated the West Shore train as well as the New York Central train, and hence defendant is liable for the negligence of the agents and persons operating the West Shore train. On the other hand, the defendant contends that there is no substantial evidence in this record that the defendant so owned or operated the West Shore train, and hence it is not responsible for the negligence of the agents and persons operating the West Shore train. The plaintiff further contends that it was negligence for the porter of the sleeping car on the West Shore train to tell the plaintiff that that was the New York train, and to invite him to get on it, and that such negligence was the primary cause of the accident, and the grease on the platform was the secondary cause of the accident, and that combined they produced the direct and proximate cause, and that neither would have, probably, caused the accident if the other had not existed. The defendant, however, contends that it is in no wise liable for any negligence of the porter of the sleeping car, or of any agent or persons operating the West Shore train, because it is not shown that the defendant had anything to do with that road or train. If the plaintiff's contention that the defendant owned and operated the West Shore train was supported by the evidence, then the plaintiff could not be heard to assign error as to the third instruction; for, though it is not the law that a defendant is only liable where his negligence is the sole cause of the accident, still that error in that instruction would not entitle the plaintiff to a reversal of this judgment, for the reason that there would be no evidence of any concurrent negligence in the case, and therefore the error in the instruction could not have prejudiced the plaintiff. But such contention is not supported by the evidence in this record. There is no substantial evidence that the defendant owned or operated the West Shore train. Therefore the negligence of the operatives of that train in telling the plaintiff that it was the New York train, and in inviting the plaintiff to get on that train, may have constituted negligence of such operatives, which concurred with the negligence of the defendant in permitting grease to accumulate on the platform, and the two combined may have caused the

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injury. In such case the defendant's negligence might not have been the sole cause of the accident, but because it was a concurrent cause the defendant would be liable. In other words because there was enough basis in this case for the application of the doctrine of concurrent negligence, it was error to give the third instruction. For these reasons the third instruction given for the defendant was erroneous in so far only as it told the jury that the defendant was not liable unless its negligence solely caused the accident. For this error the judgment of the circuit court must be reversed, and the cause remanded for further trial in conformity hereto.

This conclusion makes it unnecessary to consider the other errors assigned, as they may not reoccur upon another trial, except to say that there was no error in excluding evidence as to whether there was grease on the platform in March, 1897 (this accident occurred in August, 1897), and whether there was grease there two weeks after the accident. The first was too remote to afford a reasonable basis for an inference of the condition on the day of the accident, and the second was too far after the accident to be admissible at all. The same is true as to whether there were signs or placards upon the cars in March, 1897. Moreover, as the plaintiff in his instructions predicated a right to recover solely upon the ground that there was grease on the platform that caused the plaintiff to fall, the question of signs or placards on the cars is not material now.

The judgment of the circuit court is reversed, and the cause remanded for a new trial. All concur.

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(Supreme Court of Oregon, June 30, 1902.)

[69 Pac. Rep. 440.]

Passengers—Essentials of Relationship.*

The payment of fare or possession of a ticket or pass is not essential to the creation of the relation of passenger and carrier, so far as relates to the carrier's liability for injuries to passengers.

Same—Riding on Freight Train.*

Where a railroad company allows passengers to ride on regular freight trains, but not on "extras," and a person in good faith boards a train in fact an "extra," but in all appearances similar to a regular freight, and is allowed by the conductor to ride thereon, he is to be regarded as a passenger to whom the company is liable as a carrier for injuries received while on such train.

Same—Employees Riding Free When Off Duty.*

A railroad employee traveling free according to his contract of service, but on his own private business, and when his time is his own, is, so far as relates to the company's liability for injuries due to the negligence of its employees, a passenger.

Appeal from circuit court, Umatilla county; W. R. Ellis, Judge.

*See foot-note to *Purple v. Union Pac. R. Co. (C. C. A.)*, 3 R. R. R. 711, 26 Am. & Eng. R. Cas., N. S., 711.

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Action by G. D. Simmons against the Oregon Railroad Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

This is an action to recover damages for personal injuries suffered by the plaintiff through the negligence of the operators of a train upon which he was riding. For some 18 months prior to the accident he had been employed by the defendant company as a fireman on one of its helper engines at Kamela, a station on the summit of the Blue Mountains. He was paid by the "run," receiving no compensation when not at work. Under his contract of employment the company reserved from each check issued to him for wages 40 cents as a hospital fee, in consideration of which it agreed, in case of illness or injury, to provide him with medical services and medicine free, and, as the testimony tended to show, to transport him to and from points on the road where the company provided medical attendance for its employees. On the 17th of May, 1900, being indisposed, he obtained a "lay-off," in order to go to La Grande, a station some 20 miles east of Kamela, to consult the company's physician and obtain medical service. He rode to La Grande on one of the company's trains, without a ticket or pass, and without paying fare, or having his right to travel in this manner questioned. After consulting the physician and transacting some other business in La Grande, he went to the depot, and got aboard the caboose car of what he then supposed was a regular freight train, but which, as a matter of fact, was an extra, although there was nothing in its outward appearance to indicate any difference between it and a regular freight. It was made up as were regular freight trains, and had attached to it a caboose car, fitted up for carrying passengers, like those used by the company on regular freight trains. The conductor was in the car when the plaintiff went aboard, inquired of him where he was going, and the plaintiff told him he was going home. Plaintiff paid no fare, none was demanded of him, nor had he any written evidence of his right to ride, yet the conductor allowed him to do so. When the train reached Kamela, in the course of the work required at that station it became necessary to detach the caboose and rear helper engine from the remainder of the train, and leave them standing on the track until the rest of the train was pulled west beyond the west switch, the purpose being to pick up a non-air car from the west spur, and attach it to the train. In order to do this, it was intended that the rear helper engine should take the caboose, go in on the spur track, pick up the car, and bring it out on the main track, and attach it to the train. When, however, the engine with the caboose reached the west switch, instead of stopping, as it should have done, it was permitted, through the negligence and carelessness of the train employees, to move west on the main track until a collision occurred between the

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caboose and the main train, thereby severely and permanently injuring the plaintiff, who was then in the caboose. The rules of the company in force at the time provided that every person riding on its trains must present a ticket or pass or pay a fare for each trip, and that conductors must not carry passengers or employees without tickets or passes. Rule 243 provided that: "Freight trains will not carry passengers, except as designated in the special rules. Trains so designated will carry employees with passes, and passengers when provided with proper transportation as required by the rules. Employees with passes may be carried on all freight trains between stations at which trains stop." The special rule governing the carrying of passengers on freight trains was as follows: "Passengers presenting permit form 208, accompanied by proper transportation, may be carried by regular freight trains between points [at] which they stop, subject to rules 218 and 243." Form 208, referred to, contained a written contract, wherein the person accepting the same agreed that the railroad company, in the operation of its freight trains should not be deemed a common carrier of passengers, and should not be liable to the holder as such common carrier. The plaintiff, however, had no knowledge of these rules or requirements, or of the conditions under which the defendant carried passengers on its freight trains. His work was in another department, and he was not called upon, nor was it necessary for him, to familiarize himself with the rules governing the company's transportation business. About the 1st of January, 1900, the defendant issued and delivered to the division engine foreman at La Grande an employee's pass, No. E17, for "one fireman," good between Kamela and La Grande, which the foreman was authorized to deliver to any fireman that the company might wish to transport between the stations named. In addition to this, such foreman had blank trip passes, which he was authorized to issue to employees going over the road. Employees of the company, however, when known to the conductors, were commonly permitted to travel without a pass or other written evidence of their right to transportation. Plaintiff knew of the existence of pass No. E17, and had used it on one or two occasions, but generally rode without it, and had been told by the person having it in charge that it was not necessary for him to procure it, as he was an "old man," and therefore known to the conductors on the road. The trial resulted in a verdict and judgment in favor of the plaintiff, and the defendant appeals.

W. W. Cotton, for appellant.

T. G. Hailey and A. S. Burnett, for respondent.

BEAN, C. J. (after stating the facts). There are numerous assignments of error referred to and discussed in the briefs, but they are all grounded, substantially, upon the contention that the relation of passenger and carrier did not exist be-

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tween the plaintiff and defendant at the time of the injury, and that the defendant was, therefore, not liable to him for an injury received through the negligence of the train operatives. The question thus presented naturally divides itself into two special subjects of inquiry: First, whether the conductor of the train upon which the plaintiff was riding had apparent authority to accept him as a passenger, and to create the relationship of passenger and carrier between him and the defendant; and, second, if so, whether he is to be regarded as a passenger or an employee at the time of the injury.

A passenger is sometimes defined to be a person whom a railway company, in the performance of its duty as a common carrier, has contracted to carry from one place to another, for a valuable consideration, and whom the company, in the performance of the contract, has received at its station, or in its car, or under its care. *Patt. Ry. Acc. Law*, § 210. But the payment of fare or of a consideration for the carriage is not necessary to create that relationship, so far as it is involved in an action for a personal injury received while on the train. Where a person goes aboard a railway train in good faith for the purpose of being carried from one place to another, and is permitted by the conductor to ride, the company is liable, in the absence of a special contract, for an injury arising from the carrier's negligence, if the conductor was expressly or impliedly authorized to bind the company by such permission, even though such person was traveling gratuitously, and the conductor had violated his instructions by allowing him to remain on the train. 2 *Shear. & R. Neg.* (4th Ed.) § 491; *Beach, Cont. Neg.* (3d Ed.) § 165; 2 *Wood, R. R. (Minor's Ed.)* 1207; *Washburn v. Railroad Co.*, 75 *Am. Dec.* 784; *Wilton v. Railroad Co.*, 107 *Mass.* 108, 9 *Am. Rep.* 11; *Edgerton v. Railroad Co.*, 39 *N. Y.* 227; *Brennan v. Railroad Co.*, 45 *Conn.* 284, 29 *Am. Rep.* 679; *Railroad Co. v. Scott's Adm'r (Ky.)* 56 *S. W.* 674, 17 *Am. & Eng. R. Cas.*, *N. S.*, 261, 50 *L. R. A.* 381; *Waterbury v. Railroad Co. (C. C.)* 17 *Fed.* 674, note. The fact, therefore, that the plaintiff was being carried gratuitously is immaterial, if the company accepted him as a passenger, and expressly or impliedly agreed to transport him as such.

Nor do we regard as material the question of his inherent right to ride, or whether he should have had a pass or other written evidence of his right to transportation. He was lawfully on the train for the purpose of being carried home, with the consent and by the permission of the conductor. If the conductor had authority to bind the company by allowing him to ride on the train, the relation of passenger and carrier was thus created between him and the company, regardless of the question whether he could have been lawfully ejected from the train or denied the right to ride thereon, unless he is to be regarded as an employee, instead of a passenger. This

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brings us to the inquiry whether the conductor of the train upon which plaintiff was riding had authority, real or apparent, to create the relation of passenger and carrier between the company and one riding upon his train. A railway company may separate its passenger and freight business, providing certain trains in which people may be carried as passengers, and other trains devoted exclusively to the transportation of freight. In case of such a complete separation between its freight and passenger business, the conductor of a freight train has no implied authority to receive passengers thereon, or to bind the company by his act in so doing. And, again, where one gets on a train made up exclusively of cars appropriate alone to the carrying of freight, he is, under many of the authorities, bound to take notice that such train is not intended for passengers, and, if he rides thereon, even with the consent and approval of the conductor, he is not entitled to the rights of a passenger, nor is the company bound to exercise toward him the same degree of care that would be required of it toward a passenger lawfully traveling on one of its trains. 4 Elliott, R. R. § 1582; Patt. Ry. Acc. Law, § 215; *Eaton v. Railroad Co.*, 57 N. Y. 382, 15 Am. Rep. 513; *Powers v. Railroad Co.*, 153 Mass. 188, 26 N. E. 446; *Railway Co. v. Black*, 87 Tex. 160, 27 S. W. 118; *Railroad Co. v. Headland*, 18 Colo. 477, 33 Pac. 185, 20 L. R. A. 822; *Railway Co. v. Lynch*, 8 Tex. Civ. App. 513, 28 S. W. 252; *Railway Co. v. White* (Tex. Civ. App.) 34 S. W. 1042; *Railway Co. v. Lynch* (Tex. Civ. App.) 40 S. W. 633. Where, however, freight and passenger business is not entirely separated, but a railway company carries passengers on some of its freight trains under certain terms and conditions, one who, without knowledge of the company's regulations to the contrary, gets in a car attached to a freight train, designed and prepared for carrying passengers, and is allowed by the conductor to ride therein, is to be regarded as passenger, and entitled to recover for an injury received through the company's negligence, even though the conductor may have been prohibited by the rules of the company from carrying passengers on that particular train. *Schouler*, Bailm. 598; *Thomp. Carr.* 344; *Dunn v. Railway Co.*, 58 Me. 187, 4 Am. Rep. 267; *Lucas v. Railway Co.*, 33 Wis. 41, 14 Am. Rep. 735; *Everett v. Railway Co.*, 9 Utah, 340, 34 Pac. 289; *Whitehead v. Railway Co.*, 99 Mo. 263, 11 S. W. 751, 39 Am. & Eng. R. Cas. 410, 6 L. R. A. 409; *Railroad Co. v. Wheeler*, 35 Kan. 185, 10 Pac. 461; *Spence v. Railway Co.* (Iowa) 90 N. W. 346. Thus, in *Dunn v. Railway Co.*, supra, a person entered a saloon car attached to a freight train, and was permitted by the conductor to ride. By a rule of the company, passengers were not allowed to travel on freight trains over a specified portion of its line, and no passengers were to be carried in cars attached to freight trains, "without written authority from the superintendent." It was held that he was

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lawfully on the train, and that the company was liable for an injury he received through its negligence. The opinion was delivered by Mr. Chief Justice Appleton, and is a strong and learned exposition of the law upon this subject. In discussing the authority of the conductor and the effect of the rules of the company, he says: "The plaintiff went aboard the freight train, in the saloon car, and was there with the knowledge of the conductor. It was the duty of the conductor to inform him of this regulation, if it was to be enforced, and request him to leave. If no notice was given of this rule, and no request to leave, but instead thereof the usual fare was received, he had a right to suppose himself rightfully on board, and entitled to all the rights of a passenger. * * * If not being rightfully on board, and being advised thereof, the plaintiff neglected or refused to leave, the conductor had a right to remove him, using no more force than was necessary to accomplish that object. The regulations of the defendant corporation are binding on its servants. Passengers are not presumed to know them. Their knowledge must be affirmatively proved. If the servants of the corporation, who are bound to know its regulations, neglect or violate them, the principal should bear the loss or injury arising from such neglect or violation, rather than strangers. The corporation selects and appoints its servants, and it should be responsible for their conduct while in its employ. It alone has the right and the power of removal." And, again: "The plaintiff was not entitled by law to be carried on the freight train contrary to the regulations of defendant company. They might have refused to carry him, and have used force to remove him from the train. Not doing this, nor even requesting him to leave, but suffering him to remain, and receiving from him the ordinary fare, they must be held justly responsible for negligence or want of care in his transportation." In *Lucas v. Railway Co.*, *supra*, the company did not carry passengers on its through freight trains, but its way freight trains were allowed to carry them. The plaintiff went aboard a through freight train in good faith, and with the knowledge and consent of the conductor, supposing it to be one of those that carried passengers. It was held that, as there was nothing in the situation or condition of the train to indicate that passengers were not carried upon it as well as upon other freight trains, he was entitled to the rights of a passenger in respect to an injury received by him while on board the train. In discussing the question as to whether the plaintiff was bound by the rules of the company and the instructions to the conductor not to take passengers on his train, Mr. Justice Lyon, speaking for the court, says: "Before the defendant used any portion of its freight trains as passenger trains also, and while the functions of the two were kept entirely separate and distinct, the one being used for the carriage of passengers and the other exclusively for the transportation of merchandise, a

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person riding upon a freight train without express authority from some person competent to give it would probably have been unlawfully on the train, and could not have successfully claimed and enforced the rights of a passenger against the defendant. But since the defendant has authorized the carriage of passengers upon some of its freight trains, it seems very clear to my mind that a different rule must be applied. I think that since the system of carrying passengers on freight trains was adopted by the defendant, a person who goes upon a freight train in good faith, supposing it to be also a train for carrying passengers, is entitled to all the rights and remedies of a passenger as against the company, at least until he is informed that he has mistaken the character of the train." And, again: "The conductor of the train in question was the general agent of the defendant for the purposes of operating that train. As between himself and his employer, he had no authority to receive passengers upon it. Such want of authority, however, was not known to the plaintiff, or those in charge of him. They knew that conductors of other freight trains were authorized to receive and did receive passengers on their trains, and believed, as they well might, that the conductor with whom they were about to take passage had the same authority. Whatever the rule might be were no freight trains of the defendant permitted to carry passengers, it must be held, under the circumstances of this case, that if such conductor directed the plaintiff to go on board the train, and the plaintiff did so, he thereby became a passenger of the defendant, notwithstanding the conductor exceeded his authority. In other words, such direction, if given, was within the scope of the conductor's employment, and binding upon the defendant, although unauthorized." In *Everett v. Railway Co.*, supra, a section hand was injured while riding on an extra freight train by authority of the conductor. Under the rules of the company passengers could be carried on regular, but not on extra, freight trains. It was held that, as he went aboard the train in good faith, believing he had a right to ride, and was allowed to do so by the conductor, the company was liable to him as a passenger, although the train was one that under the rules of the company was not allowed to carry passengers. In speaking of his rights and of the duties of the conductor, the court say: "He was there [in the caboose car] with the knowledge of the conductor who had charge of the train. If this was an extra train, on which passengers were not allowed to ride, it was the conductor's duty to inform him, and request him to leave, in accordance with the regulations of the defendant; and, if plaintiff had disregarded such request, the conductor could have lawfully removed him, using no more force than was necessary for that purpose. If the conductor failed to do this, it must be presumed that the plaintiff was rightfully there. A railroad company has a right to designate which of its freight trains

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shall carry passengers and which shall not. It has a right to make regulations, and, when so made, they are binding on its servants. Those riding on its trains are not presumed to know them. If its servants neglect or violate them, and because of such neglect or violation injury results to strangers, the company will be liable." In *Whitehead v. Railway Co.*, supra, a lad 14 years of age was invited by a brakeman and permitted by the conductor of a special through freight train to ride free thereon, and while so riding was injured. Under the rules of the company, passengers were permitted to be carried on local freight trains, but not on special through trains. It was held, however, that the company was liable for the injury received by the boy through the negligence of the operators of the train. In the course of the opinion it is said: "The evidence shows that defendant carried passengers for hire on its local freight trains, but not on through freight trains. The train in question was a special through train. The rules of defendant forbade the carriage of passengers on this and like through trains. There is nothing in the outward appearance of the cars or caboose to indicate any difference between through and local freight trains, though the latter are designated on time cards displayed at stations." And, again: "Now, in this case the conductor had entire charge of the train. In its management he acted for and represented the defendant. It was a part of his duties to see that persons did not ride upon it, either with or without the payment of fare. How, therefore, can it be said his act in allowing the boy to ride upon the train was beyond or outside the scope of his employment? It was an act directly within the line of his duty. He made breach of his duty towards his master, but that is a matter of no consequence here. To all outward appearances, as well as in point of fact, he was master of the train. The defendant, therefore, cannot escape liability in this case on the ground that the conductor had no authority to permit the boy to ride on the train." In *Railroad Co. v. Wheeler*, supra, a boy was injured while riding without the payment of fare in the caboose of a construction train, by the invitation of the conductor, but against the rules of the company. It was held that the company was liable, although under its rules the conductor was instructed not to permit passengers to ride upon his train. The court say: "It is contended that Frank Wheeler was an intruder upon the train, for whose injury no liability could arise against the company, for two reasons: First, that the conductor had instructions not to carry passengers on the construction train; and, second, that from the nature of the business which was being done with the train, and also its equipment, it was apparent that the company did not permit passengers to be carried thereon. Neither of these circumstances will defeat a recovery in this case. It is true the conductor had been instructed not to allow persons to ride upon his train as pas-

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sengers, but Frank Wheeler had no knowledge of such instructions. He had asked and obtained permission to ride upon the train. It was within the range of the employment of the conductor to grant such permission. He had entire charge of the train, and was the general agent of the company in the operation of the train. As he was the representative of the company, his act, and the permission given by him, may properly be regarded as the act of the company. If Wheeler had furtively entered upon the train, or had ridden after being informed that the rules of the company forbade it, or had obtained permission only from the engineer, brakeman, or some other subordinate employee, the argument made by counsel might apply."

Under the doctrine of these cases it was within the apparent authority of the conductor of the train upon which the plaintiff was riding at the time of his injury to allow persons to ride thereon, and thereby to create the relation of passenger and carrier between such persons and the company. The rules of the company permitted the carrying of passengers upon some freight trains, and under certain conditions. It is true that under these rules the defendant may not have been a common carrier of passengers on any of its freight trains, in the sense that one had a lawful right to ride there without complying with the conditions imposed. Nor were such conditions and limitations illegal or void. But, nevertheless, the company did assume to carry such passengers as complied with its rules on certain of its freight trains. It was the duty of the conductors of its trains to enforce these rules. For that purpose they stood in the place and as the representative of the company, and by their acts the company is bound. The rules regulating the carrying of passengers on freight trains were unknown to the plaintiff. He had no knowledge of their existence, and did not know, when he entered the train, that he was violating them. He entered the car in good faith, supposing it be one in which passengers were allowed to ride, and was permitted by the conductor to remain therein. He therefore, under the law, became a passenger, and entitled to the rights of such, even if he paid no fare, unless the fact that he was an employee of the company would change that relationship.

This brings us to the other inquiry. There are many authorities holding, and it may, for the purposes of this case be conceded, that an employee of a railway company, traveling free, as a part of his contract of service, to and from his work, or in immediate connection with his employment, is not a passenger, but an employee, and a fellow-servant with those in charge of the train. *Vick v. Railroad Co.*, 95 N. Y. 267, 17 Am. & Eng. R. Cas. 609, 47 Am. Rep. 36; *Gillshannon v. Railroad Corp.*, 10 Cush. 228; *Seaver v. Boston & M. R. R.*, 14 Gray, 466; *Gilman v. Railroad Corp.*, 10 Allen, 233, 87 Am. Dec. 635; *Ryan v. Railroad Co.*, 23 Pa.

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384; *McNulty v. Railroad Co.*, 182 Pa. 479, 38 Atl. 524, 8 Am. & Eng. R. Cas., N. S., 685, 38 L. R. A. 376, 61 Am. St. Rep. 721; *Ionnone v. Railroad Co.*, 21 R. I. 452, 44 Atl. 592, 16 Am. & Eng. R. Cas., N. S., 359, 46 L. R. A. 730; *Higgins v. Railroad Co.*, 36 Mo. 418. But, where an employee is traveling on his own private business, when his time is his own, even though he travels on a pass or ticket received on account of his employment, or is permitted to travel without a pass or ticket by reason of his employment, he is a passenger, and not a servant. *Doyle v. Railroad Co.*, 162 Mass. 66, 37 N. E. 770, 25 L. R. A. 157, 44 Am. St. Rep. 335; *Dickinson v. Railway Co.*, 177 Mass. 365, 59 N. E. 60; *State v. Western Maryland R. Co.*, 63 Md. 433, 21 Am. & Eng. R. Cas. 503; *Railroad Co. v. Muhling*, 30 Ill. 9, 81 Am. Dec. 336; *Rapid-Transit Co. v. Dwyer*, 20 Colo. 132, 36 Pac. 1106; *Williams v. Railroad Co.*, 18 Utah, 210, 54 Pac. 991, 12 Am. & Eng. R. Cas., N. S., 61, 72 Am. St. Rep. 777; *O'Donnell v. Railroad Co.*, 59 Pa. 239, 98 Am. Dec. 336; *McNulty v. Railroad Co.*, 182 Pa. 479, 38 Atl. 524, 8 Am. & Eng. R. Cas., N. S., 685, 38 L. R. A. 376, 61 Am. St. Rep. 721; *Whitney v. Railroad Co.*, 43 C. C. A. 19, 102 Fed. 850, 19 Am. & Eng. R. Cas., N. S., 184, 50 L. R. A. 615; *Rosenbaum v. Railroad Co.* (Minn.) 36 N. W. 447, 8 Am. St. Rep. 653; *Washburn v. Railroad Co.* (Tenn.) 75 Am. Dec. 784; *Railroad Co. v. Scott's Adm'r* (Ky.) 56 S. W. 674, 17 Am. & Eng. R. Cas., N. S., 261, 50 L. R. A. 381; *Rapid-Transit Co. v. Venable* (Tenn.) 58 S. W. 861, 51 L. R. A. 886. The distinction between the two classes of cases is aptly illustrated by the Massachusetts decisions referred to. In the *Gillshannon*, *Seaver*, and *Gilman* Cases cited by the defendant, the injured party at the time he received the injury was being transported in immediate connection with and as a part of his employment, while in the *Doyle* and *Dickinson* Cases, cited by the plaintiff, he was traveling on his own business, although with the permission of the company, or on transportation obtained from it, as an incident to and part compensation for his services. In the *Doyle* Case the plaintiff's intestate, who lived some distance out of Boston, was employed in the freight department of the defendant in that city, at a daily wage. Each month he was furnished by the company, as a part of his compensation, with a ticket, good for 62 rides between his home and Boston during the period for which it was issued. He was entitled to ride on this ticket whether he was going to or from his work or traveling solely for his own private interests or pleasure. One evening, while returning home from a business or pleasure trip to Boston, he was killed through the negligence of the defendant. The court held, distinguishing the case from some earlier decisions, that he was a passenger, and not an employee. In the *Dickinson* Case the plaintiff was an employee of a street railway company. By a rule of the company all employees in uniform were entitled to

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ride at any time free. After the plaintiff had finished his work for the morning of a certain day, he got aboard one of the cars of the defendant for the purpose of going to his dinner, and while riding on such car was injured. It was held that, although he was an employee, riding free under a rule of the company, he was nevertheless to be regarded as a passenger at the time of his injury, the same as those who had paid fare. Now, under this doctrine, it is apparent that the plaintiff cannot be regarded as a servant or employee of the company at the time of his injury. He had on the previous day received a lay-off, and was not engaged in the service or on the business of the company at the time of the accident. It is true he was returning home, expecting to go to work the next day; but, nevertheless, on the day in question his time was his own, and he owed the defendant no duty until he actually resumed his work. He was not traveling to or from his work, or in immediate connection with it. It was no part of his duty as a servant of the defendant to take the train on which he was riding for the purpose of resuming his employment, or in the performance of any duty he owed the company. Under his contract of employment, he was paid by the run, and received no compensation when not at work; so that at the time he was injured he was not in the service of the company, and was receiving no wages or compensation from it. We are of the opinion, therefore, upon the law and the facts, that the conductor of the train upon which the plaintiff was riding had apparent authority to receive him thereon as a passenger.

The judgment of the court below is affirmed.

ILLINOIS CENT. R. CO. v. LALOGUE.

(*Court of Appeals of Kentucky, Oct. 2, 1902.*)

[69 S. W. Rep. 795.]

Carriers—Duty to Protect Proposed Passenger at Station from Assault—Use of Waiting Room Unreasonable Time before Departure of Train.*

Ky. St. § 784, requiring all railroad companies to open their ticket offices and waiting rooms for passengers at least 30 minutes preceding the schedule time for the departure of all passenger trains, fixes what is a reasonable time for the carrier to be required to care for passengers before they have taken actual passage, and therefore, where plaintiff was assaulted in the waiting room of a station about three hours before the schedule time for the departure of the train upon which she proposed to take passage, the company was not liable, in the absence of any contract, express or implied, to accommodate her for a longer time than that fixed by statute.

Appeal from circuit court, Muhlenberg county.
"To be officially reported."

*As to the duty to protect passengers from strangers at depot, see *Exton v. Central R. Co. of New Jersey* (N. J.), 14 Am. & Eng. R. Cas., N. S., 240, and note, 249.

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Action by Elizabeth Laloge against the Illinois Central Railroad Company to recover damages for personal injuries. Judgment for plaintiff, and defendant appeals. Reversed.

Jonson & Wickliffe and Pirtle & Trabue, for appellant.
R. Y. Thomas, Jr., for appellee.

O'REAR, J. Appellee claims to have been assaulted and insulted by a number of drunken and disorderly persons—loafers—while she was waiting at appellant's station for a train on which she contemplated taking passage over appellant's line of road from Central City to Paducah. She says that she arrived at Central City the morning of the 16th of February, 1900, her husband arriving later in the day. They did not stop at any hotel or other place, it seems, but loitered about appellant's depot at Central City, and at other points in the town, during the day. About 8 o'clock in the evening they went to appellant's depot for the purpose, she says, of waiting for the train upon which she and her husband intended taking passage. That train was not due till about 1:05 of the clock the following morning. According to her testimony, she and her husband were in the public waiting room of appellant's depot after 8 o'clock, when Mr. Nunsz, appellant's station agent, passed through the room; that her husband asked him what time the Paducah train would come along, and whether they would have time to go out in the town. She says the agent answered that the Paducah train would not be due till "12:05 or 1:05 in the morning,"—she did not remember which he said. They went out in the town, and returned about 10 o'clock, or earlier; that no other notification was given to the company's agent, or any of them, of appellee's intention or purpose to become a passenger. She says she and her husband had money enough to pay their passage to Paducah, but it was taken from them or lost in the fight that occurred when they were assaulted at about 10:15 p. m., while still in the depot waiting room, waiting for the train. She claimed that the boys who assaulted her and her husband were making a great deal of noise, carousing and swearing. It was not shown that any agent of appellant knew of this disturbance before the assault, or that they could have known it by the exercise of ordinary diligence, except the opinion of appellee expressed, that the noise was loud enough for them to have heard it in the adjoining room, where a number of telegraph instruments were at work. The case was submitted to the jury, and a verdict was awarded appellee. Appellant asked for a peremptory instruction.

This appeal raises, first, the question, what was appellant's duty to appellee? It is argued for her that it was that duty owed by a common carrier to its passenger; that she was the passenger of appellant from the time she entered its depot with the intention to take passage on a train over a portion of its road. It may be stated that it is not necessary, always, that the person claiming the protection or privileges of a

passenger shall have purchased a ticket. Section 558, Hutch. Carr. But at least such person must have a bona fide intention of taking a train shortly, to leave the carrier's station at the point where the complainant may be, and have the means at hand with which to pay his passage, and announce to the carrier's agent having such matter in charge, or that such agent shall be notified of, such person's purpose. This must be true because the carrier must have some consideration to support its agreement or obligation to the proposed passenger; this consideration must be either the payment of the fare, which is of itself notice, or the communication of the fact of such purpose to the carrier, that it may know to whom it certainly owes the duties imposed by its contracts, and to whom it may lawfully look for such payment on demand. Section 565, Hutch. Carr. Even this statement must be subject to another qualification: The proposed passenger must present himself at the place appointed by the carrier for receiving such passengers, and within a reasonable time therefor.

By statute in this state it is made the duty of all common carriers to provide waiting rooms for their passengers. These rooms must of necessity be open to the public. Generally, the carrier cannot know who of those who attend them contemplate taking passage on its trains. Its waiting rooms are in consequence used more or less by persons not authorized. To this latter class the carrier owes no duty save such as it owes to licensees,—that is, to so conduct its business as to not wantonly or purposely or recklessly injure them. To the passenger, whether on its train or at its station, its duty is materially different. It must use every care to prevent their injury, and if it has notice of its passenger being in danger of violence, or indecent treatment, whether at the hands of a fellow passenger, or another on its premises, or within its control, it must use its best endeavors to protect the passenger. *Kinney v. Railroad Co.*, 34 S. W. 1066, 99 Ky. 59, 3 Am. & Eng. R. Cas., N. S., 652. In *Phillips v. Railway Co.*, 124 N. C. 123, 32 S. E. 388, 45 L. R. A. 163, the plaintiff was ejected from the carrier's waiting room although he had purchased his ticket for passage on one of its trains. The facts were: The train which plaintiff was to take was not due for some five hours after the act complained of. The carrier had a rule to close its waiting room till 30 minutes before the time of departure of each train. The plaintiff was ejected, and, it being a cold night, and he being thinly clad and having no place to go to, contracted a severe cold, and resultant illness. The court held that the rule of the railway company was not an unreasonable one. On the point pertinent to the case in hand, that court said: "A party coming to a railroad station with the intention of taking the defendant's next train becomes, in contemplation of law, a passenger on defendant's road, provided that his coming is within a reasonable time

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before the time for departure of said train. To constitute him such passenger, it is not necessary that he should have purchased his ticket, as seems to have been considered by his honor. 1 Fetter, Carr. Pass. § 223. But the purchase of the ticket would probably be considered the highest evidence of his intention. But still it is his coming to the station within a reasonable time before, with the intention to take the next train, that creates the relation of passenger and carrier."

But we have in this state what may be regarded as legislative construction of the length of time that should be considered reasonable for the carrier to be required to look out for, and safeguard, its passengers before they have taken actual passage. Section 784, Ky. St.: "All companies shall keep their ticket offices open for the sale of tickets at least thirty minutes immediately preceding the schedule time of departure of all passenger trains from every regular passenger depot from which such trains start or at which they regularly stop; and shall open the waiting room for passengers at the same time as the ticket office, and keep it open and comfortably warmed in cold weather until the train departs." The carrier is not an innkeeper. It cannot, in the discharge of its other duties required by the law, be held to furnish accommodation for the entertainment, for an indefinite length of time, of those who contemplate in the future becoming its passengers. It would have been just as reasonable to have held appellant liable for the safety and comfort of appellee at any time, while at its depot, from 9 o'clock in the morning of the 16th to 12:30 in the morning of the 17th, as for the time sued for. We do not mean to hold that, if the carrier agrees to accommodate the proposed passenger by a longer time than the statute provides, it would not be liable for any injuries sustained because of its negligence during such time. But in the absence of such agreement, express or implied, we hold that the proposed passenger cannot claim the benefit of that relation by coming onto the carrier's premises an unreasonable length of time before the train which he expects to take passage on is due to depart, and that such reasonable time has been fixed by the statute above quoted. It follows that the peremptory instruction asked for by appellant should have been given. In view of the conclusion to which we have arrived, the other errors complained of need not be noticed.

Reversed and remanded for proceedings consistent herewith.

SOUTHERN RY. CO. v. ALLISON.

(*Supreme Court of Georgia, June 7, 1902.*)

[42 S. E. Rep. 15.]

Carriers of Freight—Action for Failure to Deliver—Evidence.

In an action against a railway company for damages for its failure to transport and deliver goods turned over to it for that purpose, it was

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not erroneous to allow plaintiff to testify that he had never been paid for such goods.

Res Gestæ—Declarations of Agents.

The declarations of the agent as to the business transacted by him are not admissible against his principal unless they were a part of the negotiation, and constituting the *res gestæ*, or else the agent be dead.

Declarations in Own Favor—Waybills.

Waybills made out by a railway company, being declarations in its own favor, are not admissible in its behalf.

Instructions.

There was no error in refusing to give the last clause of the request to charge, referred to in the eleventh ground of the motion for a new trial.

Sufficiency of Evidence—New Trial.

The evidence failed to show that the cotton, for the loss of which the action was brought, was delivered to the defendant company, and for this reason a new trial should have been granted.

(Syllabus by the Court.)

Error from superior court, Franklin county; A. B. Russell, Judge.

Action by T. F. Allison against the Southern Railway Company. Judgment for plaintiff. Defendant brings error. Reversed.

A. G. & J. B. McCurry, for plaintiff in error.

J. K. Skelton, for defendant in error.

FISH, J. T. F. Allison sued the Southern Railway Company for damages alleged to have been sustained by him on account of the failure of the defendant to transport and deliver two bales of cotton delivered to it for that purpose by the plaintiff. Defendant denied receiving the cotton sued for. Upon the trial there was a verdict for the plaintiff. Defendant made a motion for a new trial, which was overruled, and it excepted.

1. One of the grounds of the motion was that the court erred in permitting the plaintiff, over the defendant's objection, to testify: "I have never been paid for the cotton." The objection made was that the testimony was irrelevant. This ground is without merit. It was relevant for plaintiff, if he delivered the cotton to defendant for shipment, and it had failed to transport and deliver the same to the consignee, to show that plaintiff had not been paid for it, either by defendant or the consignee.

2. Another ground of the motion was that the court erred in permitting the plaintiff, over the objection of the defendant, to testify as follows: "Some two or three weeks after the shipment, I had a conversation with O. L. Moore, the defendant's agent, and he told me he did not ship the two bales I was claiming to have delivered, numbers 490 and 492. Said that he shipped and delivered 43 bales, all the cotton the bill of lading covered." The objection made to the admissibility of this testimony was "that the declarations were not made dum fervit opus, but after the transaction to which they

related was over." It is difficult to see how the defendant was hurt by the admission of this testimony. If the agent meant by his statement that he had never received the two bales of cotton, then this testimony was in favor of the defendant. If, however, by stressing the word "ship," it was sought to show that the agent had received the cotton but had not shipped it, then the objection made to the declarations of the agent should have been sustained, under the rule that "the declarations of the agent as to the business transacted by him are not admissible against his principal unless they were a part of the negotiation, and constituting the *res gestæ* or else the agent be dead." Civ. Code, § 3034; *Hematite Min. Co. v. East Tennessee, V. & G. Ry. Co.*, 92 Ga. 268, 18 S. E. 24.

3. Another ruling of the court complained of in the motion was the refusal to permit defendant to put in evidence copies of certain waybills, which were admitted by the plaintiff to be true copies of the originals. These waybills related to the lot of cotton in controversy, and in which plaintiff claimed there were two bales short. There was no error in excluding them, as they simply amounted to declarations of the defendant in its own favor.

4. The defendant requested the court, in writing, to charge the jury as follows: "If you believe that the agent, Moore, under instructions from plaintiff or his agent, S. C. Knox, issued the bill of lading to J. H. Sloan, as consignee, order notify G. H. McFadden & Co., for 43 bales of cotton, and said 43 bales of cotton were delivered to the consignee, and there was no other notification to defendant, or request of the agent to ship any other cotton of the S. O. P. mark, then the plaintiff cannot recover, even though you believe that said Knox, at the time the bill of lading was issued, asked for, or put on a paper handed to the agent, Moore, a memorandum for a bill of lading for 45 bales of said S. O. P. cotton." The court charged all of this request except this part of it, viz: "Even though you believe that said Knox, at the time the bill of lading was issued, asked for, or put on a paper handed to the agent, Moore, a memorandum for a bill of lading for 45 bales of said S. O. P. cotton." Defendant complained that the court erred in not giving in charge the entire request. We do not think so. The plaintiff's contention was that he had delivered 45 bales of cotton, marked "S. O. P.," to the defendant at Lavonia, to be shipped to McFadden & Co. at West Point, Va., while the defendant contended that only 43 bales had been delivered to it. The question at issue was how many bales had been delivered by plaintiff to the defendant, and not how many plaintiff had requested defendant's agent to put in the bill of lading, and such a request, if made, was only relevant in so far as it might shed light upon the question as to the number of bales delivered. If 45 bales were delivered, and defendant gave a bill of lading for only 43, it would never-

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theless be liable for 45. Or if it gave a bill of lading for 45, and only received 43, it would be liable for only the number received. The request to charge as a whole was not appropriate, and was too favorable to the defendant, in that it was susceptible of the construction that if defendant, under plaintiff's instructions, issued a bill of lading for 43 bales of cotton, and these were delivered to the consignee, the defendant would not be liable although it had received for shipment 45 bales of cotton, all of which plaintiff intended should be included in the bill of lading and shipped.

5. After a careful study of the evidence, we conclude that it was not sufficient to authorize a verdict for the plaintiff, and that the court, for this reason, should have granted a new trial. The defendant admitted that 43 bales of the lot of cotton in question were delivered to it. There was no dispute as to them. The evidence failed to show the delivery to the defendant of more than 43 bales. The agent of the plaintiff testified that he weighed and marked 45 bales of this lot in the cotton yard of the plaintiff, about 100 yards from the defendant's depot in Lavonia, and had it carried on a dray to defendant's depot platform; that he did not accompany the dray to the depot, but ordered the cotton placed on the dray, and saw the dray go and return each time; that he did not know how many loads were carried, nor how many bales at each load, nor did he examine the cotton after it was placed on the depot platform. The drayman was not sworn as a witness, and there was no other evidence introduced tending to show that more than 43 bales had been delivered to the defendant.

Judgment reversed. All the justices concurring, except LEWIS, J., absent on account of sickness.

SOUTHERN RY. CO. v. ADAMS *et al.*

(*Supreme Court of Georgia, June 10, 1902.*)

[42 S. E. Rep. 35.]

Carriers—Live Stock Shipment—Notice of Injury.*

When, in a written contract between a consignor and a transportation company, it was stipulated that, as a condition precedent to the right of the owner and shipper to recover damages for loss or injury to live stock shipped under such contract, "he will give notice in writing of his claim therefor to the agent of the railroad companies actually delivering said stock to him * * * before said stock is removed from the place of destination, * * * and before said stock is intermingled with other stock," the owner or consignor is not entitled to recover unless it be shown that such notice was given according to the terms of the contract. (a) Such an agreement is a reasonable one.

(Syllabus by the Court.)

*See *Missouri, K. & T. Ry. Co. v. Kirkham* (Kan.), 21 Am. & Eng. R. Cas., N. S., 845, and foot-note; *St. Louis & S. F. R. Co. v. Hurst* (Ark.), 17 Am. & Eng. R. Cas., N. S., 324; *Richardson v. Chicago & A. R. Co.* (Mo.), 13 Am. & Eng. R. Cas., N. S., 170; *Houston & Texas Cent. R. Co. v. Davis* (Tex.), 2 Am. & Eng. R. Cas., N. S., 512.

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Error from superior court, Franklin county; R. B. Russell, Judge.

Action by William A. Adams and others against the Southern Railway Company. Judgment for plaintiffs, and defendant brings error. Reversed.

A. G. & J. B. McCurry, for plaintiff in error.

W. R. Little, for defendants in error.

LITTLE, J. Adams instituted an action against the Southern Railway Company to recover damages in the sum of \$80, which he alleged he had sustained in the shipment of a car load of cattle from Lavonia, Ga., to Norfolk, Va. He claims that he was injured by the negligence of the company in causing unreasonable delay in the transportation of said cattle, on account of which they had deteriorated in value. Attached to his petition was a written contract, into which the parties entered at the time the shipment was made. This contract is in the usual form of contracts for the transportation of live stock by railroad companies. It was signed both by the company and by Adams, the plaintiff, and recited that the cattle which were received at Lavonia were to be shipped to the freight station at Norfolk, Va., ready to be delivered to the consignee or his order. It also contained a stipulation hereafter set out and discussed. The defendant denied liability, and at the trial the plaintiff testified in part to the following effect: He went on the train with the cattle. They were watered and fed at Spencer, N. C. At Greensboro they were side-tracked, and remained five hours. They were further delayed an hour or more at Pinner's Point, opposite Norfolk. They were in bad condition when they arrived at Norfolk. They were off in flesh, and the witness considered that they were damaged \$3 per head. They were not weighed on delivery, but were put in the lot of the consignee with other cattle and sold. He thought they brought less per pound on account of their bad condition, and in this way they were damaged \$3 per head. No exceptions to the cattle were made by the witness or consignee when they were delivered and sold. No notice was given of any claim or damage at the point of destination or elsewhere, or before they were intermingled with other cattle. The damage was occasioned by reason of side-tracking the cattle at Greensboro and Pinner's Point and at Norfolk by reason of the fact that the cattle had had no food or water, and, being empty, looked bad, which caused a loss in sales. Other evidence, to which reference need not be made, was introduced. The jury returned a verdict for the plaintiff for \$50. The defendant made a motion for a new trial on the grounds that the verdict was contrary to the evidence, and without evidence to support it, against the weight of the evidence, and contrary to law. By an amendment other grounds assigning error on the failure of the judge to instruct the jury in certain particulars were added.

In certifying to the amended grounds, the trial judge in a note states that no special reference was made to any particular piece of the testimony of either the plaintiff or defendant in his charge, nor was any request for the same made, but the general contentions of both parties were fully submitted to the jury with instructions as to the law applicable thereto. He overruled the motion for a new trial, and in his order so doing he states that the jury were instructed generally that the question of negligence was for them to determine, both as to its existence or nonexistence, and were fully charged upon that subject; and it was not the duty of the judge, in the absence of a request to elaborate or magnify any particular feature of the testimony, more especially as in this case, where the sections of the contract referred to in the fourth and fifth grounds of the amended motion, in the opinion of the judge, were unreasonable, and contrary to sound public policy; that the evidence in the case was conflicting, and it was the right of the jury to say whom they would prefer to believe. The contract of shipment contained this stipulation: "It is further agreed that, as a condition precedent to the right of the owner to recover any damages for any loss or injury to said live stock, he will give notice in writing of his claim therefor to the agent of the railroad companies actually delivering said stock to him * * * before said stock is removed from the place of destination * * * and before said stock is intermingled with other stock." By the terms of this contract no recovery can be had in the absence of the notice contracted for, and yet, confessedly, the cattle were received at the place of destination by the consignee or the owner, who accompanied them, and no notice of a claim for damages was given to the agent of the company at the place of destination; and, more than that, having been received, they were at once, according to the testimony of the owner, intermingled with other stock, and sold. It is suggested by the trial judge in his order overruling the motion for a new trial that these stipulations were, in his opinion, unreasonable, and contrary to sound public policy. Mr. Hutchinson, in his work on Carriers, states as the law this rule: "As the carrier may limit the amount beyond which he is not to be held liable unless a greater value be declared at the time of the delivery for carriage, so it has been held that he may limit the time within which claim shall be made upon him by the owner of the goods in case of their loss, provided the limitation is reasonable,"—for which he cites *Express Co. v. Glenn*, 16 Lea, 472, 1 S. W. 102; *Glenn v. Express Co.*, 86 Tenn. 594, 8 S. W. 152; *Sprague v. Railway Co.*, 34 Kan. 347, 8 Pac. 465; *Express Co. v. Hunnicutt*, 54 Miss. 566, 28 Am. Rep. 385. In the case of *Sprague v. Railway Co.*, so cited, it was expressly ruled that: "In an agreement between a railway company and a shipper for the transportation of horses over the railway, there was a stipulation which pro-

vided that, as a condition precedent to his right to recover damages for any loss or injury to the horses while in transit, the shipper would give notice of his claim therefor to some officer of the said railway company, or its nearest station agent, before the horses were removed from the place of destination, or from the place of delivery to the shipper, and before such horses were mingled with other stock. Held, that the agreement was reasonable, and, when fairly made, is binding upon the parties thereto." In the case of *Express Co. v. Caldwell*, 21 Wall. 264, 22 L. Ed. 556, Mr. Justice Strong, in discussing this subject, in his opinion delivered in that case, said: "The stipulation is not a conventional limitation of the right of the carrier's employer to sue. He is left at liberty to sue at any time within the period fixed by the statute of limitations. He is only required to make his claim within ninety days, in season to enable the carrier to ascertain what the facts are, and, having made his claim, he may delay his suit. It may also be remarked that the contract is not a stipulation for exemption from responsibility for the defendant's negligence, or for that of their servants. It is freely conceded that, had it been such, it would have been against the policy of the law, and inoperative. * * * A common carrier is always responsible for his negligence, no matter what his stipulations may be. But an agreement that, in case of failure by the carrier to deliver the goods, a claim shall be made by the bailor, or by the consignee, within a specified period, if that period be a reasonable one, is altogether of a different character. It contravenes no public policy. It excuses no negligence. It is perfectly consistent with holding the carrier to the fullest measure of good faith, of diligence, and of capacity which the strictest rules of the common law ever required." In the case of *Banking Co. v. Hasselkus*, 91 Ga. 382, 17 S. E. 838, 44 Am. St. Rep. 37, it was further ruled that a stipulation in a bill of lading, which exempts the carrier from liability unless notice is given within a specified time, is one of the matters forbidden by section 2276 of the Code, and is not effectual without proof of assent thereto by the shipper. In the present case the stipulations referred to were not only assented to by the shipper, but were contained in an express written contract, and we know of no legal reason why the shipper is not bound thereby. It can, we think, readily be seen that a stipulation making it a condition precedent in a case where live stock is shipped that the owner or consignee shall, when such live stock reaches the place of its destination, give notice to the agent of the company of a claim for damages before the stock is carried from such a place, and before the animals are intermingled with others, is reasonable; for, if such stock has become depreciated by delay in transportation, or want of proper attention on the part of the transportation company, such fact can be more readily ascertained at that time than afterwards, and it affords

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to the carrier an opportunity of protecting itself from an unauthorized claim. So, likewise, the stipulation that this notice shall be given before the stock is intermingled with others serves the purpose of identifying the stock which were actually shipped. It would seem, then, that such a stipulation prejudices no right of the owner or consignor, and at the same time protects the transportation company; and, following the authorities above cited, we must rule that not only could the carrier lawfully make a contract containing a stipulation of this character, but that the stipulation is a reasonable one. We therefore rule that the court erred in overruling the motion for a new trial on the ground that the verdict was not supported by the evidence.

Judgment reversed. All the justices concurring, except LEWIS, J., absent on account of sickness.

GEORGIA RAILROAD & BANKING CO. v. GARDNER *et al.*

(*Supreme Court of Georgia, July 19, 1902.*)

[42 S. E. Rep. 250.]

Trespass—Punitive Damages.

One who enters upon and injures another's land is not, though a trespasser, liable for punitive damages, when the acts causing the injury were done in good faith, under the honest belief that the land belonged to the former, and there was nothing in the manner of doing such acts to indicate an intention to wantonly disregard the rights of the true owner. See *Mining Co. v. Irby*, 40 Ga. 479; *Carli v. Depot Co.*, 32 Minn. 101, 20 N. W. 89.

Same—Same—Aggravating Circumstances.

It was in the present case erroneous to give in charge to the jury section 3906 of the Civil Code, which authorizes the giving of such damages in cases of tort where there are aggravating circumstances.

(Syllabus by the Court.)

Error from superior court, Richmond county; E. L. Brinson, Judge.

Action by M. G. S. Gardner & others against the Georgia Railroad & Banking Company. Judgment for plaintiffs, and defendant brings error. Reversed.

Jos. B. & Bryan Cumming, for plaintiff in error.

Wm. H. Fleming, for defendants in error.

PER CURIAM. Judgment reversed.

LEWIS, J., absent on account of sickness.

WITHAM v. BANGOR & A. R. Co.

(*Supreme Judicial Court of Maine, March 26, 1902.*)

[52 Atl. Rep. 764.]

Frightening Horses—Materials for Repairs near Right of Way.

While driving along the highway near the railroad track of the defendant, the plaintiff was thrown from her wagon and injured by her horse

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becoming frightened at three pieces of culvert pipe some 17 feet outside of the highway, and upon the defendant's right of way, and which had been deposited there four days before for the purpose of repairing and improving its roadbed by substituting a culvert for a bridge at that point. The appearance of the pipe was such as was calculated to frighten horses of ordinary gentleness.

The defendant in repairing and improving its roads, was in the exercise of a right conferred by its charter, and a duty which the law imposes upon it for the safety of the public who travel over its road.

In doing this, it must act reasonably and with a due regard for the rights and safety of persons who have occasion to use the highway. It cannot act negligently, improperly, or unreasonably. But to create a liability on its part for the resulting injury, there must be something in the time or manner or circumstances under which the act is done which charges it with a want of proper regard for the rights of others.

Same—Same.

The defendant corporation was created by the public for public purposes. The public safety and convenience demand that its roadbed be kept in repair. If it exercises due care in making repairs and improvements upon its own premises, no action will lie for such inconveniences or even injurious consequences as are necessarily incident to its management and operation.

Same—Same—Degree of Care.

The appearance of the pipe being such as was calculated to frighten horses of ordinary gentleness, the defendant would not be justified in letting it remain so near the highway for an unreasonable length of time.

Same—Same—Reasonable Length of Time.

Held, that in view of the nature of the repairs for which the pipe was intended, the constant and regular use of the defendant's road for public travel and commerce, and the extent of its line which must be kept in repair at all times and in all places, four days was not an unreasonable length of time, under the circumstances of this case.

(Official.)

Report from supreme judicial court, Piscataquis county.

Action by Vesta A. Witham against the Bangor & Aroostook Railroad Company. Case reported, and judgment for defendant.

Action of tort to recover damages sustained by the plaintiff by being thrown from her carriage while traveling on the highway in Guilford adjoining the defendant's railroad. The cause of the accident, as the plaintiff alleged, was due to her horse taking fright at some culvert pipe placed in close proximity to the highway. There were three pieces of pipe, black in color, 3 feet and 8½ inches in diameter at one end, 4 feet and 3 inches at the other end, and 12 feet and 6½ inches long. They weighed 6,147 pounds, each.

By agreement of the parties, the case was reported to the law court to determine whether the action was maintainable.

Argued before WISWELL, C. J., and EMERY, WHITEHOUSE, STROUT, SAVAGE, and POWERS, JJ.

H. Hudson, for plaintiff.

F. H. Appleton and H. R. Chapin, for defendant.

POWERS, J. From the report we find the following facts: As the plaintiff was driving along the highway in Guilford

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alleged to have been received by the plaintiff while he was a passenger upon one of the defendant's street cars, and alleged to have been occasioned by the defendant's negligence. The original complaint stated a good cause of action. The defendant evidently so considered, since it did not, as it otherwise should have done, demur to it as a whole. Notwithstanding this fact, as the result of three successive successful attacks by demurrer (the first two being to portions thereof only, and the last to the residue, and all being for insufficiency or irrelevancy only) the plaintiff has been driven out of court, and had judgment awarded against him. This simple statement is all that is needed to show that there has been error at some stage of this somewhat unusual history. If all the parts of this complaint were irrelevant and insufficient, the whole complaint certainly was also. It is as true in pleading as in mathematics that nothing added to nothing makes nothing, and that the whole cannot be greater than the sum of all its parts. We might, perhaps, well stop with this simple demonstration of error, but it may be useful in the future history of the case if we locate the error, or certain of the errors, which led to this result.

The defendant first demurred to paragraphs 10 and 11, and a portion of paragraph 24, upon the grounds that the matter therein alleged did not constitute negligence and was irrelevant. The court struck out the two paragraphs, as containing irrelevant matter, and sustained the demurrer to the part of paragraph 24, as not containing a proper statement of facts constituting negligence. This action of the court, while not, perhaps, in any material way prejudicial to the plaintiff, was erroneous in both its parts. The allegations of the expunged paragraphs were not so clearly irrelevant that they should have been stricken out. *Freeman's Appeal*, 71 Conn. 708, 43 Atl. 185. They formed such a part of the history of the affair which occasioned the plaintiff's claimed injury that the plaintiff was fairly entitled to incorporate them in his complaint if he chose to do so.

The complaint, after reciting the acts of the defendant complained of, contained, as paragraph 24, the following:

"Said injury to the plaintiff was caused by the default and negligence of the defendant corporation in forcing plaintiff to leave a car in which he had a seat, and forcing him, in order to reach his destination, to find passage in a car already filled, in starting said car before plaintiff had found a place thereon, and in allowing said car to strike forcibly upon a switch, so as to cause the plaintiff to be thrown from said last-mentioned car."

The demurrer ran to the first portion of this paragraph, down to and including the word "filled."

If we understand correctly the theory of the defendant in demurring, and of the court in sustaining the demurrer, it was that the allegations were demurrable because, as a matter of

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law, negligence could not be predicated upon the particular things therein alleged as constituting the defendant's negligence. The difficulty with this contention is that the plaintiff did not predicate its negligence upon those allegations alone. He predicated it upon those allegations taken in connection with other things,—with other things directly connected therewith. Underlying the action of the defendant in filing his first two demurrers in this case, and of the court in sustaining them, is distinctly to be recognized a mistaken notion as to the right to demur to a paragraph or a portion of a paragraph of a pleading for insufficiency. Ordinarily it is only in those rare cases where a pleading consists of one paragraph, or one essential paragraph, that it can be said of a single paragraph that it is an insufficient statement of a cause of action, ground of defense or reply, etc. Paragraphs are rarely intended to be sufficient in that sense. They are only convenient subdivisions of that larger and more comprehensive statement which the rules of good pleading require to embody the essential allegations of fact which lead to a legal conclusion sufficient for the purpose of the pleader. In this sense, which is the strictly correct sense, an entire pleading may be insufficient; a part less than the essential whole, rarely. The term "insufficiency," used in a looser sense as synonymous with "immateriality" or "irrelevancy," is, however, occasionally met with in our practice, as applied to a part of a pleading. In this sense a portion of a pleading is not insufficient if, taken in connection with the facts with which it is pleaded, it tends to the making of a sufficient statement taken in its entirety. If the entire statement is insufficient for its purpose, it should be demurred to as a whole. If it is sufficient, every part of it which is relevant and material to the story of the whole is sufficient. It would conduce greatly to clearer conceptions upon this subject if there was a strict adherence to a correct use of terms, and "relevancy" and "materiality" were employed whenever the inquiry is as to the performance by a selected portion of a pleading of a valuable office in the place which it occupies, and its right therefore to that place, and "sufficiency" be employed whenever the inquiry is as to the legal sufficiency for its purpose of the pleading demurred to. If the defendant's first demurrer had employed this terminology, the real issue presented by it would not have been as much obscured as it appears to have been.

The first demurrer having been successful in its attack, the plaintiff amended his complaint by inserting the words "improperly and negligently" to characterize the several acts complained of, and in one or two other minor particulars. The complaint was still a good one. The defendant evidently continued to so regard it, since it did not venture to demur to it in its entirety. Instead, it demurred to the five paragraphs which alleged the negligent acts complained of,

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and for the same reasons contained in the first demurrer, to wit, that the matters therein alleged were irrelevant, and did not constitute negligence. This demurrer reached the vital part of the complaint. The paragraphs in question recited certain acts as done by the defendant, whereby the plaintiff was injured, and alleged that these acts were improperly and negligently done. Upon the strength of these acts so done, the complaint charged negligence. The action of the court in sustaining this demurrer was clearly erroneous. The facts recited were neither irrelevant nor immaterial. In connection with the other allegations with which they were joined, they tended to make a statement of a good cause of action. They in fact contained the very essence of a good complaint. Their purpose was to show the defendant's negligence. Clearly, the court could not in this case say, as a matter of law, that negligence could not arise out of the acts alleged, when those acts were distinctly alleged to have been improperly and negligently done.

The defendant dissects the complaint into paragraphs, and selects the five in question for separate analysis and demurrer. As each act therein alleged is characterized by the words "improperly and negligently," it seems to be assumed that each purports to contain a statement of actionable negligence, which must be complete and adequate in itself. It is also assumed and asserted that the use of these qualifying adverbs imports into the pleading so many statements of conclusions of law,—statements which are ineffectual unless accompanied by allegations of fact showing wherein the negligence consisted and disclosing negligence in fact. It is in this way that the defendant seeks to justify the demurrer. Unfortunately for the result, these assumptions and contentions embody erroneous conceptions. In the first place, the plaintiff has not, as we have already observed, attempted to predicate actionable negligence upon any single, isolated act, although that act was improperly and negligently done. He predicates the actionable negligence upon which he relies upon a course of improper and negligent conduct, in the progress of which there were several acts all improperly and negligently done, and all closely connected together, and all together leading up to and culminating in the accident to the plaintiff. An allegation of negligence is not ordinarily an allegation of a conclusion of law. It cannot be, since the question of negligence is commonly one of mixed law and fact. It does not concern our present inquiry to decide to what extent or under what circumstances it may be necessary to support an allegation of negligence with a statement of the facts from which it is claimed to arise, in order to make a complaint safe under demurrer. We are dealing with more superficial and elemental questions. Negligence may consist not only in the doing of unlawful acts, but also in the negligent doing of acts otherwise lawful. It results from the

simplest logic that when the cause of action arises from the latter cause the pleader should be allowed to state the fact of negligent performance upon which he relies. In so doing he states simply a fact,—a substantive, issuable fact. The pleader does not rely upon the act. The legal wrong does not arise from that, but from the color and character which the qualifying language gives to it. Such is the accepted rule. General allegations of negligence are allowable as qualifying an act otherwise not wrongful. Bliss, Code Pl. § 211.

The final stage in the progress of the case grew out of a demurrer to the residue of the complaint. The anomalous situation thus presented, of one demurrer following another of the same character, without an intervening amendment to the complaint, is one which suggests sundry reflections. Among them is the question whether the latter should be regarded, as the plaintiff regarded and expressed it, as a demurrer to the balance of the complaint not already successfully demurred to, or whether its filing should have been held to be a waiver of the former demurrer. We do not deem it necessary to decide this question, as the situation, we fancy, is not likely, in view of what we have said, to arise again. No more is it necessary to pursue the case further. Enough has been disclosed to make it clear that the action of the court below must be undone, and enough said to guide the progress of the pleadings afloat at the next attempt.

There is error. The judgment of the superior court is set aside, and the cause remanded to be proceeded with according to law. The other judges concurred.

WESTERN & A. R. CO. v. COX.

(*Supreme Court of Georgia, June 10, 1902.*)

[42 S. E. Rep. 74.]

Personal Injuries—Damages—Carlisle Life Tables.*

It is not a good objection to the admission in evidence of the Carlisle mortality table, and the table showing the value of annuities according to the Carlisle mortality table, that the accuracy and correctness of such tables have not been shown. These, being standard tables, are admissible in evidence, not as conclusive proof of the expectancy of life of a certain person, and the present value of an annuity, but as data which may be considered by the jury in determining such questions when made.

Remarks of Counsel—New Trial.

On account of the improper and prejudicial remarks made in his concluding address to the jury by counsel for the plaintiff in the court below, a mistrial should have been granted; and, inasmuch as the motion of counsel for the defendant to grant a mistrial was overruled, it was error not to set aside the verdict for the plaintiff and grant a new trial.

(Syllabus by the Court.)

*See foot-note appended to *Missouri, K. & T. Ry. Co. of Texas v. Scarborough* (Tex.), 3 R. R. R. 608, 26 Am. & Eng. R. Cas., N. S., 608.

Western & A. R. Co. v. Cox

Error from superior court, Cobb county; Geo. F. Gober, Judge.

Action by R. H. Cox against the Western & Atlantic Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed.

Clay & Blair and Payne & Tye, for plaintiff in error.

J. Z. Foster and Morris & Green, for defendant in error.

LITTLE, J. Cox instituted an action against the Western & Atlantic Railroad Company to recover damages for personal injuries, which he alleged he sustained on account of the negligence of the servants and employees of the company in the running and operation of one of its trains. All the material allegations of the petition were denied by the defendant. It appears from the evidence that the plaintiff, a man 80 years old, attempted to drive across a track of the defendant in a buggy, when a freight train ran into the buggy, inflicting the injuries upon the person and property of the plaintiff for which he sued. The jury returned a verdict for the plaintiff for \$750. The defendant made a motion for a new trial, which was overruled, and it excepted. Inasmuch as the judgment of the court below is reversed on one of the grounds of the motion for a new trial hereafter considered, no attempt is here made to set out the evidence in detail, or to pass upon those grounds of the motion which complain that the verdict is contrary to the evidence.

1. It is insisted on the part of the plaintiff in error that the court erred in admitting in evidence, over the defendant's objection, certain tables, known as the "Carlisle Mortality Table" and the "Annuity Table," published in the appendix to the seventieth volume of the Georgia Reports. The defendant urged that these tables were not admissible in evidence, because their accuracy had not been proved, and there was no evidence as to whether they were correct. In their briefs, counsel for the plaintiff in error insist that as there was no evidence before the court that these tables are what they purport to be, or that they are correctly figured in the volume of the Georgia Reports referred to, that they were inadmissible as evidence, and, when challenged, were not evidence to prove any fact in any court. To support this contention they cite the case of Railroad Co. v. Hyer, 113 Ga. 776, 39 S. E. 447, which, in our judgment, does not aid them in sustaining their position. In the case cited there appeared in the brief of evidence simply the statement that "plaintiff here introduced in evidence the mortality and annuity tables in the seventieth Georgia Report," and nothing further appeared in the brief of evidence in relation to the tables. It was ruled in that case that a mere statement in the brief of evidence that the plaintiff introduced in evidence the mortality and annuity tables in the seventieth volume of the Georgia Reports does not authorize this court to take judicial cogni-

zance of the contents of the tables published by the official reporter as an appendix to that volume. The point made in that case was that as the brief of evidence showed that certain tables were introduced, which appear as an appendix in one volume of the Reports of cases decided by this court, judicial cognizance should be taken of what was there shown; but it was held that the mere recital of the fact that certain mortality and annuity tables were introduced in evidence did not authorize this court to take judicial notice of what the tables contained. In the opinion, Lumpkin, P. J., said, "we have no authority to look outside of the record of any given case for the purpose of discovering something which that record should, but does not, itself disclose." This we understand to be a very different proposition from the question whether the correctness of such tables must be proved, as a condition precedent to their admission in evidence. The record in the Hyer Case did not contain the tables. The question here is whether the Carlisle mortality table and the annuity table are of themselves admissible in evidence. That they are, without any proof of their correctness, is not an open question. In the case of *Railroad Co. v. Johnson*, 66 Ga. 259, 1 Am. & Eng. R. Cas., N. S., 267, this court ruled that "it is not improper to introduce in evidence standard life tables to show the expectancy of life of a person of the age of the injured party, as a basis upon which to estimate the amount of damages he should recover"; and in the case of *Railroad Co. v. Crosby*, 74 Ga. 738, 58 Am. Rep. 463, it was held: "The Carlisle tables of mortality are admissible in evidence. They are not conclusive, but may be considered by the jury as data on which they may act." It will be remembered that the objection to the introduction of the tables in this case was not urged because they were not the Carlisle tables of mortality, but because the correctness of the tables had not been proved. The case last cited is direct authority for the proposition that the Carlisle tables are admissible in evidence; that is to say, that, when it appears that the table of mortality offered in evidence is the Carlisle table, it is admissible, and it is admissible because it is a standard table. Such admission does not conclude the fact of expectancy as shown by the table, but, being a recognized standard table, what it contains may, not must, be taken and considered by the jury. Again, in the case of *Railroad Co. v. Garner*, 91 Ga. 27, 16 S. E. 110, this court ruled that, where the evidence bearing on the question whether the injury of the plaintiff was permanent was conflicting, it was not error to admit in his behalf the mortality and annuity tables in 70 Ga. to aid the jury in arriving at the proper amount of damages in case they should determine that the plaintiff was entitled to recover, and that the injuries were permanent. So it must be ruled in this case that the trial judge did not err in the admission of the tables referred to.

2. Another reason alleged why the trial judge erred in overruling the motion for a new trial is that while counsel for the plaintiff was concluding his address to the jury he used the following language: "The only way to reach a railroad is to make it pay money. A railroad has no soul, no conscience, no sympathy, and no God." When this language was used, counsel for the defendant asked that the jury be retired, and moved the court to declare a mistrial on the ground that this language was inflammatory and improper. The motion was overruled, and it is here contended that it should have been sustained. It must be conceded that the language used was improper, irrelevant, inflammatory, and prejudicial to the rights of the defendant to have its case tried under the same rules and regulations that would govern the trial of a similar action against a natural person. It has always been held in this and other states, and in all countries where justice is sought to be done to parties litigant, that counsel, in their addresses to the jury, shall be confined to legitimate argument. An attorney is not only an officer of the court, but his office is that of a helper of the court to administer justice impartially. In the case of *Thompson v. State*, 43 Tex. 268, Mr. Justice Moore, delivering the opinion, said: "Zeal in behalf of their clients, or desire for success, should never induce counsel in civil cases—much less, those representing the state in criminal cases—to permit themselves to endeavor to obtain a verdict by arguments based upon any other than the facts in the case, and the conclusions legitimately deducible from the law applicable to them." Mr. Thompson, in his treatise on the Law of Trials, in section 966 of volume 1 gives a number of instances where, under the application of the rule just quoted, judgments of the trial court have been reversed. Among these numerous instances is stated the rule laid down by the supreme court of Alabama in the case of *Cross v. State*, 68 Ala. 476, where it is said: "There must be an objection in the court below, the objection overruled, and an exception reserved; the statement must be as of fact; the fact stated must be unsupported by any evidence, must be pertinent to the issue, or its natural tendency must be to influence the finding of the jury,—or the case is not brought within the influence of this rule. * * * We would not embarrass free discussion, or regard the many hasty or exaggerated statements counsel often make in the heat of debate, which cannot, and are not expected to, become factors in the formation of their verdict. * * * It is only when the statement is of a substantive outside fact, stated as a fact, and which manifestly bears on a material inquiry before the jury, that the court can interfere and arrest discussion." In the case of *Pierson v. State*, 18 Tex. App. 524, Wilson, J., said: "In view of the frequency of exceptions of this character, we will take occasion here to say that, before we will reverse a conviction because of remarks of prosecuting counsel, it must

appear to us (1) that the remarks were improper; and (2) that they were of a material character, and such as, under the circumstances, were calculated to injuriously affect the defendant's rights." It was ruled in the case of *School Town v. Shaw*, 100 Ind. 268, that an appeal to local prejudice in these words: "Stand by your own citizen. * * * The school directors, people, and citizens of Fulton county are trying to disgrace and oppress a citizen of Marshall county,"—affords ground for a new trial. In the case of *Willis v. McNeill*, 57 Tex. 465, it was ruled to be an abuse of the right of argument, and a ground for awarding a new trial, for counsel for the plaintiff in an action for maliciously suing out an attachment to discuss in his closing argument the wealth of the defendant, and to insist that, the wealthier they were, the greater the amount of damages that should be assessed against them. For a similar reason it was held in the case of *Brown v. Swineford*, 44 Wis. 282, 28 Am. Rep. 582, to be ground for a new trial for counsel for the plaintiff, in an action against an officer in a railway company for a tort which might be the subject of exemplary damages, to comment to the jury in the concluding argument upon the defendant's connection with the railway company, upon the wealth and power of the company, and upon the defendant's ability, from these circumstances, to pay any judgment which might be rendered against him, although no evidence had been given as to his pecuniary ability. For illustration of the rules under which new trials are granted for improper statements by counsel in addresses to the jury, see 1 Thomp. Trials, § 974 et seq. These rules have been recognized and enforced by this court since its organization. In the case of *Berry v. State*, 10 Ga. 511, the court ruled that for counsel to attempt surreptitiously to get before the jury facts by way of supposition which have not been proved is highly reprehensible, and that the practice should be repressed by the court without waiting to be called on by the opposite party. In his opinion delivered in that case, where counsel for the state was permitted to indulge in certain suppositions, which were fully stated, Lumpkin, J., said: "Does not history, ancient and modern, nature, art, science, and philosophy, the moral, political, financial, commercial, and legal, all open to counsel their rich and inexhaustible treasures for illustration? Here, under the fullest inspiration of excited genius, they may give vent to their glowing conceptions in thoughts that breathe and words that burn. Nay, more; giving rein to their imagination, they may permit the spirit of their heated enthusiasm to swing and sweep beyond the flaming bounds of space and time. * * * But let nothing tempt them to pervert the testimony, or surreptitiously array before the jury facts which, whether true or not, have not been proven." In the case of *Mitchum v. State*, 11 Ga. 616, it was ruled: "It is error in the court, when requested

to prevent it, to permit counsel to comment on facts in their argument to the jury not in evidence." In the opinion in that case, Nesbit, J., said: "We have had occasion to consider the habit of counsel, in addressing the jury, of commenting upon matters not proven and not growing out of the pleadings, before, and have been content with visiting it with a decided and emphatic disapproval. [Citing *Berry v. State*, supra.] We entertain no shadow of doubt as to the necessity of pronouncing it, as we now do, illegal and highly prejudicial to a fair and just administration of the rights of parties, either on the criminal or civil side of the court. It is the duty of the court to prevent such comments, and, in all cases where this is not done, provided the court is requested to prevent them, we shall hold, as we rule in this case, that it is good ground for a new trial." So, too, in later cases the same rule has been observed. In the case of *Railroad Co. v. Randall*, 85 Ga. 297, 11 S. E. 706, counsel for the plaintiff, after indulging in remarks before the jury implying that the superintendent of the railroad company was responsible for keeping a witness away from the court, which he withdrew on an intimation from the court that he was not authorized to make the statement without evidence, said: "At all events, gentlemen, I believe, before high heaven, that, if Mr. Mosher had not paid this visit to our witness this morning, she would have fulfilled her promise, and would have come to court and testified in this case. It would be improper for me to say what she would have testified to; but we deemed her testimony important,—in fact, our most important witness,—and were very anxious to have her present." The court said that the remarks of counsel were calculated to, and doubtless did, prejudice the minds of the jury against the defendant, and ruled that the court below should not have refused to grant a new trial on this ground. And as late as the case of *Ivey v. State*, 113 Ga. 1062, 39 S. E. 423, 54 L. R. A. 959, this court—citing *Berry v. State*, 10 Ga. 511; *Mitchum v. State*, 11 Ga. 615; *Forsyth v. Cothran*, 61 Ga. 278; *Railroad Co. v. Randall*, 85 Ga. 297, 11 S. E. 706; *Bennett v. State*, 86 Ga. 401, 12 S. E. 806, 12 L. R. A. 449, 22 Am. St. Rep. 465; *Washington v. State*, 87 Ga. 12, 13 S. E. 131; *Johnson v. State*, 88 Ga. 606, 15 S. E. 667; *Farmer v. State*, 91 Ga. 720, 18 S. E. 987; *Bowens v. State*, 106 Ga. 760, 32 S. E. 666—adhered to the same rule. Under these authorities, there can be no question that the court below, when the defendant's counsel requested the grant of a mistrial, should have granted the motion. It may have been that, had the trial judge fully and explicitly instructed the jury that no consideration of the objectionable remarks should affect their verdict, and satisfied himself that the evil effects of the remarks which counsel made had not found lodgment in the minds of the jurors, this would have sufficed. But however this may be, in the

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absence of any interposition a mistrial should have been ordered, and the failure to so order it is cause for a new trial.

The grounds of the motion which have not been specifically to present no legal cause for the grant of a new trial.

Judgment reversed. All the justices concurring, except LEWIS, J., absent on account of sickness.

O'BANION v. MISSOURI PAC. RY. CO.

(Supreme Court of Kansas, Division No. 2, July 5, 1902.)

[69 Pac. Rep. 353.]

Evidence.

A party who, in the cross-examination of a witness, calls for incompetent testimony, cannot complain of its admission.

Trespassers—Ejection—Authority of Brakeman.*

It is within the scope of the implied authority of a brakeman in charge of a freight train to eject trespassers therefrom. *Railroad Co. v. Kelly*, 14 Pac. 172, 36 Kan. 655, 59 Am. Rep. 596, followed.

Same—Same—Same.

It is peculiarly within the province of a jury to determine whether a brakeman who forcibly ejected a trespasser from a car did so in discharge of the duty he owed the railway company to remove such persons, or for the purpose of extorting money from such trespasser, or out of resentment to him for his failure to pay a demand for money made by the brakeman.

(Syllabus by the Court.)

Error from district court, Leavenworth county; J. H. Gillpatrick, Judge.

Action by Harry O'Banion against the Missouri Pacific Railway Company. Judgment for defendant, and plaintiff brings error. Reversed.

The plaintiff in error fell under the wheels of a coal car which was part of a freight train operated by defendant in error. His left arm was run over, rendering amputation necessary, and he was otherwise injured. At the close of the testimony of plaintiff below, the court sustained a demurrer to the evidence filed by the railway company. Whether this ruling of the court was proper depends on the testimony of O'Banion, and the inferences to be properly drawn therefrom. He testified, in substance, as follows: "It was on the 11th day of October, '99, at the foot of Cherokee street, I boarded the Missouri Pacific train going south toward Kansas City. I got on the car, and met a brakeman at the rear end of the train. * * * He wanted to know where I was going, and I told him I was going to Kansas City, and he wanted to know if I had any money, and I told him 'Yes.' I paid the brakeman 25 cents to ride from Leavenworth to Kansas City,—the first one I met,—and I then went three or four

*See foot-note appended to *Illinois Cent. R. Co. v. McManus' Adm'r* (Ky.), 2 R. R. R. 572, 25 Am. & Eng. R. Cas., N. S., 572.

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cars to the front, and met another brakeman, and he wanted to know where I was going, and I told him to Kansas City, and he asked me if I had any money, and I told him 'No,' that I paid the brakeman in the rear. Well, he said, I would have to pay him, or get off, because he was the head brakeman of the train. I told him to go to the back, and ask that brakeman if I didn't pay him, and if I didn't pay him he could come to me, and I would pay him. Well, he stood there, and talked a while, and I started to pass him, and when I started to pass him he told me he was head brakeman of the train, and I would have to pay him, or else get off the train, and as I made a move to pass him he grabbed hold of my shoulder and pushed me in such a manner as to make me fall beneath the train. * * *

Q. What did he have that indicated he was a brakeman? A. Well, he had a lantern, and he had a stick about a foot and a half long. * * * A stick brakemen generally use in letting on and turning off brakes. * * *

Q. Did you see the brakeman do anything on the train,—this last brakeman that you met I have reference to? A. When I was coming toward him he was letting off the brake. * * *

Q. How far ahead of you? A. Four or five cars. * * *

Q. Which way did he push you? A. Backwards. Q. Where were you standing at that time? A. Standing on a coal car at the end of the platform about a foot and a half long, standing outside of the end gate." On cross-examination plaintiff below testified that it was his intention to ride to Kansas City without paying regular fare; that he had no ticket; that at different times before this he had gone down to Kansas City and paid 15 cents; that he knew he was not doing right. He was cross-examined further: "Q. What did you say to this last brakeman? A. I told him to go back and see this other brakeman, and I would get in the coal car and sit down, and wait until he came back; and as I started to go by him he grabbed hold of me and shoved me. * * *

He said he was the head brakeman, and I would have to pay him. Q. You said you wouldn't do it? A. I didn't say I wouldn't do it. Q. You started to go right by him? A. No, sir; I didn't start to go right by him. * * * He shoved me after I had one foot up. I was just in the act of putting it up.

Q. To get by him? A. Yes, sir. * * * Q. And at the time he put up his hands you were just in the act of getting over the end of the gate,—just about to start? A. Yes, sir. * * *

Q. He said he was brakeman on that train? A. Yes, sir. Q. You supposed he had authority to run it, didn't you? A. Yes, sir. Q. And you swear that, just as you were attempting to get over the end of that car, after the brakeman told you you mustn't come any further, he pushed you, and you slipped and fell, is that right? A. Yes, sir.

Q. He pushed you a little, and you slipped, and fell under the car? A. Yes, sir. Q. That's right, is it? A. When he shoved me; yes, sir. * * *

Q. Didn't he tell you not to

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go up there? A. No, sir. Q. Didn't he tell you you couldn't go any further until you paid him? A. He told me if I wanted to ride I would have to pay him. Q. And you said you had paid, and you were going anyhow? A. No, sir; I didn't tell him I was going anyhow. * * * Q. You lost your footing and fell down; that's right, is it? A. Yes, sir. * * * Q. He didn't strike you with a club? A. No, sir. Q. He made no motion to strike you—didn't threaten to strike you—with a club? A. No, sir. Q. He didn't threaten to strike you with a lantern? A. No, sir."

Argued before DOSTER, C. J., and SMITH and POLLOCK, JJ.

J. C. Petherbridge and Dennis Jones, for plaintiff in error.
Waggener, Horton & Orr, for defendant in error.

SMITH, J. (after stating the facts). Counsel for the railway company contend: First, that there was no evidence proving or tending to prove that the person who it is claimed pushed the plaintiff below from the car was in the employ of the railway company in the capacity of a brakeman or otherwise. Many decisions are cited confirming the general rule that the declarations of a person are not competent to prove his authority to act as agent for another. It will be noted, however, that counsel for defendant below on cross-examination of the plaintiff interrogated him as follows: "Q. He said he was the head brakeman of that train? A. Yes, sir. Q. You supposed he had authority to run it, didn't you? A. Yes, sir." These responses, now claimed to be incompetent, would not have been extracted from the witness except for their supposed benefit to the railway's side of the case. Having sought to profit by the use of such testimony in its behalf, it cannot now be permitted to complain that the adventure was disastrous. It cannot avail a party bringing such testimony before the jury to invoke authority in denial of its competency. This testimony, coupled with the fact that the person who stated the capacity in which he was employed had a brakeman's stick in his hand, and was engaged, when plaintiff approached him, in letting off a brake on the car, was *prima facie* evidence that he was a brakeman in the employ of the railway company.

The second contention of defendant in error is that: "Assuming that the person who pushed plaintiff, if he was pushed, was a brakeman in the service of the railway company, then his act complained of was not in the discharge of any duty he owed the company." The argument is that in pushing the plaintiff from the car the brakeman was acting on his own account, piqued by the refusal of O'Banion to pay him the amount demanded for passage on the train. It cannot be said that a brakeman situated as this one was, in charge of the front end of the train, did not have general authority to remove trespassers therefrom. *Railroad Co. v.*

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Kelly, 36 Kan. 655, 14 Pac. 172, 59 Am. Rep. 596. In *Railway Co. v. Mitchell*, 56 Kan. 324-327, 43 Pac. 244, the authority of a brakeman to eject trespassers was recognized by the approval of an instruction given to that effect. In 3 Elliott, R. R. p. 1962, the author notes the rule prevailing in this state as announced in the case of *Railroad Co. v. Kelly*, supra, that the ejection of trespassers is within the scope of the implied authority of a brakeman. If it were clear that in pushing O'Banion from the car the brakeman did so for the purpose of extorting money from him, or inflicted punishment on him in that way for not paying the sum demanded, then we might say that the brakeman was not, when so doing, engaged in the performance of any duty imposed on him by reason of his employment as agent of the railway company. See *Railway Co. v. Divinney* (just decided) 64 Kan. —, 69 Pac. 351. The brakeman owed a duty to his employer (the railway company) to remove trespassers from the cars which made up the train, and if, in the discharge of such duty, he recklessly or in a willful, wanton, or malicious manner performed it, and ejected a trespasser in a way to cause bodily injury, the railway company was liable for his acts. *Railway Co. v. Mitchell*, supra. In the case of *Railway Co. v. Divinney*, supra, there was an express finding of the jury that when the agent of the railway company struck a person who was about to take passage on a train the agent was not in the discharge of any duty imposed on him as a servant of the company. In the present case different minds might arrive at different conclusions, after considering the testimony introduced on behalf of plaintiff below, concerning the reasons which impelled the brakeman to act as he did. We are asked to determine that the motive which actuated the brakeman in ejecting the plaintiff was a desire for personal gain to himself, and that he was not influenced by any obligation of duty which he owed the railway company to keep trespassers from riding on the train. To arrive at the impelling motive in the case was a matter peculiarly within the province of the jury. After a demand for money made by the brakeman, and up to the time of plaintiff's forcible ejection from the car, though the intervening time was short, there was a *locus poenitentiae* during which the servant's continuing duty to his employer might have asserted itself and overcome his desire for personal gain, causing him to act solely in the interests of the company, and not for his own benefit. We cannot conclude, considering all the testimony given by the plaintiff below, that his injuries were the result of a willful attack made on him by a person acting independently of and outside of the range of his employment, when the servant who caused his injuries was, immediately before and directly after the plaintiff was hurt, satisfactorily proved to have been in the service of the company. The intent and purpose with which acts are done can be better ascertained by a jury composed of persons drawn

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from different vocations in life than by a body of professional men all engaged in one calling. Thompson, in his Commentaries on the Law of Negligence, says: "Sec. 615. It is obviously a question of fact for the determination of a jury whether, at the time of the particular act or omission by the servant which caused the injury, the plaintiff's servant was acting within the scope of his employment, or acting outside of it to effect some purpose of his own. Sec. 616. Whether the person whose immediate negligence or misconduct caused the particular injury was acting at the time as the servant of the person sought to be charged, frequently depends on such a variety of facts that it falls outside of any definite rule, and for that reason becomes, under proper instructions, a question of fact for the jury."

The judgment of the court below will be reversed, and a new trial ordered. All the justices concurring.

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(*Supreme Court of Vermont, Washington, March 8, 1902.*)

[52 Atl. Rep. 537.]

Accident at Crossing—Evidence—Failure to Keep Flagman, in Absence of Statutory Requirement.

In an action against a railroad for personal injuries, evidence that the company kept no flagman at the crossing where the injury occurred was admissible to show the surrounding circumstances, although the company was not bound to keep a flagman there.

Same—Evidence—Harmless Error.

Where it was shown that the crossing where the accident occurred was a roadway used in passing between a factory and the street, the admission of evidence that the exact limits of the street at this point could not be ascertained was not prejudicial to the defendant, as it did not except when the jury was told that it made no difference whether the accident occurred in the highway or not.

Same—Personal Injuries—Elements of Damage—Weight of Artificial Leg.

In an action for the loss of a leg, evidence of the weight of an artificial leg which plaintiff had been obliged to wear as a consequence of his injury was admissible on the question of damages.

Same—Same—Weight of Artificial Leg—Judicial Notice.

The court will not take judicial notice of the weight of artificial legs.

Same—Same—Negligence—Running Train Backwards.

In an action for injuries received by being hit by a backing train, it was for the jury to determine whether the defendant, under the circumstances, was negligent in running the train backward, although defendant's expert witnesses who testified that such was the only practical way were uncontradicted.

Exceptions from Washington county court; Start, Judge.

Action for personal injuries by Alec Carrow against the Barre Railroad Company. Judgment for plaintiff, and defendant brings exceptions. Affirmed.

Argued before TAFT, C. J., and ROWELL, TYLER, MUNSON, WATSON, and STAFFORD, JJ.

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W. A. Lord, F. P. Carlton, and F. L. Laird, for plaintiff.
J. P. Lamson, for defendant.

STAFFORD, J. The defendant was pushing a train of four loaded freight cars, bound for the quarries, up through the city of Barre, when it ran upon the plaintiff as he was attempting to drive over the track at a sort of crossing near the old fork factory. In consequence of his injury, the plaintiff lost a leg. In the court below he had verdict and judgment, and the case is here on exceptions by the company.

The defendant moved for a verdict. The motion was denied, and an exception allowed. In the bill the whole testimony is referred to, but the defendant has supplied us with a part only; and the plaintiff objects that some of the omitted portion is essential. So we do not consider this exception. But we improve the occasion to say that when the testimony is all referred to, and is voluminous, good practice would suggest that the excepting party select such portions as he cares for, and submit them to his opponent, who, in his turn, should point out such portions as he cares to have added, whereupon the selection thus agreed to might be substituted for the entire transcript, with an obvious advantage to the court as well as to the parties. But, when no such agreement is made, the whole testimony must be furnished by the excepting party.

Several exceptions were taken to the admission of evidence. Some of these are not contained in the bill of exceptions, nor even mentioned there, except in a clause at the end, which refers to a transcript of the reporter's minutes "for the purpose of showing the tendency of the evidence, claims, and concessions of the parties, requests to charge, motions, rulings, charge of the court, and exceptions taken on trial, and is to control." Under the present rule, exceptions are not to be reserved in this way, for the transcript is to be referred to only when and in so far as may be necessary to test the accuracy of the statement in the bill of the meaning and tendency of the testimony, or to take up the whole testimony. County Ct. Rule 29. But this bill was allowed before the present rule went into effect, and under the practice that has prevailed we must consider the exceptions shown by the transcript so far as they are presented, pointed out, and relied upon, although they are not to be found in the bill itself; for in *State v. Noakes*, 70 Vt. 247, 40 Atl. 249, we refused to consider an exception noted in the bill, but not noted in the transcript, because that bill referred to the transcript, and said it should control, just as this does; and, if it is to be controlling one way, it ought to be the other also.

1. The plaintiff was allowed to show that the defendant kept no flagman at the crossing in question, "as bearing upon the degree of care required in operating trains over that crossing without a flagman"; that is, the fact was shown just like any other circumstance showing the situation and sur-

roundings affecting the degree of care required in running trains there. Had not the jury a right to know whether there was a flagman there or not,—just as it had a right to know whether there was a crossing there, or a ditch, or a fence? The evidence was not admitted upon the ground that the defendant was bound to keep a flagman. In ruling the evidence in, the court guarded that point by saying that he was not prepared to hold that as the case then stood; and in the charge it is treated merely as a part of the description. We quote: "The law does not impose upon the defendant the duty of maintaining gates or electric signals, nor to have a flagman at the crossing, but in running and operating its train at this point without gates, electric signals, or a flagman it was bound to exercise the care of a prudent man in like circumstances." No exception was taken to the charge in this respect.

2. The crossing where the plaintiff was hurt was a roadway by which customers of the factory passed back and forth between the factory and Main street. A little beyond the point where the railroad crosses this roadway it crosses the street itself, and the plaintiff was permitted to show by the city surveyor that the exact limits of Main street along there could not be ascertained. It is evident that the defendant could not have been harmed by this, for the jury were told that it made no difference whether the place where the accident occurred was in the highway or not, and to this no exception was taken. The court thus ruled when the defendant interrupted plaintiff's counsel, and objected to his arguing that the accident occurred within the limits of the highway. Although counsel was told that he might go on with the argument if he desired, under exception, and an exception was noted, it does not appear that he did so, and no question upon his argument is before us.

3. When the plaintiff was on the stand his counsel asked him about the artificial leg he was wearing,—how much it weighed. The defendant objected, and the court ruled that he might show the weight of the one he had worn down to that time about his work. The witness then said this was the only one he had had, and that it weighed eight pounds. The defendant now submits that this was error, but gives no reason why; and we suppose it must be on the ground that it is immaterial. It can hardly be called immaterial on the question of damages. If we are to assume that the leg was heavier than it need be, and worn for the very purpose of making himself trouble, and thereby increasing his damages, of course it is inadmissible. But probably we are not justified in assuming that, and if it was true it was open to proof. We cannot take judicial notice of the weight of artificial legs, and cannot assume that this was heavier than need be. The plaintiff had dragged it about several months, and it was

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apparently one of the consequences of his misfortune. We think it cannot be said that the record shows error in admitting evidence of the fact.

4. The defendant put on the conductor of the train, and showed by him how fast the train was going, and what was done to stop it when the plaintiff was discovered, and how long it took to stop it; that is, how far it went after the air brakes on the engine were applied. He said 20 feet. In cross-examination he was asked about air brakes on cars, and said he did not know how quickly the train could have been stopped if these cars had been equipped with them. In answer to one such question he repeated his former answer that the train did stop in 20 feet "easy enough." The defendant now treats this as a statement that a train equipped in the manner supposed could have been stopped in that distance, and argues that the witness was not shown to be an expert. We think the defendant misconstrues the answer, and that there is no substance in this exception.

5. The court was requested to charge "that, under the evidence in the case, as a matter of law, the defendant is not liable by reason of pushing its train instead of hauling it." Instead of complying, the court left it to the jury to say whether, in pushing its train as it was made up and at the speed it was going, it was in the exercise of such care and prudence as a careful and prudent man would exercise in like circumstances. The defendant had several expert witnesses, who testified that in the circumstances, considering the grade and all, the only practicable safe way was to push the train. The defendant says now that there were no witnesses to contradict them. But it was for the jury to weigh their testimony, and we cannot say that they believed them, nor that they were bound to believe them. The defendant urges that the court should take it upon itself to say as matter of law that a railroad has a right to back its trains. So it has, if to do so is to exercise the care of a careful man in the circumstances. So has a farmer a right to back his ox cart in the street upon the same condition. We fail to see how it is a question of law in one case more than in the other. The question was not whether, as a naked, separate proposition, railroads have a right to push or pull their trains as they see fit, but whether, in the circumstances, it was prudent to push this one. This very request recognizes the point, and is to charge that the defendant was not negligent in pushing instead of hauling its train "under the evidence in the case." This required a consideration of the circumstances under which the pushing was done, and made a fair question for the jury.

Judgment affirmed.

ROWE v. CENTRAL OF GEORGIA RY. CO.

(Supreme Court of Georgia, July 19, 1902.)

[42 S. E. Rep. 219.]

Accident at Crossing—Negligence—Directing Verdict.

Assuming that the negligence of the defendant was shown, there was no error in granting a nonsuit, for the evidence required a finding that the deceased was not exercising that degree of care which the law requires of even a youth of his years and experience, under the circumstances existing at the time of the collision which resulted in his death. (Syllabus by the Court.)

Error from city court of Atlanta; H. M. Reid, Judge.

Action by Miley Rowe against the Central of Georgia Railway Company. Judgment for defendant, and plaintiff brings error. Affirmed.

W. S. Howard and Westmoreland Bros., for plaintiff in error.

Dorsey, Brewster & Howell, for defendant in error.

PER CURIAM. Judgment affirmed.

LEWIS, J., absent on account of sickness.

ATCHISON, T. & S. F. RY. CO. v. JUDAH.

(Supreme Court of Kansas, Oct. 11, 1902.)

[70 Pac. Rep. 346.]

Accident at Crossing—Contributory Negligence as Affected by Failure to Give Signals.*

A traveler on the highway, who is about to cross a railroad track, and who is already warned of the approach of a train in time to escape injury, cannot complain of the negligence of the railway company for its failure to give signals of danger.

Same—Speed at Country Crossings.

In an open country, where the view of a traveler on the highway is unobstructed, a railway company is not chargeable with negligence in running its passenger trains over a road crossing at a speed of from 40 to 50 miles per hour.

Imputed Negligence.

Whether the carelessness of the driver of a wagon can be imputed to another riding with him, who is injured at a road crossing in a collision between the vehicle and a railway train, becomes immaterial when it is found that the railway company was guilty of no acts of negligence toward the occupants of the wagon.

(Syllabus by the Court.)

In banc. Error from district court, Atchison county; W. T. Bland, Judge.

Action by Nancy J. Judah against the Atchison, Topeka & Santa Fe Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

*See foot-note appended to Chicago, I. & L. Ry. Co. v. Reed (Ind. App.), 3 R. R. R. 627, 26 Am. & Eng. R. Cas., N. S., 627.

Atchison, etc., Ry. Co. v. Judah

A. A. Hurd and O. J. Wood, for plaintiff in error.

C. D. Walker and J. L. Berry, for defendant in error.

SMITH, J. This was an action by Nancy J. Judah, as mother and next of kin of Fannie Judah, to recover damages for her death. She had judgment in the district court. Jennings D. Judah, the husband of the plaintiff below, with his two daughters, Fannie and another, were killed in a collision between a spring wagon in which they were riding and an engine pulling a passenger train of plaintiff in error. The accident happened in January, 1898, about 6 o'clock p. m., at a crossing a short distance west of the city of Atchison, where what is known as the Monrovia road passes over the tracks of the Missouri Pacific Railway Company, the Central Branch Union Pacific Railway Company, and the Atchison, Topeka & Santa Fe Railway Company, in the order named, beginning from the north. The wagon road runs from the north in a southwesterly direction across the tracks. Jennings D. Judah, accompanied by his two daughters, started from Atchison toward their home in the country. He was driving the team. When they reached a point several feet north of the Missouri Pacific track, which is about 50 feet north of the track of plaintiff in error, a switchman, whose watchhouse or "shanty" was about 140 feet north from the center of the Santa Fe track, south of the wagon road, and 8 or 9 feet north of the Missouri Pacific Railway track, heard the voices of persons approaching. About this time he saw the headlight of an engine coming from the west. A few seconds later he heard the whistle sounded 80 rods distant. Immediately he heard one of the women in the wagon exclaim, "Stop, there comes a train!" He then took his lantern, went out, and saw a team of horses and a spring wagon approaching from the northeast. The team was then 65 feet distant from the Santa Fe track. He shouted, as the jury found, in more than a moderate tone of voice, "Hold on, you can't make the crossing!" The team was going at a brisk trot, and continued at the same speed until the collision with the locomotive. Eighty rods from the crossing the engineer sounded four blasts of the whistle. The jury found that the bell was not rung. They also found that, as soon as the engineer learned that there was a team going toward the crossing, he applied the air brakes with full force. The negligence of plaintiff in error was found by the jury in answer to a particular question, as follows: "Q. If you find that deceased came to her death by or through the fault or negligence of the defendant, then state fully all the facts and things which you find from the evidence constituted the said fault or negligence of the defendant. A. Excessive rate of speed over a crossing which had an unusual amount of travel over same, and failing to provide proper and reasonable precautions." The testimony introduced by plaintiff below tended to show that the train was running at a speed of from 40 to 50 miles per hour. It is an

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established fact that the occupants of the wagon had due warning of the approach of the train when they were at least 65 feet from the track of the plaintiff in error. The first alarm came from one of the women, who said, "Stop, there comes a train!" and the second from the switchman who was watching the crossing. Having ample knowledge of the proximity of the train, a failure to ring the bell cannot be charged against the railway company as an act of negligence. A signal by whistle or bell in such cases is to give warning of an approaching train. When a traveler about to cross a railroad track has notice of that which a whistle or bell signifies, the giving of such warnings is a work of supererogation as to him. A failure to give notice to one already informed of a fact cannot be called negligence. *Railway Co. v. Bell*, 70 Ill. 102; *Pakalinsky v. Railroad Co.*, 82 N. Y. 424, 2 Am. & Eng. R. Cas. 251; *Railroad Co. v. Walz*, 40 Kan. 433, 19 Pac. 787. There remains, therefore, in the case, but one question, which is whether the railway company is chargeable with negligence in running its train at a speed of from 40 to 50 miles an hour. This speed, it is urged, was so great that the momentum of it could not be overcome by the engineer after he saw the team and wagon about to cross the track. Witnesses who testified for the plaintiff below stated that the train was going at about its usual speed, and it appeared not to be behind time. While there was considerable travel over this crossing, yet it was not in the corporate limits of a city, but in the country. It has been held by this court that in such cases speed cannot be made an element of negligence. In *Railway Co. v. Moffatt*, 56 Kan. 667, 670, 44 Pac. 607, 3 Am. & Eng. R. Cas., N. S., 488, it is said: "The crossing was in an open country, where there was no statutory or municipal regulation with respect to the speed of trains. The demands of the public and the necessities of modern business require that such trains should be run at a rapid rate, and railroad companies would hardly be justified in slacking the speed at every such highway crossing to avoid the risk of a collision with some one who was passing over the same. Even if the rate of speed had been pleaded as a specific act of negligence, it could hardly be held, under the circumstances, that the speed at which the train in question was run was negligent or unlawful. The court, however, without justification, made the speed of the train an element of negligence, and the jury evidently made it a basis of recovery. In this there was error."

* * * Under ordinary circumstances, in the open country, the railroad company can run as many trains and at as great a rate of speed as is consistent with the safety of its passengers." *Railroad Co. v. Hague*, 54 Kan. 284, 38 Pac. 257, 45 Am. St. Rep. 278. Those in charge of the train seem to have done all they could to avert the accident. Probably nothing more would have served any useful purpose.

Counsel for defendant in error insist that the carelessness

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of the father, who was driving the horses, cannot be imputed to the daughter, who was riding by his side. This is an immaterial consideration, however, when it is found that the railway company was guilty of no act of negligence toward the occupants of the wagon.

The judgment of the court below will be reversed, with directions to enter judgment on the findings of the jury in favor of the defendant below. All the justices concurring.

CHICAGO, ST. P. M. & O. R. Co. v. Rossow.*

(*Circuit Court of Appeals, Eighth Circuit, July 7, 1902.*)

[117 Fed. Rep. 491.]

Railroads—Injury at Crossing—Contributory Negligence.

A farmer, after unloading a load of grain at an elevator, drove directly to and upon a railroad crossing 330 feet distant, with which he was well acquainted, where he was struck by a passing train and killed. He wore a fur coat, with the collar turned up over his ears and extending forward beyond his face. The ground was frozen, and he drove the entire distance at a trot, without stopping or looking in the direction from which the train was approaching. If he had looked, he could have seen it, and if he had listened he could have heard it, in time to have stopped before reaching the crossing: *held*, such facts appearing by undisputed testimony, that he was guilty of contributory negligence as a matter of law, which precluded a recovery for his death, though the railroad company may have also been negligent.

In Error to the Circuit Court of the United States for the district of Minnesota.

Pierce Butler (Thomas Wilson, on brief), for plaintiff in error.

F. D. Larrabee, for defendant in error.

Before SANBORN and THAYER, Circuit Judges, and CARLAND, District Judge.

CARLAND, District Judge. Rossow, as administrator, brought this action in the court below to recover damages from the railroad company for causing the death of William Rossow, at Wilder, state of Minnesota, on December 14, 1899. The acts of negligence are stated in the complaint filed herein as follows:

"That at said village of Wilder, during all the time herein alleged, there was, and still is, a public highway crossing the defendant's line of railway in said village, and upon the 14th day of December, 1899, said William Rossow was riding in a wagon drawn by a team of horses driven by himself along and upon said highway, and over and across defendant's said line of railway where said highway and said railway intersected in said village, and while said William Rossow was in

*See foot-note appended to Chicago I. & L. Ry. Co. v. Reed (Ind.), 3 R. R. R. 627, 26 Am. & Eng. R. Cas., N. S., 627.

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said wagon upon said highway and upon said defendant's railway track said defendant, through its agents and servants, carelessly, wrongfully, negligently, and unlawfully ran and propelled one of its trains of cars at a high and dangerous rate of speed, and without the ringing of bell, or blowing of whistle, or the giving of signal in any manner of the running of said train, to, against, and upon said team and wagon and said William Rossow; and thereby personal injuries were inflicted upon said William Rossow, from the effects whereof he immediately died."

The answer of the railroad company denied the acts of negligence alleged, and also alleged that the death of Rossow was caused by his own negligence or want of ordinary care. At the close of all the evidence counsel for the railroad company moved the court to direct the jury to return a verdict in favor of the railroad company, for the reasons: (1) That the evidence failed to show any negligence on the part of the railroad company; (2) that the evidence conclusively established that the negligence of William Rossow caused his death, or directly contributed thereto. This motion was overruled, and exception taken. The railroad company assigns this ruling of the court as error.

Section 6637, 2 Gen. St. Minn. 1894, reads as follows:

"The person acting as engineer drawing a locomotive on any railway in this state, who fails to ring the bell, or sound the whistle upon said locomotive, or cause the same to be rung or sounded at least eighty rods from any place where such railway crosses a traveled road or street, of the same level, except in cities, or to continue the ringing such bell or sounding such whistle at intervals, until such locomotive and the train to which such locomotive is attached, shall have completely crossed such road or street, is guilty of a misdemeanor."

The trial court instructed the jury that at the time of the collision which resulted in the death of William Rossow the railway company had complied with the statute above quoted, so far as the sounding of the whistle was concerned, but submitted the issue as to whether or not the bell had been rung in accordance with the requirements of said statute. Upon this issue the jury found in favor of the defendant in error, and returned a general verdict in accordance with said finding. The trial court also instructed the jury that there was no evidence to warrant them in finding that the railway company was running its train at a high or dangerous rate of speed. The following special question was, among others, submitted to the jury, and answered in the affirmative: "Was the whistle sounded when reasonably near, but more distant than a point eighty rods distant from the crossing?" The trial court, upon the issue of contributory negligence, charged the jury as follows:

"The theory of the defendant is that the deceased was

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guilty of negligence in approaching that crossing which caused or contributed to the collision; that when he drove out of the west end of the elevator, and around to the crossing, he drove his team upon a trot, with his wagon rattling over the frozen ground, without attempting to observe, by the use of his sight or hearing, whether a train was approaching or not; that he had pulled his fur collar over his ears in such a way that his hearing would be diminished, and did not turn his head to observe what might come within the range of his vision. You have heard his acts and conduct described by the two witnesses who stood in the elevator door, and by other witnesses called by defendant, who stood near the blacksmith shop and elsewhere. If from this evidence you are satisfied that the deceased did in fact drive upon the crossing in such manner, on a trot, without using his senses to inform himself as to whether or not a train was approaching, then I charge upon that he was guilty of contributory negligence, which will bar any recovery in this case."

As Rossow did just what is stated in the above excerpt from the charge, the court ought to have directed a verdict for the railway company upon that issue, as there was no dispute as to what Rossow did immediately prior to his death. The principles of law governing this case are stated in the unanimous opinion of this court in *Pyle v. Clark*, 25 C. C. A. 190, 79 Fed. 746, as follows:

"One whose negligence is one of the proximate causes of his injury cannot recover damages of another, even though the negligence of the latter also contributed to it. The question in such a case is not whose negligence was the more proximate cause of the injury, but it is, did the negligence of the complainant directly contribute to it? If it did, that negligence is fatal to his recovery, and the negligence of the defendant does not excuse it. *Railway Co. v. Hoedling's Adm'r*, 10 U. S. App. 422, 426, 3 C. C. A. 429, 431, 53 Fed. 61, 63; *Railway Co. v. Moseley*, 12 U. S. App. 601, 604, 608, 6 C. C. A. 641, 643, 646, 57 Fed. 921, 923, 925; *Reynolds v. Railway Co.*, 32 U. S. App. 577, 16 C. C. A. 435, 69 Fed. 808, 811; *Motey v. Granite Co.*, 36 U. S. App. 682, 20 C. C. A. 336, 74 Fed. 156; *Schofield v. Railway Co.*, 114 U. S. 615, 618, 5 Sup. Ct. 1125, 29 L. Ed. 224; *Railroad Co. v. Houston*, 95 U. S. 697, 24 L. Ed. 542; *Hayden v. Railway Co.*, 124 Mo. 566, 573, 28 S. W. 74; *Wilcox v. Railroad Co.*, 39 N. Y. 358, 100 Am. Dec. 440. Every railroad is a menace of danger. It is the duty of every one who approaches it to look both ways, and to listen, before crossing its track; and, when a diligent use of the senses would have avoided the injury, a failure to use them is, under ordinary circumstances, contributory negligence, and should be so declared by the court. Where contributory negligence is established by the uncontroverted facts of the case, it is the duty of the trial court to instruct the jury that the plaintiff cannot recover. See the

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cases cited supra, and *Railroad Co. v. Whittle*, 40 U. S. App. 23, 20 C. C. A. 196, 74 Fed. 296, 301; *Donaldson v. Railway Co.*, 21 Minn. 293; *Brown v. Railway Co.*, 22 Minn. 165; *Smith v. Railway Co.*, 26 Minn. 419, 4 N. W. 782; *Lenix v. Railway Co.*, 76 Mo. 86; *Railroad Co. v. Dick*, 91 Ky. 434, 15 S. W. 665; *Aerkfetz v. Humphreys*, 53 Am. & Eng. R. Cas. 459, 145 U. S. 418, 420, 12 Sup. Ct. 835, 36 L. Ed. 758; *Powell v. Railway Co.*, 76 Mo. 80, 8 Am. & Eng. R. Cas. 467; *Dlauhi v. Railway Co.*, 105 Mo. 645, 654, 658, 16 S. W. 281. But it is only where the undisputed facts are such that reasonable men can fairly draw but one conclusion from them that the question of negligence is considered one of law for the court. *Railway Co. v. Jarvi*, 10 U. S. App. 439, 451, 3 C. C. A. 433, 53 Fed. 65; *Railway Co. v. Ives*, 144 U. S. 408, 417, 12 Sup. Ct. 679, 36 L. Ed. 485; *Railroad Co. v. Converse*, 139 U. S. 469, 11 Sup. Ct. 569, 35 L. Ed. 213; *Railroad Co. v. Pollard*, 22 Wall. 341, 22 L. Ed. 277."

This being the law, let us examine the undisputed facts. They appear in the record as follows: William Rossow was a farmer, 32 years of age, living in the vicinity of the village of Wilder, state of Minnesota. He had lived there many years, and was acquainted with the railroad crossing described in the evidence. On December 14, 1899, which was a bright, clear day, he hauled to the elevator at Wilder, on the line of plaintiff in error's road, a load of flax. The railroad at Wilder extends nearly in an easterly and westerly direction. In hauling the load of flax to the elevator, Rossow crossed the railroad from the south to the north. After Rossow had unloaded his flax, and at about 2:30 p. m., he drove out of the elevator at its westerly end, over the unbroken and frozen ground, to the north and south highway over which he had come to the elevator, and, proceeding along this highway with his team at a middling trot, collided with a regular passenger train running on schedule time going north on the plaintiff in error's road, and was killed. The distance from the west end of the driveway alongside of the elevator to the crossing, measured along the route which Rossow traveled, was 330 feet. Rossow had an ordinary farm wagon, and sat thereon upon a spring seat near the forward end of the wagon box. He had a fur coat on, with the collar turned up over his ears as high as the top of his head, and extending forward beyond his face. He wore a cap. While Rossow approached the crossing on his return from the elevator his team traveled at substantially a uniform rate of speed of seven miles per hour. From the time Rossow left the elevator until the collision he neither stopped, looked, nor listened. The engine and train were visible for a time sufficient to have enabled him to stop or turn his horses if he had seen them. The engine whistled about 90 rods before it came to the crossing, and the rumble and roar of the train could have been heard if he had listened. Nine witnesses

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were at different places around this crossing when the collision occurred. No one of them was so near the crossing that the duty of exercising care to hear and see the train was imposed upon him, yet every one of these nine witnesses was aware of the approach of the train before it reached the crossing. Every one of these nine witnesses received this knowledge in ample time to stop and turn the horses he was driving if he had been in Rossow's place. Every one of them heard the roar and rumble of the train in time to have avoided the collision. Many of them heard the whistle; many heard the bell ring. The two witnesses who were most disadvantageously situated—Malchow and Swanson, who were on the east side of the elevator, so that the train came from past the elevator behind them—heard the bell ring, heard the roar of the train, knew of its approach, and called to Rossow in time to have enabled him to keep off the railroad track if he had been listening. The fact that all witnesses who observed Rossow from the time he left the elevator till his team was struck by the engine saw him do nothing but trot his team down to and upon the railroad track, taken in connection with the fact that every other person about the crossing learned of the approach of the train in time to have avoided the collision, is conclusive either that Rossow did not look or listen, or that, if he did, he utterly ignored what he saw or heard. This state of the evidence also proves that, if Rossow had exercised the care which those who were not approaching the railroad track did exercise,—the mere care inspired by idle curiosity,—he would not have been injured. Greater care was required of him. The railroad itself was a notice of danger. It was his duty to stop if he could not see or hear. It was his duty to put himself in a position where he could clearly see and hear, and thus be assured that there was no approaching train. He did not stop. He covered his ears with the collar of the fur coat, so that he could not hear. He did not look,—for, if he had looked, he would have seen,—but drove blindly, carelessly, upon the train. The evidence in regard to the shying of the off horse has been considered, and we are unable to find any evidence that this fact in any way caused the collision. It was but natural that a horse which was being driven upon a locomotive engine should make some effort to get away from it. There is no evidence that the team was not at all times under the perfect control of Rossow. It is suggested, in opposition to the views herein expressed, that the court ignores the fact that the railroad company was also negligent in not ringing the bell as required by the statute. This suggestion is without force. The question is, as hereinbefore stated, did the negligence of Rossow directly contribute to his death? If it did, defendant in error cannot recover, even though plaintiff in error was also negligent. To say that contributory negligence cannot be invoked to defeat a recovery only in cases where the defendant is not negligent, would

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eliminate the defense of contributory negligence from all cases, for, if there is no negligence on the part of the defendant, then there can be no recovery in any event. The facts, as disclosed by the evidence in this case, bring it clearly within the rule announced in the cases hereinbefore cited, and also the recent case of *Railroad Co. v. Freeman*, 174 U. S. 379, 19 Sup. Ct. 763, 43 L. Ed. 1014.

For refusing to direct a verdict for the plaintiff in error upon the second ground of the motion made by it, the judgment below must be reversed, and a new trial ordered.

KILPATRICK v. GRAND TRUNK RY. CO.

(*Supreme Court of Vermont, Orleans, March 14, 1902.*)

[52 Atl. Rep. 531.]

Injury to Switchman—Proximate Cause—Position of Side Ladder.

In an action by a railroad switchman, for injuries received from being knocked off a ladder maintained on the side of a freight car in violation of V. S. § 3886, in passing a post in the railroad yards, the position of the ladder on the side of the car was a proximate cause of the accident.

Same—Assumption of Risk—Position of Side Ladder—Employers' Liability Act.

Under V. S. § 3886, prohibiting any railroad company from running cars of its own with ladders on the side of the car, and section 3887, providing that a railroad company not complying with such requirement shall be liable for the damages and injuries to employees resulting from such neglect, a switchman injured while using a ladder on the side of a freight car, which injury was caused by the ladder being on the side, cannot be said to have assumed the risk of such use.

Same—Same—Employers' Liability Act—Public Policy.

Under such statutes, the doctrine of assumption of the risk cannot be upheld on the theory of contract, as the same would be against public policy.

Same—Same—Right to Contract—Police Power.*

The statutes, when construed as preventing an employee from assuming the risk by contract, are not void as depriving the employee of his right to contract; the same being an exercise of the police power for the protection of the poor and helpless.

Same—Contributory Negligence.

In an action by a switchman for injuries received in being knocked off a ladder on the side of a car while passing a post in the switch yards on a dark night, it appeared that plaintiff mounted the car to prevent the same from running with too much force into other cars on the same track. He knew of the location of the post, but did not know the distance it was from the rail, and had often ridden by other posts in the yard on such ladders. Plaintiff testified that he did not think anything about the danger of being struck, and that, if he had, he would have known that he was liable to be hit: *held*, that the question of contributory negligence was for the jury.

Same—Same—Choosing Dangerous Method of Working.

An instruction that plaintiff could not recover if he voluntarily chose a dangerous method of performing the work when other safer methods

*See foot-note appended to *Cincinnati, etc., R. Co. v. Thieband* (C. C. A.), 4 R. R. R. 26, 27 Am. & Eng. R. Cas., N. S., 26.

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were open to him was properly refused, as it omitted the essential element of plaintiff's knowledge of such safer methods.

Same—Same—Forgetfulness.

An instruction that plaintiff was guilty of contributory negligence if he knew of the danger of performing his work in the manner selected, and from inattention failed to avoid it, was properly refused, since forgetfulness at a critical moment is not, as a matter of law, negligence.

Same—Same—Instruction.

A requested instruction on contributory negligence, embodying one phase of the evidence, was properly refused, where the general rule of contributory negligence had been given.

Same—Same—Same.

Instructions precluding a recovery on the ground of contributory negligence if the jury found a certain fact were properly refused, as the question of negligence is to be determined from all the facts.

Damages Recoverable on Second Trial.

The amount of damages recovered in the first trial is not conclusive of the amount recoverable in a second trial, the entire proceedings being *de novo*.

Exceptions from Orleans county court; Taft, Judge.

Action by Cornelius Kilpatrick against the Grand Trunk Railway Company. From a judgment in favor of the plaintiff, the defendant brings exceptions. Affirmed.

Argued before ROWELL, TYLER, MUNSON, START, WATSON, and STAFFORD, JJ.

C. A. Cook and Geo. E. Young, for plaintiff.

C. A. Hight, L. L. Hight, and R. N. Chamberlin, for defendant.

STAFFORD, J. The plaintiff is seeking to recover for injuries sustained by him, as an employee of the defendant, in consequence of the latter's running a car of its own, equipped with a side ladder instead of a ladder upon the end or inside, in contravention of the statute, and having a post dangerously near its track; whereby the plaintiff, using the ladder to mount the car while in motion, was knocked off by the post, and his foot run over by the wheels.

Statement of Facts and History of the Case. The Grand Trunk Railway runs through the village of Island Pond, where it has a large yard, 14 or 15 tracks wide. The tracks extend east and west. On the south side are freight sheds,—a long line of buildings. On the north side is a hotel. Connecting the sides is an overhead bridge, built by the railway company, some 20 feet above the tracks, and supported by 8 or 10 standards about 20 feet apart, each standard consisting of 2 posts strengthened by a brace, and framed at the bottom into a timber resting upon the ground. The passenger station is near the middle of the yard, dividing it into what are called the east end and the west end. The bridge is 25 or 30 feet west of the station. All but two of the tracks are on the north side of the station; those two are on the south side, and are, first from the station, the main line, and second, the freight-

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shed track. A platform extends around the station and under the bridge. The freight-shed track is 50 or 60 rods long, and at each end joins the main line, having probably two-thirds of its length west of the bridge; and it runs so near one of the standards that the north rail is only 41 inches from it; so that, when a freight car is on the track opposite the standard, the distance between the car and the post is only 20 inches. The accident occurred on the 14th of October, 1898, and the foregoing description is to be understood as of that date. The location of the standards had not been changed since the bridge was built, in 1899, but the location of the freight-shed track had been changed, bringing it thus near the post, instead of, as before, at some considerable distance from it. This change had been made about a year before the accident. No other standard or post in the yard stood so near the track by six inches, and most of them were still farther away. Kilpatrick had worked for the company in this yard nearly all the time for 18 years. From May until the September before his accident in October, he had been yard master. Now he was acting as switchman, and it was his duty to assist in shunting cars, making up trains, and letting them in and out of the yard under direction of the foreman. The defendant introduced no testimony, and the only witnesses, aside from the physician, were the engineer of the train upon which the plaintiff was riding when the accident occurred and the plaintiff himself. The engineer did not see what happened, so that the case rested substantially upon the plaintiff's own story. There had been a previous trial resulting in a verdict and judgment for the plaintiff, which this court reversed on the ground that the plaintiff was guilty of contributory negligence as matter of law. *Kilpatrick v. Railway Co.*, 72 Vt. 263, 47 Atl. 827, 20 Am. & Eng. R. Cas., N. S., 300, 82 Am. St. Rep. 939. Upon the second trial, the evidence was so far varied that the question was submitted to the jury. The plaintiff's story was that about 1 o'clock in the morning he started from a point near the west end of the yard, where he had been at work, and came to the passenger station on his way to do other work at the east end. As he came upon the platform, he saw approaching from the east, on the freight-shed track, a train of four box cars and one empty coal car, pushed by a backing engine attached to the east end. He knew that there were cars already standing on this same track farther west, beyond the bridge, and considering it his duty to be there when the train should come up to them, and thinking there was not time for him to walk or run ahead in the dark, and in order to be where he might the better signal to the engineer with the lantern he was carrying, and where he might put on the brake if necessary to prevent a too violent collision which might break the drawbars, or even throw the standing cars foul upon the main line, where they would be in the way of trains soon to be let in, he made up his mind to mount

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the first car. This was a Grand Trunk box car, and was equipped with a side ladder at the west end on the north side, the side towards him, and had no ladder on the end. So, having his left arm through the ball of the lantern and both hands free, he caught hold of a round of the ladder with his right hand, and stepped with his left foot upon the truck box under the car, the box that covers the end of the axle. His foot slipped from the box to the ground, and, running along a few steps beside the car, he tried again in the same way, and succeeded, drawing himself up so far on the ladder that his feet were on the bottom round and his head at the top of the car, when he struck against the post of the standard, and was knocked off; and the wheels passed over his foot, inflicting the injury for which he claimed to recover. As to the speed of the train he had said on the first trial that he could not tell accurately, but, upon being pressed for an opinion, had estimated it at eight or nine miles an hour. Upon this trial he reduced his estimate to three or four miles, the rate at which the engineer, also, testified the train was running.

The Statutes Relied Upon. V. S. §§ 3886, 3887, declare that no railroad corporation shall run a car of its own with a ladder or steps to the top of the same on the side, but that the same shall be on the end or inside of the car; and that it shall forfeit \$50 for each day's neglect to comply with this requirement, and be liable for damages and injuries to passengers and employees resulting from such neglect. This car was one of the defendant's own, and was being run in violation of the statute. The trial court correctly held that its action in that respect was negligence in law. Such was the holding of this court when this case was here the first time.

The Questions Raised Below. At the close of the plaintiff's testimony, the defendant moved for a verdict on two grounds: (1) That the plaintiff was guilty of contributory negligence; (2) that he had assumed the risk. The court said it would hold pro forma that he did not assume the risk; that the defendant was guilty of negligence as matter of law; that it thought the only question, aside from damages, was that of contributory negligence,—which it thought should be submitted to the jury. To the ruling that the defendant was negligent as matter of law, and the ruling that the plaintiff did not assume the risk, the defendant excepted, and requested the court to hold, as matter of law, that the side ladder was not the proximate cause of the injury. It did not ask to have it left to the jury as a question of fact, and evidently did not desire that; for, although it excepted to the refusal of the court to hold that the side ladder was not the proximate cause, it did not except to its omission to submit the question to the jury, nor to the charge itself, wherein it was assumed that the injury resulted from the presence of the side ladder. In view of the attitude taken, the court had a right to understand that the defendant stood upon its point of law alone. So we

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think it is not open to it now to argue that the question was one of fact, and ought to have been submitted to the jury.

Proximate Cause. In refusing to hold, as matter of law, that the side ladder was not the proximate cause, there was no error. That certainly could not be ruled as matter of law. Leaving out of view the question of contributory negligence, there were three essential factors in the accident: The post, the ladder, and the man. It was necessary that the post should be near enough to strike the man when on the ladder; it was necessary that the man should be on the ladder to be struck; it was necessary that the ladder should be on the side instead of the end, to bring the man near enough the post to be struck. If either one had been omitted, the accident would not have occurred. If the post was too near by any one's fault, it was the fault of the defendant; but leave that question out, and say the post was not near enough to be dangerous except to one on a side ladder; then we have only two factors left: (1) A ladder on the side instead of the end; (2) a man on the ladder. Can one be said to be any more proximate to the injury than the other? Are they not mutual, contemporaneous? As said before in this case (72 Vt. 266, 47 Atl. 828, 82 Am. St. Rep. 939), "In the use of the words proximate cause, negligence occurring at the time of the injury is meant." Did not the negligence of the company in having a side ladder occur at the time of the injury as much as the presence of the man upon the ladder? Well then, if both causes were equally proximate, and one cause existed through the negligence of the defendant and the other existed without the fault of the plaintiff, and while and because he was in the performance of his duty towards the defendant, is not the defendant liable? And if the plaintiff was not guilty of contributory negligence, but was rightfully and prudently where he was, what question was there for the jury, of proximate or remote cause? Even if the question be treated as saved by the exception, we think the court was right in assuming that the side ladder was the cause of the injury, and that the defendant was liable, unless the plaintiff was guilty of contributory negligence, or had assumed the risk. Pertinent instruction may be found in two cases from the federal supreme court. The Michigan Central Railroad Company was bound, by a municipal ordinance of Chicago, to fence its track, but omitted to do so; and the plaintiff, a child of 9 years, bright and well grown, but deaf and dumb, came with his companions, in the course of play, upon the track, there being no fence to prevent him, and was run over by a passing train. The circuit court directed a verdict for the defendant on the ground that there was no evidence of legal negligence on its part. The supreme court held otherwise. It was there argued, in support of the judgment below, that the want of a fence was not the cause of the injury. The court said: "In the sense of an efficient cause, *causa causans*,

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this is no doubt strictly true; but that is not the sense in which the law uses the term in this connection. The question is, was it *causa sine qua non*,—a cause which, if it had not existed, the injury would not have taken place; an occasional cause?—and that is a question of fact unless the causal connection is evidently not proximate." *Hayes v. Railroad Co.*, 111 U. S. 228, 4 Sup. Ct. 369, 28 L. Ed. 410, 15 Am. & Eng. R. Cas. 394.

In *Railroad Co. v. McDonald*, 152 U. S. 262, 282, 283, 14 Sup. Ct. 619, 38 L. Ed. 434, where a child was burned by running into a hot slack pile left unfenced, in disregard of the statute, near the mouth of the company's coal mine, it appeared that the plaintiff was frightened by miners, who came up out of the pit calling, "Let's grease him; let's burn him;" and ran away, making for the village where his mother was, but slipped, and fell into the pile. The circuit court held the child not guilty of contributory negligence as matter of law, and told the jury that the only question was one of damages, the defendant being negligent in law in failing to have a fence; and the supreme court affirmed the judgment, citing and relying upon the *Hayes Case*.

Assumption of Risk. Did the court err in its *pro forma* ruling that the plaintiff did not assume the risk? The doctrine of assumption of risk may be regarded as only one phase of the broader doctrine expressed by the maxim, "*Volenti non fit injuria*." One is not to be allowed to recover for an injury which he has voluntarily brought upon himself, and he had brought it upon himself voluntarily if it resulted from a course of action which he took with full knowledge and appreciation of the risk. Moreover, one who enters upon a regular employment is presumed to know and appreciate the risks ordinarily incident thereto, and he assumes them. And when, in the course of his employment, a special and obvious risk is presented to him, one not ordinarily incident to the business, he may, as a rule, refuse to accept it, and if he choose to encounter it he assumes that also. *Carbine's Adm'r v. Railroad Co.*, 61 Vt. 348, 17 Atl. 491, 38 Am. & Eng. R. Cas. 45; *Dumas v. Stone*, 65 Vt. 442, 25 Atl. 1097. The latter rule is subject to some exceptions, but they are not in point here, and we do not stop to notice them. But sometimes the legislature, in tenderness for a class liable to abuse or oppression, railroad or factory hands for example, forbids the use of a certain dangerous appliance, and gives an action to employees who may be injured as the result of using it. Such is this case. Now, it must be apparent to every one that the legislature understood perfectly well that the employees who might be injured by using the appliance would be using it knowingly and voluntarily. In the case of a side ladder, for instance, they could not have expected that employees would not know they were using a side ladder; still they give an action for the injury. So we think the ordinary doctrine of assumption of

risk does not apply to a case where the negligence of the employer consists in the disregard of a statutory duty imposed upon him for the protection of his employees; certainly not when an action is expressly given for the breach. And this is exactly the difference between cases of negligence arising from the disregard of a statutory obligation, like the present, and cases of negligence arising from the failure of the employer to fulfill his common-law duty of providing safe appliances,—that in the latter case the common-law duty is to be applied in connection with the common-law rule of the assumption of risk, while in the former the statutory rule is accompanied by the bestowal of a right of action for the breach of it, in favor of those who must necessarily be deprived of any action by the application of the common-law rule of the assumption of risk; and consequently the common-law rule is inconsistent with the statute, and falls to the ground. *Baddeley v. Earl Granville*, 19 Q. B. Div. 423; *Id.* 17 Eng. Rul. Cas. 212, with notes at page 237. On the other hand, the doctrine of assumption of risk may be regarded as purely a matter of contract, express or implied, between master and servant; and, when so regarded, the servant's inability to recover is put on the ground that he was hired to do that very thing, and paid for taking that very risk. If that theory should be adopted in this case, then the first question would be whether, in view of the statute, the plaintiff could assume this risk as a part of his contract. The statute is a criminal one to the extent that it imposes a penalty of \$50 for each day's disobedience; and it also gives, as a still more efficient means of securing its observance, a private action in favor of the person injured. How plain it is that the act is an exercise of the police power of the state for the protection of life and limb among a large class of its people; and how easy it would be to thwart the whole purpose of the legislature by holding, as we are asked to do, that the class thus sought to be protected not only might formally contract away their protection, and relieve the road of its public duty thus imposed, but that the very fact of their using the ladder, seeing and knowing it was on the side of the car, constituted in law such a contract. We cannot adopt so bold a conception of judicial duty. If the doctrine of assumption of risk is to be regarded as contractual, then we hold that the statutory protection cannot be bought and sold, but that the policy of the law forbids it in the interest of public welfare. This very question was thus decided in *Narramore v. Railroad Co.*, 37 C. C. A. 499, 96 Fed. 298, 48 L. R. A. 68, 17 Am. & Eng. R. Cas., N. S., 502, where the judgment is laid down by Taft, J., with a breadth of view and vigor of reasoning that leaves little need or excuse for treating the subject further. There, too, the authorities on both sides are cited, criticised, and distinguished. If it be objected that the statute when thus read deprives the laborer of his right to make his own contracts,

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the answer is to be found in the principle that the state has a right to protect its poor and helpless, even to that extent, if need be. *Iron Co. v. Harrison* (decided Oct. 21, 1901) 22 Sup. Ct. 1, 46 L. Ed. —. Such is the basis of the decisions that uphold the Utah labor law restricting the hours of mining work to eight per day (*Short v. Mining Co. [Utah]* 57 Pac. 720, 45 L. R. A. 603; *Holden v. Hardy*, 169 U. S. 366, 18 Sup. Ct. 383, 42 L. Ed. 780), statutes that forbid the employment of children in certain callings, the store-order acts, and the long-standing statutes against usury, in defense of one of the last named of which this court held, some 20 years ago, that even a release under seal, given by the borrower at the time of the loan, did not bar his right to recover the unlawful rate, declaring that "the statute was intended for the protection of the weak against the strong, and public policy requires that it should not be evaded nor its force abated." *Rowell, J.*, in *Herrick v. Dean*, 54 Vt. 568. Everybody knows that there are large classes who get their living from day to day, in such service as the plaintiff was engaged, who must work where they are working, and keep their job at all hazards, if they would not bring themselves and their families to want. To say to such men, "If you do not like the conditions, you may quit," is often only a heartless mockery. The legislature understood this; and the act we are considering was an attempt to better the condition of that very class by compelling the employer to yield something of profit in the interest of humanity, and to save the lives and limbs of his workmen by adopting safer instruments of labor. It seems to us a court should be very slow to construe the beneficial purpose out of such a law, or make it of no effect. On broad lines of public good and social progress, it is plain that such legislation must be largely looked to if government is to remain firm and secure in the respect and affection of the people.

Contributory Negligence. Yet it does not follow that an employee who is injured, by reason of the neglect of his employer to comply with the statute, can recover under all circumstances. By the language of the statute, the right to recover is limited to injuries "resulting from such neglect"; and, as this court has once decided in this very case, that means resulting from such neglect alone; and the plaintiff must, as in other actions of this character, show that his own negligence did not contribute to the injury. But the doctrine of contributory negligence is entirely separate and distinct in theory from the doctrine of assumption of risk, although, as a practical matter, the fact that the employee knew and appreciated the risk he was running may, in the circumstances, justify or even require a finding that he was guilty of contributory negligence; or the negligence may consist entirely in the manner in which the risk is met. To speak concretely, take this very case,—the use of a side ladder. They had been

used by employees for years, and doubtless by such use the risk had been assumed. Now, by reason of the statute, the risk is not, and cannot be, assumed. Yet the use of it, under the given circumstances, may be negligence, and may even be so gross as to be negligence as matter of law. The defendant here claimed that the plaintiff was guilty of contributory negligence as matter of law, and based the claim mainly upon the ground that the plaintiff knew the location of the post and the track, their nearness to each other, and the consequent danger to one riding by the post on a side ladder. The plaintiff admitted that he knew the location of the post and the rail in a general way, but denied that he knew the distance between the two, and testified that before the accident he did not know of any reason why one could not ride safely by the post on a side ladder; that he had never tried it or seen it tried, although he had ridden safely past other posts in the yard. At the first trial, he had testified as follows, referring to the post against which he struck: "Q. You knew the location of it; you had seen it there every day for years? A. Yes, sir. Q. But you forgot at that moment? You didn't think about it at that moment? A. I didn't think about it at that moment. Q. Ever think about that question of getting injured as you were riding along through on those cars anywhere,—about hitting those posts along there anywhere? A. No, sir. Q. Never thought of it? A. No, sir. Q. You knew the danger if you did get hit? A. Yes, sir. Q. You knew, with respect to this one, that you were liable to get hit, if you had thought of it? A. Yes, if I had thought of it." Upon this testimony, we are asked to say as matter of law that the plaintiff was guilty of contributory negligence. We think it was a question for the jury. Taking the plaintiff's testimony in the light most favorable to him, as we are bound to do, it means that, even if he had taken thought, he would not have known that he would be hit in the position in which he then was, but only that he might be, that he was "liable" to be; and that such thought, if it had occurred to him, would not have been the recollection of some danger which he had thought of before, for he says he had never thought of it, but would have been his opinion concerning the danger if it had occurred to him to form an opinion at that time. The fact that he did not do this at that time is not of itself negligence in law. It is a fact to be considered by the jury, with all the other facts. The law required of him the prudence of a prudent man. The prudent man is not the man who never forgets anything, who is never guilty of any inattention, who never fails to think of any possible danger to which he is exposed. That is the perfect, the infallible man. Circumstances may excuse ignorance, forgetfulness, inattention, whenever the jury may reasonably say that a man so placed might be so ignorant, or forgetful, or

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inattentive, without losing his right to be called a prudent man in the circumstances. And here the circumstances must be attended to. The plaintiff is attempting to mount the car to perform his duty. In his first attempt his foot slips from the box, and he finds himself in a position of danger. In the moment's struggle, his mind intent upon its object, he does not think of the post at all. Considering his situation at the instant, can it be said as matter of law that his failure to think of the post and of his liability to be struck by it was negligence? There may have been ample time for him to have reached a place of safety if his foot had not slipped. In his second attempt, we cannot expect of him quite the same calmness and deliberation as in his first. It is the miscarriage of the first attempt that has placed him in an unexpected and dangerous position, where he must decide and act quickly. We are much aided in this inquiry by a case remarkably in point. *Kane v. Railroad Co.*, 128 U. S. 91, 9 Sup. Ct. 16, 32 L. Ed. 339. There the plaintiff, a brakeman, in letting himself down from the end of a car to pass over a lumber car to the next one, where he belonged, fell between the cars, and was injured by reason of one of the steps being gone from the end of the car he was getting down from. He knew the step was gone, and had called the conductor's attention to it, and the conductor had promised to have it set out at a station soon to be reached. But it was a dark, stormy, bitter-cold night in the winter, and he was in a hurry to get to his post, and forgot the step was missing until it was too late. If he had not forgotten, he could have avoided the accident. If he had thought a moment sooner, he could still have saved himself by drawing himself back up. The circuit court ordered a verdict for the defendant on the ground of contributory negligence; but the supreme court of the United States reversed the judgment, and held that it ought to have been left to the jury "to determine whether the plaintiff, in forgetting or not recalling, at the precise moment," that the step was missing, "was in the exercise of the degree of care and caution which was incumbent upon a man of ordinary prudence in the same calling, and under the circumstances in which he was placed"; saying that, if he was, he was not defeated of his right to recovery by contributory negligence. *Harlan, J.*, at page 96, 128 U. S., page 18, 9 Sup. Ct., 32 L. Ed. 339. The case is approved in *Railroad Co. v. McDonald*, 152 U. S. 262, 281, 282, 14 Sup. Ct. 619, 38 L. Ed. 434. In view of all the surroundings here, the duty of the plaintiff as the defendant's servant, the need, if need there was, to mount the car to set the brake or give the signals or be at the place of collision, the speed of the train, the darkness, the mischance of the plaintiff in his first attempt to get on, his knowledge of the post and track, his experience or want of experience in passing there, his position upon the ladder, the exigency, and his

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failure to think at that time of his liability to be struck,—in view of all this, we think it was fairly within the province of the jury to determine whether the conduct of the plaintiff deserved to be called negligent. The facts are not, in our opinion, sufficiently decisive to make the question one of law. The court submitted to the jury the question whether the plaintiff had been guilty of contributory negligence; and to its charge as given upon this subject no exception was taken. The defendant presented, however, 11 requests, none of which was granted, and excepted to the refusal in respect to each. Each request, therefore, must be considered.

Requests to Charge. The first was to charge that the plaintiff could not recover, without specifying any ground, and is sufficiently covered by the foregoing reasoning, as is also the second, which requests the same charge on the ground that the plaintiff was guilty of contributory negligence. The third and fourth insist that the plaintiff, by the very fact of knowingly and voluntarily using a side ladder, necessarily assumed all the risks and perils incident thereto. This question has been already disposed of. The fifth reads as follows: "That if the plaintiff, voluntarily and without necessity, chose a dangerous method of performing his work, when other safer methods were open to him, then he assumed the risks and perils arising from the method which he chose, and if injured because of such choice, and because of the performance of his work by the dangerous method, he is not entitled to recover." This request was properly refused, because it omits the essential element of knowledge on the part of the plaintiff that other safer methods were open to him, and that the method he was choosing was dangerous. It is not enough that he voluntarily chose a way which the jury could see was dangerous, instead of one which the jury could see would have been safer, if it did not so appear to him, nor would necessarily have so appeared to a man of prudence under those circumstances. The sixth was: "That if the plaintiff knew, or in the exercise of due care ought to have known, of the danger of getting upon the car and riding, or attempting to get on and ride, as he was attempting to do, by the supports of the overpass, and from inattention, indifference, absent-mindedness, or forgetfulness failed to avoid such danger, and was injured, he was guilty of negligence, and cannot recover." This was properly refused, because it cannot be said that inattention or forgetfulness at the critical moment was necessarily, and as matter of law, negligence. The question would still remain whether he was acting as a prudent man in the circumstances. And, besides that, the court did charge upon the subject of contributory negligence, and in a manner not excepted to. In so charging, it laid down the general rule that the plaintiff was bound to show that he was acting as a careful and prudent man would act under the same cir-

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cumstances. This is the true rule; and it was not the right of the defendant to dictate the language of the instruction, or to select certain possible phases of the evidence, and formulate them into a rule of law, to take the place of the general and long-approved form which the court adopted. For the same reason, the court properly refused the seventh request, which was that if the plaintiff knew of his danger, but temporarily forgot it, he could not recover. In the eighth, ninth, and tenth requests, the defendant singled out the question of the speed of the train, and insisted that the plaintiff could not recover if he thought the train was going faster than he could naturally walk or run, or about eight or nine miles an hour, or if it was in fact moving at such a speed. These requests were properly refused, for the question of negligence could not be made to turn entirely upon one isolated fact, but was to be determined upon a view of all the facts. The eleventh request was to charge that the side ladder, as matter of law, was not the proximate cause of the accident,—a subject already discussed and disposed of.

The Argument to the Jury. Mr. Cook, of counsel for plaintiff, in arguing to the jury, stated that had the plaintiff failed in his duty at the time of the accident, or failed to do what he attempted at the time, it would not have been long before he would have had notice from the defendant. To this argument, the defendant objected and excepted; and then Mr. Cook inquired of the court if he had not the right to argue and ask the jury what they would do to a man who failed to do his duty; and, upon being told that such argument was not legitimate, said that he withdrew all that had been said upon the subject. The defendant asks special consideration of this exception. Although an exception was allowed to what had been said, the ruling seems to have been in favor of the excepting party; and in the absence of any indication of bad faith, and in view of the instant submission and complete retraction, we should hardly be justified in considering the exception at all. Moreover, it was a question for the jury to consider, whether the plaintiff, in attempting to mount the car, was performing a duty to the defendant,—doing what the defendant would reasonably expect him to do, and what he would naturally and rightly understand was expected of him. It was to this point that the argument was addressed. It was merely claiming, not by way of fact, but by way of inference and probability, that the plaintiff was acting in the line of his duty, and so clearly so that, if he had failed to do as he did, he might reasonably have expected to be dismissed. We are not prepared to say that, so far as the argument had proceeded, it was not legitimate.

The Second Trial was De Novo. The verdict on the first trial was \$1,750. Upon the second it was \$3,000. The defendant excepted to judgment being rendered for the larger sum,

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claiming that the damages had been determined by the first verdict, and that the judgment could only be for that sum. When the new trial was granted, the whole adjudication of the first was wiped out, and the case proceeded de novo. Such has always been the practice here. *State v. Bradley*, 67 Ct. 465, 472, 473, 32 Atl. 238.

Judgment affirmed.

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(*Supreme Court of Indiana, May 27, 1902.*)

[64 N. E. Rep. 217.]

Street Railway Conductor—Turning Car on Turntable—Overexertion—Assumption of Risk.

A street railway conductor was required, as part of his duty, to assist the motorman in turning the car on a turntable at the end of the line. The turntable got out of repair, so that the turning was hindered by the rails scraping against the sides of the turntable pit. The conductor was aware of this condition the day before the accident, and on the day in question had assisted in turning the car three times, but had been assisted in so doing by passengers. In attempting to turn the car with only the motorman's assistance, he overexerted and strained himself: *held*, that he was under no obligation to do this, and, in so doing, assumed the risk.

Appeal from superior court, Marion county; John L. McMasters, Judge.

Action by Edward C. Roberts against the Indianapolis Street Railway Company. From a judgment in favor of defendant, plaintiff appeals. Transferred to supreme court under act approved March 13, 1901. Affirmed.

Hefron & Harrington, for appellant.

Winter & Winter, for appellee.

JORDAN, J. Action by appellant against appellee to recover for personal injuries. Demurrer to the complaint sustained. Judgment on demurrer, from which this appeal is prosecuted. The following are the facts alleged in the complaint: Appellee is a street railway corporation engaged in running and operating electric cars in and over the streets of the city of Indianapolis. On and prior to December 21, 1900, appellant was in the employ of said company, engaged as a conductor on one of its lines, known as the "Alabama and Garfield Park Line." At the end of this line there was located a turntable, used by the company for the purpose of turning cars for their return trip. It was the duty of the conductors and motormen in charge of each car on the aforesaid line to run the car onto this turntable and turn the car around, by means of the conductor and motorman taking positions opposite each other, and, by pushing and pressing against the cars with their backs and shoulders, turning the table around. When the table was in proper repair and good condition, it could by this method, with little exertion, be easily turned. After

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giving a description in respect to the construction of the table, the complaint then further avers that on January 21, 1900, the table became out of repair, in this: "That the rails of the track beneath the table became loose and out of place, so that the wheels of the table, in turning around, would slip off the rails. That the timber and framework of said table became worn and loose, so that the platform of the table was caused to tip and sag, and caused the outer edge thereof and the ends of the rails of the track on said table to rub and scrape against the wooden rim of the pit, and bind and hinder the turning of the table. That, on the afternoon of said day that the table became out of repair as aforesaid, plaintiff, being off duty, was sent for by the defendant, and he and another employee of defendant were ordered and directed to assist the car men in turning their cars on the said table. Plaintiff and said assistant remained in attendance at said turntable until the cars quit running that night. While this plaintiff was so attending and assisting in the turning of cars on said table, the defendant's road officer came, and examined the condition of the turntable, and ordered and directed its repair without delay. Plaintiff avers that the defendant ordered and directed the repairs of said turntable, and promised to have the same repaired without delay. On January 22, 1900, the plaintiff was ordered by the defendant to go upon duty, and take charge of his car, and resume his run upon said line. Plaintiff, relying upon the promise of the defendant that the said turntable would be at once repaired, went upon duty as conductor in charge of one of the defendant's cars upon said line. Upon the first three trips made upon his run the turntable was still unrepaired, and there were no helpers to turn the car, but it so happened that there were passengers on the car who voluntarily assisted in turning the same. On his fourth trip there were neither helpers nor passengers on the car, and the turntable was still unrepaired; but the emergency of the defendant's business was such that it required that his car should be kept going, and still relying upon the promise of the defendant to repair said turntable, and believing that it would be repaired in a short time, plaintiff and the motorman in charge of said car ran it upon the said turntable and turned it around. That, in turning said turntable and car, plaintiff placed his back against the car, and caught hold of the projection of the car over the step, while the motorman did likewise by his side. That, by reason of said turntable being out of repair as aforesaid, considerable force and exertion was required to push the same around, and, in pushing and exerting himself to turn said table, because of the extra force required on account of the defective condition of said table, which he exercised to a reasonable degree, plaintiff was strained and severely injured internally, in this, to wit: that the lumbar muscles of the lower part of his spinal column were strained." Here follows a specific account of the

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injuries which he received by the overexertion in turning the car. It is then averred "that the said injuries so sustained by the plaintiff were the result of the negligence and carelessness of the defendant in suffering said turntable to become defective and out of repair as aforesaid, and in negligently suffering it to remain out of repair an unreasonable length of time, and in negligently failing to furnish help to turn said table when it became necessary to turn it around." Damages in the sum of \$5,000 are demanded.

Conceding that appellee, under the alleged facts, was guilty of negligence in failing to keep the turntable in proper repair, nevertheless the complaint, under its averments, clearly establishes that appellant, in exerting or straining himself in turning the table, was also guilty of negligence which contributed as a proximate cause to the injuries which he sustained; hence the case is ruled by the maxim of "*Damnum absque injuria*," and he cannot recover in this action. Appellant was under no obligation to appellee to overexert or strain himself in his effort to turn the table, and certainly, under the circumstances, appellee company could not anticipate or foresee that by reason of its failure to repair the table there was any necessity to protect appellant against his own voluntary action in subjecting himself to the overexertion or strain which resulted in the injury of which he complains. He is shown to have known of the condition of the table, and, from his previous experience in the operation thereof, he certainly was aware of the extra effort or force that was required to operate the table. He is presumed to have known his own strength, and in fact he himself was the only one who, under the circumstances, could measure the extent to which he could safely exert himself in his effort to turn the table. As nothing appears to the contrary, we may assume that he was competent to act and judge for himself. The company neither exacted nor had the right to exact of him any overexertion of his strength in turning the table; hence he assumed whatever risk there was due to such overexertion or strain to which he voluntarily subjected himself. If the complaint can be said to show actionable negligence on the part of appellee, it also, under the facts, establishes a defense in its favor, and therefore, under a well-settled rule of pleading, is bad on demurrer. *Behrley v. Behrley*, 93 Ind. 255; *Gold v. Railway Co.*, 153 Ind. 232, 247, 53 N. E. 285.

Judgment affirmed.

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motorman is not going to
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son County Ry. Co. (N. J.),
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One who starts to cross a rail-
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proaching train, which he
could have seen, that he is
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is guilty of contributory
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Peck v. Oregon Short Line R. Co. (Utah), 358.

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Street car company in the operation of its cars has no right at street intersection superior to the rights of other vehicles.

Nashville Ry. v. Norman (Tenn.), 350.

Street railway company constructing its tracks across steam railroad not required to maintain crossing gates and other safety appliances at crossing.

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Merely nominal damages could be recovered for breach of covenant to maintain cattle guards where no loss was occasioned thereby.

Douglass *v.* Ohio River R. Co. (W. Va.), 430.

Mere speculative and conjectural estimates of profits which might have been made, had there not been breach of covenants to maintain cattle guard are not a legitimate basis upon which to fix damages.

Douglass *v.* Ohio River R. Co. (W. Va.), 430.

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- That spur track constructed over plaintiff's land under defective condemnation proceedings was not an essential part of the main line did not entitle plaintiff to portion of freights as compensation.
 Illinois Cent. R. Co. v. Hoskins (Miss.), 469.
- Where a railroad, in the condemnation of land for right of way fails to proceed in conformity with its legal power, all its acts on the land are trespasses, for which it is liable.
 Illinois Cent. R. Co. v. Hoskins (Miss.), 469.

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Common-law liability not enlarged by Indiana statute but restricted, so that injured employee could not recover unless he was obeying a superior at the time of his injury.
 Thacker v. Chicago, I. & L. Ry. Co. (Ind.), 772.

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Kilpatrick v. Grand Trunk Ry. Co. (Vt.), 945.

Liability under employer's liability act of Indiana for injury to section hand caused by proper order of foreman negligently performed.

Thacker v. Chicago, I. & L. Ry. Co. (Ind.), 772.

Statute of Indiana did not enlarge railroad's liability.

Thacker v. Chicago, I. & L. Ry. Co. (Ind.), 772.

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Bussey v. Gulf & S. I. R. Co. (Miss.), 504.

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Bussey v. Gulf & S. I. R. Co. (Miss.), 504.

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Negligence of fellow servant obeying negligent order of vice principal.

Galveston, H. & S. A. Ry. Co. v. Sherwood (Tex.), 564.

Section foreman while transporting men on hand cars to a place where they are to work does not act as a vice principal in giving an order to stop.
 Thacker v. Chicago, I. & L. Ry. Co. (Ind.), 772.

Sufficiency of petition in action for injury to section hand from fall from hand car in charge of foreman.

Thacker v. Chicago, I. & L. Ry. Co. (Ind.), 772.

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Failure to fence could not be held to be proximate cause where injury to licensee was result of his being pushed on track by cow.

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Evidence as to whether there was an accumulation of grass, etc., near pile of posts was inadmissible as the only contributory negligence alleged was that of piling posts on right of way. St. Louis Southwestern Ry. Co. of Texas *v.* McAdams (Tex.), 19.

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Sufficiency of evidence of negligence.

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Lowe *v.* Alabama & V. Ry. Co. (Miss.), 335.

Insufficiency of evidence to show willfulness or wantonness where horse frightened by locomotive was injured by fall into ditch.

Lowe *v.* Alabama & V. Ry. Co. (Miss.), 335.

Proximate cause where gentle horse became unaccountably frightened and shied over unguarded approach to bridge. Gulf, C. & S. F. Ry. Co. *v.* Sandifer (Tex.), 387.

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Application of proceeds of foreclosure sale, construction of decree.

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Judgments may be obtained against railroad in hands of receiver.

Fidelity Ins. Trust & Safe Deposit Co. *v.* Norfolk & W. R. Co. (N. Car.), 598.

Judgments obtained against company during receivership for tort committed prior to receivership not entitled to priority over claims of mortgage bondholders from earnings of receivership.

Fidelity Ins. Trust & Safe Deposit Co. *v.* Norfolk & W. R. Co. (N. Car.), 598.

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Priority as between receiver's certificates where foreclosure of mortgage.

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Trust funds where distribution of assets in insolvency.

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merce need not be pleaded in order to avail plaintiff.

Voelker *v.* Chicago, M. & St. P. Ry. Co. (Iowa), 509.

Act of Cong. of March 2, 1893, requiring cars used in interstate commerce to be equipped with automatic couplers applicable to car designed for interstate commerce though at the time being hauled empty.

Voelker *v.* Chicago, M. & St. P. Ry. Co. (Iowa), 509.

Cab business not exempt from taxation under New York statute exempting from taxation on corporate franchises property employed in interstate commerce, although the company was also engaged in interstate commerce.

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Conclusiveness of foreign judgment, regardless of whether stipulation against liability was void or not under laws of state where action is brought. MacDonald *v.* Grand Trunk Ry. Co. (N. H.), 415.

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Judicial notice will not be taken of weight of artificial leg. Carrow *v.* Barre R. Co. (Vt.), 933.

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Purchase of railroad equipment by lessee, construction of contract.

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Care due from company to licensees on track.

Schreiner *v.* Great Northern Ry. Co. (Minn.), 243.

Continued use of railroad track as footway does not make the users licensees, where repeated protests and warnings by company were given.

Denver & R. G. R. Co. *v.* Buf-fehr (Colo.), 762.

Contributory Negligence.

Employee of grain shipper superintending loading injured by reason of his contributory negligence in stepping between cars.

Chicago & E. R. Co. *v.* Shaw (C. C. A.), 333.

Duty of company to employee using hand car as licensee.

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Failure to fence could not be held to be proximate cause where licensee was pushed on track by cow.

Schreiner *v.* Great Northern Ry. Co. (Minn.), 243.

Greater care due licensee than trespasser.

Boggero *v.* Southern Ry. Co. (S. Car.), 376.

Liability for injury to husband on board to assist his wife, caused by being thrown from platform where he had been forced to remain by conductor.

Great Northern Ry. Co. *v.* Bruyere (C. C. A.), 141.

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Liability for killing boy making a short cut to circus showing in railroad yard.

Clark *v.* Northern Pac. Ry. Co. (Wash.), 755.

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Voelker v. Chicago, M. & St. P. Ry. Co. (Iowa), 509.

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Voelker v. Chicago, M. & St. P. Ry. Co. (Iowa), 509.

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- Court may instruct that Act of Cong. of March 2, 1893, relating to couplings on cars of carriers engaged in interstate commerce is applicable although it is not alleged that the car was used in interstate commerce.
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Action under Georgia statute should be brought in county where principal office of railroad company is located.
 Southern Ry. Co. *v.* Brock (Ga.), 771.

Contributory Negligence.

Leaving gate open.

Herrell *v.* Chicago, M. & St. P. Ry. Co. (Wis.), 337.

The fact that the horse killed by reason of defective cattle guard was trespassing on right of way no defense.

Herrell *v.* Chicago, M. & St. P. Ry. Co. (Wis.), 337.

Evidence.

Admissibility of evidence to show that the cattle had gone through the fence.

Townsend *v.* Northern Pac. Ry. Co. (Wash.), 850.

Negligence was question for jury.

Illinois Cent. R. Co. *v.* Gholson (Ky.), 770.

Presumption of negligence from killing of stock, overcome.

Felton *v.* Anderson (Ky.), 114.

Sufficiency of evidence of negligence.

Illinois Cent. R. Co. *v.* Tucker (Miss.), 297.

Southern Ry. Co. *v.* Camp (Ga.), 772.

Southern Ry. Co. *v.* Gilmore (Ga.), 852.

Sufficiency of evidence to show that horse was killed within right of way by reason of defendant's negligence in failing to maintain proper cattle guard.

Herrell *v.* Chicago, M. & St. P. Ry. Co. (Wis.), 337.

Venue in action for killing of stock.

Southern Ry. Co. *v.* Brock (Ga.), 771.

STREETS AND HIGHWAYS.*See Electric Railways.**Street Railways.*

Authority of commissioners of county court to grant permission to build railroad track in highway.

Texarkana & Ft. S. Ry. Co. *v.* Texas & N. O. R. Co. (Tex.), 631.

STREETS AND HIGHWAYS—Continued.**Contributory Negligence.**

Care required of pedestrian in crossing street.

Indianapolis St. Ry. Co. *v.* Walton (Ind.), 388.

Dedication.

Plat as evidence.

James *v.* Illinois Cent. R. Co. (Ill.), 232.

General verdict for plaintiff injured by reason of act of street railway company in stretching rope across street not overcome by answers to interrogatories.

Indianapolis St. Ry. Co. *v.* Walton (Ind.), 388.

STREET RAILWAYS.*See Carriers of Passengers.**Crossings.**Electric Railways.*

Care due from company to other travelers.

Adams *v.* Wilmington & N. Electric Ry. Co. (Del.), 307.

Compensation for construction of street railway track across steam railroad track.

Central Pass. Ry. Co. *v.* Philadelphia, etc., R. Co. (Md.), 392.

Contract rights of company not impaired by act of city in requiring it to pave street with different material from that specified by ordinance granting franchise.

City of Reading *v.* United Traction Co. (Pa.), 625.

Contributory Negligence.

Care due from person approaching crossing.

Adams *v.* Wilmington & N. Electric Ry. Co. (Del.), 307.

Care required of passengers.

Davis *v.* Paducah Ry. & Light Co. (Ky.), 684.

Care required of pedestrians in using highway, instruction.

Chicago City Ry. Co. *v.* Tuohy (Ill.), 1.

Care required of person about to cross street railway track, instruction.

Nashville Ry. *v.* Norman (Tenn.), 350.

STREET RAILWAYS—*Cont'd.* STREET RAILWAYS

- Care required of person driving along street railway tracks.
Tunison v. Weadock (Mich.), 203.
- Contributory negligence of boy in walking on track without looking for trains.
Kaiser v. New Orleans & C. R. Co. (La.), 237.
- Necessity of passenger to leave moving car, instruction erroneous for requiring absolute necessity.
United Rys. & Elec. Co. of Baltimore v. Beidelman (Md.), 662.
- Passenger extending head from car window.
Flynn v. Consolidated Traction Co. (N. J.), 688.
- Prospective passenger crossing in front of street railway car.
Gilliland v. Middlesex & S. Traction Co. (N. J.), 406.
- Question for jury, in action for injuries caused by collision between street car and heavy wagon crossing track.
Metropolitan St. Ry. Co. v. Slayman (Kan.), 199.
- Question of plaintiff's negligence in crossing track in front of approaching street car did not depend on his judgment as to whether there was a chance of his crossing in safety.
Whitman v. Boston El. Ry. Co. (Mass.), 198.
- Sufficiency of evidence in action for injury to plaintiff sustained while attempting to drive across street railway tracks.
Nashville Ry. v. Norman (Tenn.), 350.
- Degree of care required of street railway company, as carrier of passengers, in inspecting cars.
Davis v. Paducah Ry. & Light Co. (Ky.), 684.
- Degree of care to avoid collisions at crossings with vehicles.
Memphis St. Ry. Co. v. Norris (Tenn.), 659.
- Drayman and motorman at crossing have equal rights.
Memphis St. Ry. Co. v. Norris (Tenn.), 659.
- Duty of street railway constructing its tracks across steam railroad to perpetually maintain and repair according to direction of steam road.
Central Pass. Philadelphia (Md.), 392.
- Duty to give crossing.
Adams v. Wilm. Electric Ry. Co.
- Duty to look for cars.
Nashville Ry. Co. (Tenn.), 350.
- Duty to repair.
City of Springfield St. Ry. Co.
- Duty to repair street railway.
City of Worcester Consol. St. Ry. Co. 856.
- Erroneous instruction giving only question of plaintiff's negligence in withdrawing question of negligence and contributory negligence, in action for street railway passenger.
Kellegher v. Fort M. & St. N. A. Ry. Co. (N. Y.), 117.
- Evidence.
 Plaintiff's testimony of general habit of cars at crossing.
Nashville Ry. Co. (Tenn.), 350.
- The fact that a street car is stopped after a person is seen to enter improper management.
Chicago City Ry. Co. v. Tuohy (Ill.), 117.
- Failure to stop car because of injury.
Flynn v. Consolidated Traction Co. (N. J.), 688.
- Insufficiency of evidence of negligence on part of railway company in filling ditch.
Struck by body of car standing on side track.
- United Railway Co. of Baltimore City (Md.), 389.
- Liability of street railway company constructing across steam railroad of constructing crossing.
Central Pass. Ry. Co. Philadelphia, etc., 392.

- STREET RAILWAYS—Cont'd.**
- Liability, question for jury where passenger standing in crowded street car was injured by its sudden stoppage. *Chicago City Ry. Co. v. Morae* (Ill.), 215.
- Negligence a question for jury where boy was injured on street railroad track. *Chicago City Ry. Co. v. Tuohy* (Ill.), 1.
- Negligence in allowing ring in floor to remain in such condition as to endanger passengers. *Kingman v. Lynn & B. R. Co.* (Mass.), 672.
- Negligence in starting car while passenger is alighting. *United Rys. & Elec. Co. of Baltimore v. Beidelman* (Md.), 662.
- Person crossing tracks chargeable with notice of approach of car within range of vision. *Metropolitan St. Ry. Co. v. Agnew* (Kan.), 589.
- Prima facie case of negligence where passenger was injured. *United Rys. & Elec. Co. of Baltimore v. Beidelman* (Md.), 662.
- Proximate cause where street railway passenger was injured in panic among passengers caused by flashes of electricity. *Davis v. Paducah Ry. & Light Co.* (Ky.), 684.
- Question of freehold involved in suit by one claiming right to maintain railroad in street. *Village of Harlem v. Suburban R. Co.* (Ill.), 860.
- Recovery by city where street railway has neglected to pave. *City of Reading v. United Traction Co.* (Pa.), 625.
- Right of city to lower tracks. *City of Reading v. United Traction Co.* (Pa.), 625.
- Right of city to mandatory injunction to compel removal of rails replacing old rails. *City of Springfield v. Springfield St. Ry. Co.* (Mass.), 815.
- Ring in floor of street car, notice of defect. *Kingman v. Lynn & B. R. Co.* (Mass.), 672.
- Statute of Massachusetts relieving company of duty of repairing street not unconstitutional as impairing contract obligations. *City of Springfield v. Springfield St. Ry. Co.* (Mass.), 815.
- Statute relieving company from obligations imposed by city to repair not unconstitutional as impairing contract obligations. *City of Worcester v. Worcester Consol. St. Ry. Co.* (Mass.), 856.
- Street car company in the operation of its cars has no right to street intersection superior to the rights of other vehicles. *Nashville Ry. v. Norman* (Tenn.), 350.
- Street car company's right to use street included with other tracks superior to that of other travelers. *Adams v. Wilmington & Electric Ry. Co.* (Del.), 307.
- Sufficiency of evidence to sustain verdict for plaintiff in action for injury to pedestrians. *Henderson v. United Traction Co.* (Pa.), 115.
- STREET RAILWAYS—Cont'd.**
- as impairing contract obligations. *City of Springfield v. Springfield St. Ry. Co.* (Mass.), 815.
- Statute relieving company from obligations imposed by city to repair not unconstitutional as impairing contract obligations. *City of Worcester v. Worcester Consol. St. Ry. Co.* (Mass.), 856.
- Street car company in the operation of its cars has no right to street intersection superior to the rights of other vehicles. *Nashville Ry. v. Norman* (Tenn.), 350.
- Street car company's right to use street included with other tracks superior to that of other travelers. *Adams v. Wilmington & Electric Ry. Co.* (Del.), 307.
- Sufficiency of evidence to sustain verdict for plaintiff in action for injury to pedestrians. *Henderson v. United Traction Co.* (Pa.), 115.
- SUMMONS.**
- See Actions.*
- TAXATION.**
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- Apportionment among counties of taxes on rolling stock. *State ex rel. Fensell v. Aldridge, Auditor* (Ohio), 842.
- Exemption.
- Cab business not exempt from taxation under New York statute exempting from taxation on corporate franchises property employed in interstate commerce, although the company was also engaged in interstate commerce. *People v. Knight* (N. Y.), 636.
- Road substantially complete. *Louisiana, etc., R. Co. v. State Board of Appraisers* (La.), 846.
- TELEGRAPH OPERATORS.**
- See Fellow Servants.*
- TIDE WATER.**
- See Water and Watercourses.*

TORPEDOES.

See Children.

TORTS.

See Railroads.

Complaint alleging willful tort cannot be amended so as to also allege cause of action based on mere negligence. *Proctor v. Southern Ry. (S. Car.), 586.*

North Carolina statute providing that the giving of a mortgage by a corporation shall not exempt its property or earnings from execution for the satisfaction of a judgment against it for a tort can operate only as to property within state.

Fidelity Ins., Trust & Safe Deposit Co. *v. Norfolk & W. R. Co. (N. Car.), 598.*

TRACKS.

See Cattle Guards.

TRAIN DISPATCHER.

See Fellow Servants.

TRANSPORTATION.

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TRESPASSERS.

See Accidents on Track.
Children.
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Stock, Injuries to.

Authority of brakeman to eject trespasser from moving train. *Krueger v. Chicago & A. Ry. Co. (Mo.), 400.*

Company not liable for injury to trespasser on train in absence of wantonness or willfulness. *Burns v. Southern Ry. Co. (S. Car.), 287.*

Continued use of railroad track as footway does not make the users licensees, where repeated protests and warnings by company were given. *Denver & R. G. R. Co. v. Buffehr (Colo.), 762.*

Implied authority of brakeman to eject.

O'Banion v. Missouri Pac. Ry. Co. (Kan.), 929.

Liability for injury to trespasser where trainman was chargeable with notice of his peril. *Denver & R. G. R. Co. v. Buffehr (Colo.), 762.*

TRESPASSERS—

Liability of railroad trespasser on injury willfully inflicted.

Denver & R. Buffehr (Colo.)

Negligence after plaintiff's peril.

Denver & R. Buffehr (Colo.)

Person going on though in accordance with custom of the locality with from company. *Louisville & N. Mitchell (Ala.)*

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Burns v. South (S. Car.), 287.

Tracks adjacent public places. *James v. Illinois (Ill.), 232.*

TRESTLES.

See Water and

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ULTRA VIRES.

That the act of a pany in building track was ultra justify entry on other company. *Texarkana & Ft. Texas & N. O. 631.*

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*See Death by Wrongful Act.
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WATER AND WATER-COURSES.

Right of private individual to compensation where navigable water obstructed by trestle authorized by congress.

Frost v. Washington County R. Co. (Me.), 184.

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Frost v. Washington County R. Co. (Me.), 184.

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Frost v. Washington County R. Co. (Me.), 184.

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Frost v. Washington County R. Co. (Me.), 184.

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Cogdell v. Southern Ry. Co. (N. Car.), 39.

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Chicago City Ry. Co. v. Tuohy (Ill.), 1.

